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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

In re	:	
	:	**Chapter 11 Case No.**
	:	
ATA HOLDINGS CORP, et al.,	:	**04--19866**
	:	
	:	**(Jointly Administered)**
Debtors.	:	
	:	

ATA'S OPPOSITION TO AMFA MOTION TO COMPEL ASSUMPTION OF TENTATIVE AGREEMENT

I. INTRODUCTION

The Aircraft Mechanics Fraternal Association ("AMFA") asks the court to force Debtor ATA Airlines, Inc. ("ATA") to assume a so-called "Tentative Agreement" on a single issue among the hundreds of issues discussed by ATA and AMFA during their ongoing

collective bargaining. While AMFA characterizes this fragment as a purported "collective bargaining agreement," in reality, it is not an "agreement" at all, and there is no "agreement" to assume or reject. ATA and AMFA remain in the midst of collective bargaining for their first agreement, under the mediation auspices of the National Mediation Board. The parties' "Tentative Agreement" or "T/A" on moving expenses was simply one step in a lengthy bargaining process, in which a "T/A" on one issue is a partial, conditional agreement, expressly contingent upon (1) reaching an overall agreement on all issues between the parties; and (2) ratification by the AMFA membership at ATA. Since AMFA and ATA have not yet reached agreement on all issues, and nothing has yet been ratified, any and all T/As between them remain contingent and conditional; thus there is no "agreement" at all to be assumed or rejected. AMFA's suggestion to the contrary is totally unfounded. Indeed, AMFA has told its members in writing as recently as October, 2004 that "since we have not completed the negotiating process, we do not yet have a binding contract." See Meyer Declaration, ¶10 and Exhibit K.

The legal premises of AMFA's motion are far from clear. To the extent that AMFA is seeking to enforce a purported agreement, AMFA's Motion fails because there is no "agreement" to be enforced (or rejected or assumed). To the extent AMFA is attempting to force ATA to abide by the "status quo" requirements of the Railway Labor Act, AMFA's motion also fails, because ATA's longstanding policy has been not to pay moving expenses, and it is non-payment that is the status quo. Thus, there has been no change to the status quo.

II. STATEMENT OF FACTS

The following facts are set forth more fully in the Declaration of ATA's Senior Vice President of Employee Relations, Richard W. Meyer.

A. ATA's Policy Does Not Provide For Moving Expenses

Until 2002, ATA's Mechanics and Related employees were unrepresented. The terms and conditions of employment for these employees, and all other employees not covered by a collective bargaining agreement, were set forth in ATA's Employee Handbook, which expressly provided "Any relocation expense will be the responsibility of the employee." Meyer Decl. ¶ 2 and Exhibit A. On September 1, 2002, ATA issued "Maintenance & Engineering Furlough & Recall Procedures" which again provided that "Any moving expenses associated with furlough/displacement shall be paid for by the employee."[1] Meyer Decl. ¶ 3 and Exhibits B-D.

On August 21, 2002, ATA advised AMFA of ATA's plans to furlough additional AMFA-represented employees, and invited AMFA's input on the furlough process. *Id.* Exhibit B. ATA shared with AMFA a draft of the Recall Procedures to be applicable to the furloughs in September 2002 and thereafter. That draft document expressly provided that "Any moving expenses associated with furlough/displacement shall be paid for by the employee." *Id.* Exhibit C. AMFA suggested changes to several provisions of this policy, some of which ATA accepted, but AMFA did not recommend any change in the provision that moving expenses be paid by the employee, and this provision carried over unchanged in the final policy that ATA issued on September 1, 2002. *Id.* Exhibit D. Several furloughs took place after September 1, 2002 pursuant to these procedures, and ATA paid no moving expenses. *Id.* Exhibit E.

[1] During 2001, ATA management allowed for limited exceptions to the Handbook, and provided that relocation assistance could be available, subject to management approval, on a case-by-case basis. Exhibit B.

