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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AIRLINE DIVISION, *et al.*, Plaintiffs, v. ALLEGIANT TRAVEL COMPANY, *et al.*, Defendants.	Case No. 2:14-cv-00043-APG-GWF **PLAINTIFFS' MOTION FOR CONTEMPT SANCTIONS**

Plaintiffs International Brotherhood of Teamsters, Airline Division, and Airline Professionals Association of the International Brotherhood of Teamsters, Local No. 1224 ("Plaintiffs" or "Teamsters") respectfully move that this Court sanction Defendants for violation of this Court's July 22, 2014 preliminary injunction (Dkt. No. 79) (the "Order").

In their January 8, 2015 reply memorandum in support of their motion to amend the Court's injunction order ("Reply Brief"),[1] Plaintiffs pointed out that Defendants were working to replace Merlot.

[1] Dkt. No. 129.

Plaintiffs also predicted with confidence that whatever replacement model Defendants rolled out would violate the scheduling and seniority requirements of the Pilot Work Rules Agreement (PWR)[2] and the RLA status quo. Our prediction was based upon Defendants' rejection of the Merlot PBS module in favor of their own home-built Excel scheduling program and non-use of that PBS module since well before the injunction hearing—despite the misleading and fallacious comments of Allegiant's Rob Wilson and its counsel. Reply Brief at 9. Plaintiffs noted that "Defendants are steadfastly determined to construct pilot schedules using their own concept of what scheduling should be and look like, regardless of what they had previously agreed to with the pilots as set forth in the PWR, including the scheduling provisions and seniority protections contained in it." *Id.* We now know that Defendants have not only abandoned the Merlot scheduling software to build schedules, but have also abandoned the Merlot software to function even as a passive interface to publish the schedules that are built using Defendants' in-house (*i.e.*, non-Merlot) program. Defendants designed their interface program according to a preferential bidding system and completely disregarded the PWR's line bidding scheduling requirements. Thus, having misled the Court regarding the nature and functionality of the Merlot scheduling program in order to avoid having to restore the status quo relating to scheduling, Defendants are now attempting to capitalize on their misdeeds by unilaterally locking in a scheduling system that is completely at odds with the PWR's scheduling requirements. Defendants should not be allowed to profit from their misdeeds, and should be held in contempt for so brazenly flouting the RLA's status quo requirements and the Court's injunction order.

Background

The PWR's scheduling provisions require that Allegiant build trips and bid lines, make them available for bid by the pilots, and award them to the pilots by seniority. The PWR also requires that trips and lines be generated with the advice and assistance of the Pilot Scheduling Committee. Order at 17. In its Order, this Court held that "Allegiant's unilateral election to use a preferential bidding system ("PBS") in lieu of line bidding is not arguably justified by the terms of the PWR, as the use of a PBS directly conflicts with the PWR's mandated use of line bidding." *Id.* In crafting a narrowly tailored injunction relating to pilot scheduling, the Court ordered that "Allegiant shall modify its current Merlot

[2] Dkt. No. 51-5.

pilot scheduling system *to better respect pilot seniority and to provide greater transparency and predictability for the pilots*. Allegiant shall make those modifications within 90 days of the date of this Order." *Id.* at 22 (emphasis added). This Court expressly admonished Defendants that "[t]he failure of either side to act in good faith likely will result in sanctions." *Id.* at 23.

As we have pointed out in our pending Motion to Amend,[3] Defendants misled the Court about their use of the Merlot scheduling software. Despite their testimony and assertions at the injunction hearing, Defendants have not used the Merlot scheduling program to build schedules since March 2014, approximately three months prior to the injunction hearing. We have also explained in our Motion to Amend that Defendants' home-built program does not "better respect pilot seniority" or provide for "predictability" for pilots, as required by the Court's Order. Indeed, Defendants have done nothing in this regard since the Court instructed them to do so on July 22, 2014. Allegiant's management has simply exhibited bad faith toward Plaintiffs in both process and result.

As evidenced in the an email that Defendants sent to Phoenix ("IWA")-based pilots, Defendants are continuing to use their home-built scheduling program and have added a new, home-built interface to feed PBS selections to the scheduling program. The email states as follows, in pertinent part:

> To: IWA Crew Members
> From: Tracy Tulle, VP of Inflight Services
> Greg Baden, VP of Flight Operations
> Re: Introducing a new Crew Bidding Interface (CBI)
> Date: February 19, 2015
>
> IWA Crew Members:
>
> In our continued effort to improve the PBS process for our crews, we are introducing a new crew-bidding interface to the Merlot scheduling system. This simply means that the way crews submit their bids will be different; *the process by which the solver awards schedules remains the same*. The new interface incorporates many of the improvements that crew members have suggested over the last few months.
>
> IWA will be the first crew base to test this new interface in the upcoming bid period. Training material will be provided to all crew members in addition to onsite training and support throughout the April bid period. Your feedback throughout this testing period will be critical for implementation system-wide.
>
> WHAT IS IT?

[3] Dkt. No. 125; *see also* Dkt. No. 129.

> The Crew Bidding Interface (CBI) has been designed by Allegiant to improve the bidding process for our crew members. The functionality within the CBI has been designed to serve several roles:
>
> To provide the ability for crew members to submit a monthly standing bid
>
> To display the bid packet information in one place to assist with the building of monthly preferences
>
> To significantly reduce the time required for crew members to submit preferences
>
> To facilitate improved bidding on mobile devices: The CBI has been designed to work on most tabular and cellular devices, as well as standard desktops.
>
> To mitigate the notion of the "apathetic bidder": All crew members will be bidding on all preferences based on their selections.
>
> To provide automated feedback to crew members regarding their final schedule awards
>
> IS THE CBI REPLACING MERLOT?
>
> It is important to note that the CBI is not a replacement of Merlot. Merlot will remain Allegiant's system of record for crew information, scheduling, and legality tracking. *The CBI is a filtering function for crewmember preferences, which will be exported to the solver once the bidding period is closed. Schedules will then be loaded into Merlot and managed by Crew Services. At the same time, reasoning for your awards will be displayed in the CBI under the Results tab.*

Email from T. Tulley & G. Baden to IWA Crew Members (Feb. 19, 2015), attached hereto as Exhibit 1 (emphasis added).

First, as fully set forth in the Motion to Amend and Reply Brief, Defendants have never used the Merlot scheduling program (the "PBS module") as they represented to the Court at the preliminary injunction hearing. This email is another example of just how misleading and fallacious Allegiant's testimony was at the time. Merlot's scheduling program, (*i.e.*, the Merlot PBS module) never "built" schedules as Defendants' Vice President of Information Technology Robert Wilson testified to this Court under oath. Tr. 657, 665–71.[4] Moreover, Defendants' PBS system never honored pilot seniority as

[4] In his closing arguments, Allegiant's counsel summarized Mr. Wilson's testimony regarding Allegiant's use of the Merlot software program as follows:

> And finally, a couple of things that, you know, that—in discussing the theoretical Preliminary Injunctions that Mr. Gleason said, just simply aren't supported by evidence about saying that lines can be built by hand and fed back into Merlot and that's what Mr. Mavis was doing, that wasn't the testimony. Mr. Wilson testified definitively he's not

Defendants represented at the preliminary injunction hearing. Tr. 660. The CBI interface is just a continuation of the Defendants' practice of using their own scheduling program or "solver" to construct schedules based upon its own needs and preferences, as opposed to the seniority of the pilots. Suffice it to say, Defendants have done nothing to "better respect pilot seniority" in compliance with this Court's order. And the result is that Defendants have not provided basic "predictability" as required by that same court order.

While Defendants may claim to have provided more "transparency," the most transparent thing that can be gleaned from their actions here is that they have no intent to comply with the Court's order to respect seniority and thus provide predictability for pilots. As an egregious example, Defendants concededly[5] are now distributing valuable "Open Time" flying on a "first come, first served" basis, which is in direct contravention of the PWRs provisions for Open Time flying assignments by seniority.[6] These Open Time flying assignments are unassigned trip pairings that heretofore pilots bid on by

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> building lines, he's working after the lines are built to make them better under Merlot. There's no testimony that this would be something simple for the company to just take out an Excel spreadsheet and start doing.

Tr. 784.

[5] A Merlot Q&A document from Defendants states:

> **Is there Open Time in Merlot?**
>
> After final bids have been awarded, there should be no open time as all trips should be assigned to crewmembers. However, there may be times when open time becomes available:
>
> 1) **Company offered trips.** These are trips that become available after final bid lines have been awarded. An example would be if a crew member goes on an extended leave of absence mid-month. All of his/her trips would become available in open time. *Trips will be awarded by Merlot to the first person who submits to pick it up on the principle of "first come, first served", dependent on legalities.*

Ex. 2, attached hereto (emphasis added).

[6] The PWR provides that "Open Time" is "flying time that is not yet assigned to a specific pilot." Dkt. No. 51-5 at 16. Open Time flying is awarded as follows:

> 3. Beginning on the 21st of each month preceding the bid, *the remaining Open Time (after step 2) will be posted for all Pilots to bid on. Pilots will be awarded open time in the following order: 1) In Domicile by seniority and legality 2) Out of Domicile by system wide seniority and legality.* The Company will not provide transportation and lodging for pilots picking up time out of Domicile. Pilots should bid for desired trips (anytime during the month) by sending an email to triptradespilots@allegiantair.com. The Open Time pickup bids will close each day at 1600 (Pacific Time) and will be awarded that same day.

Id. at 32 (emphasis added).

seniority under the PWR. They are essentially valuable voluntary overtime assignments for crewmembers. Rather than "better" respecting seniority, Defendants are flagrantly assigning them to the first pilots to sign up. Defendants are now totally eschewing seniority-based assignments altogether.

Defendants' continued cavalier attitude toward a critical component of the status quo under the PWR—the basic scheduling of pilot's work lives—is astonishing. Their defiance of the Court's order respecting pilot seniority must be found contemptuous.[7]

Argument

In the leading case of *United States v. United Mine Workers of America*, 330 U.S. 258, 302–03 (1947), the United States Supreme Court stated:

> Sentences for criminal contempt are punitive in their nature and are imposed for the purpose of vindicating the authority of the court. *Gompers v. Buck's Stove & Range Co., supra*, at 441. The interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter. One who defies the public authority and willfully refuses his obedience, does so at his peril. In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future. Because of the nature of these standards, great reliance must be placed upon the discretion of the trial judge.

As for civil contempt to compel compliance with a prior decree, the Court further stated:

> Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained.

Id. at 303.

In *Union of Prof'l Airmen v. Alaska Aeronautical Indus., Inc.*, 625 F.2d 881 (9th Cir. 1980), the Ninth Circuit considered whether a $17,500 award of damages to the union for its attorney's fees against a recalcitrant carrier and its president for a four month delay in complying with the District Court's decree to reinstate fired union supporters and to cease and desist from undermining support for the union

[7] Defendants' continued to refusal to abide by the Court's Order regarding disability, is another example of their stubborn refusal to restore the RLA status quo.

under the Railway Labor Act was "criminal" or "civil contempt." The Ninth Circuit held that such an award was civil in nature, as the trial court was contemplating criminal contempt proceedings.

Indeed, in that case the District Court judge found that the carrier and its president had actual notice of its order and simply chose not to comply, warranting sanctions against them both. The District Court wrote:

> [I]n a manner typifying the cavalier attitude of defendant toward the requirements of the law it chose wilfully and consciously to disobey the court's order. Defendant has, in all ill-contrived scheme, flaunted its arrogance in the face of those employees who sought the sanctuary of the court for the peaceful resolution of a bitter labor struggle. That attitude was again underscored by the conspicuous "absence" of [its President] Mr. Haynes from the contempt hearing and the condescending agreement by defendant at the beginning of the contempt hearing in what it apparently viewed as an eleventh-hour gesture, finally to comply with the injunction. The time for such gestures long ago expired.
>
> . . .
>
> Hence, the court finds that civil contempt has been established by clear and convincing evidence. The award will include substantial damages. It should be clear that this is not an award of back pay pursuant to the Railway Labor Act. That issue will await trial. This award is the price defendant must pay to those harmed by its disobedience of an order of the court.

Union of Prof'l Airmen v. Alaska Aeronautical Indus., Inc., No. A77-41 Civil, 1977 WL 27504 (D. Alaska Oct. 12, 1977), 96 L.R.R.M. 2770.

Accordingly, this Court should at minimum likewise hold Defendants and their officers Chief Executive Officer Maurice Gallagher, Vice President of Flight Operations Greg Baden, and Vice President of Information Technology Robert Wilson jointly and severally liable in civil contempt with Defendants for damages and attorney's fees for the *seven-month delay* in failing to comply with the Court's order. To be sure, Rule 65(d) of the Federal Rules of Civil Procedure provides that an injunction order binds "the parties to the action, their officers, agents, servants, and attorneys, and those persons in active concert participation with them who receive actual notice of the order by personal service or otherwise." *Elec. Workers Pension Trust Fund of Local Union No. 58, IBEW v. Gary's Elec. Serv. Co.*, 340 F.3d 373 (6th Cir. 2003), cited in *Eighth Dist. Elec. Pension Fund v. Elec. Forces, LLC*, No. 07-cv-01465-LTB-CBS, 2011 WL 1397208 (D. Colo. Mar. 28, 2011), adopted by 2011 WL 1399691 (Apr. 13, 2011) (ordering a bench warrant to incarcerate the corporate principal to ensure compliance). Thus, the

corporate principals charged with complying with the Court's order—Mr. Gallagher, Mr. Baden and Mr. Wilson—must be likewise be held accountable for this corporation's contumacious behavior accomplished by their own hands.

In this case, this Court recognized in its preliminary injunction Order the irreparable harm to the Allegiant pilots' union due to Defendants' undermining of the collective bargaining representative through such deliberate, unilateral changes. Order at 19. This harm is particularly acute in the context of contract negotiations. *Id*. Plaintiffs have sought to peacefully remedy Defendants' continued efforts at "union avoidance"[8] in the form of wreaking havoc on the pilots' lives though unilateral changes to the negotiated scheduling system. The Teamsters—and its pilots—have come to learn that Defendants misrepresented to the Court the status of its unilaterally promulgated Merlot scheduling system to obtain a more favorable injunction so that Defendants can manipulate schedules as they see fit without any respect for seniority or predictability. The Teamsters and its pilots have waited seven months for Allegiant to comply with the Court's Order, but instead are witnessing and suffering the cavalier attitude of Defendants to the Orders of this Court. The Teamsters and its pilots have exhibited good faith in seeking recourse in this Court but have encountered bad faith from Defendants. This Court must hold Defendants liable in contempt in the interest of justice. The Defendants' wholesale lack of respect for the law cannot be condoned.

Conclusion

For all the foregoing reasons, Plaintiffs respectfully request that the Court grant this Motion for Contempt Sanctions and make an award of substantial damages and attorney's fees to compel compliance with its decree, as well as all other remedies both civil and criminal as the Court deems appropriate in the interest of justice.

In determining an appropriate sanction, Plaintiffs note, in this regard, that the RLA Section 2, Tenth, may provide guidance to the Court. RLA Section 2, Tenth, provides in relevant part:

> The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction

[8] The Court should be mindful of Mr. Gallagher's unabashed testimony at the preliminary injunction hearing registering his dislike for the IBT and "third-party" unions. Tr. 706:18-20. Mr. Gallagher's admitted "strategy" in this case was to keep "in abeyance" third party unions. He cannot be permitted to violate Court orders in his unlawful zeal to do so.

> thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

In the present case, Defendants have changed the working conditions of its pilots as a class, as embodied in the PWR. Those changes violate the status quo provisions of RLA Section 6, 45 U.S.C. § 156, and also violate RLA Section 2, Seventh, 45 U.S.C. § 152, Seventh ([n]o carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.").

Dated: February 27, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed electronically on February 27, 2015. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

Dated this 27th day of February, 2015.

/s/ Sean W. McDonald
An employee of The Urban Law Firm