B. Collective Bargaining Between AMFA and ATA

1. Status of Negotiations: In Mediation Before NMB

AMFA was certified to represent the Mechanics and Related employees at ATA Airlines Inc. on February 15, 2002. Meyer Decl. ¶ 4. The parties commenced formal bargaining on October 11, 2002. The National Mediation Board assigned a mediator to the bargaining on March 25, 2004. Mediation has the effect of holding the parties in bargaining until the NMB declares the parties at impasse and issues a proffer of binding arbitration to resolve their differences. If either party refuses the proffer of arbitration, that action triggers a 30-day "cooling off" period. Only after expiration of that period are the parties free to engaged in self-help, i.e. AMFA is permitted to strike, and ATA is permitted to implement its proposals. The NMB has not yet issued a release, with the consequences that the parties are still bargaining for their first agreement. *Id.*

2. "Tentative Agreements"

Airline collective bargaining agreements are complex and lengthy documents covering a variety of terms for pay, benefits and work rules. Bargaining to reach a new agreement usually takes many months, and sometimes years. To facilitate the course of negotiations, it is customary for the parties to address issues seriatim, either by subject matter or section of the Agreement. Meyer Decl. ¶ 5. When the terms of an agreement on a discrete issue are acceptable to both parties, it is customary to reach "tentative agreement" or "T/A" on the issue. That issue is then set aside as the parties turn their attention to other issues. The express understanding, however, is that there is no binding agreement on any issue until (a) the parties reach a final agreement on all terms, and (2) the complete final agreement is ratified by the

members.[2] *Id.* Thus, a T/A is only a conditional agreement; it is conditioned upon reaching agreement on all outstanding issues between the parties and upon ratification by the union membership. Meyer Decl. ¶ 7 and Exhibit G. AMFA has acknowledged that it does not send each section which is T/Ad out for ratification; it waits until it has a T/A on the overall agreement. Meyer Decl. ¶ 7 and Exhibits G and H.

3. AMFA Acknowledges ATA's Right To Make Changes

On January 7, 2005, ATA informed AMFA that ATA was prepared to make a change in the current Employee Handbook, that partly mirrored language in a T/A with AMFA on seniority. Meyer Decl. ¶ 9 and Exhibit J. The announcement stated that the "change is non-precedent setting and non-biding in terms of the Company's discretion to amend the policy during the collective bargaining process between ATA and AMFA In addition, the decision to implement the T/A is on a non-referral [sic] basis regarding any other T/As which may have been reached in the bargaining process." *Id*. AMFA did not protest; instead, AMFA confirmed in writing to its members the Company's right to take action. Meyer Decl. ¶10 and Exhibit K.

During the bargaining process, AMFA and ATA T/A'd several other provisions, set forth in Exhibit I. Until filing the present Motion, AMFA has not previously asserted that ATA is somehow required to implement any of these provisions. Meyer Decl. ¶8. To the contrary, AMFA has communicated to its members at ATA that the Company has the discretion to amend its policies as long as there is no collective bargaining agreement in effect. Meyer Decl. ¶ 10 and Exhibit K.

[2] Among other problems, the discrete TAs on separate issues have no stated effective date or duration - because the parties intend to address those terms elsewhere in the Agreement.

III. ARGUMENT

A. No Agreement On Moving Expenses Has Come Into Existence

It is common practice in collective bargaining for the issues between the parties to be broken down into numerous sub-issues, and for some issues to be tentatively agreed upon, or "T/A'd," subject to agreement on the contract as a whole. Thus, as the very label indicates, a T/A is not a final "agreement," but only a "tentative" and conditional agreement. Unless expressly provided otherwise, no independent agreement comes about on a "T/A'd" item until overall agreement on all terms is concluded. Meyer Decl. ¶¶5-7. This practice is necessary, because of the sheer volume of open issues in complex collective bargaining agreements. Moreover, AMFA has conditioned existence of an agreement upon ratification by the membership. Meyer Decl. ¶ 7 and Exhibit G. AMFA has stated that it does not send single sections of the agreement out for ratification – it waits until a tentative agreement has been reached on the contract as a whole. Meyer Decl. ¶ 7 and Exhibit H. AMFA has sent no T/A'd section out for ratification. *Id.*

The nature of T/As is well established in labor law. As stated in the leading treatise: "During contract negotiations an employer ordinarily may not implement proposed changes **or those tentatively agreed to by the parties,** even if an opportunity to bargain is first given to the union, absent a valid preexisting impasse or waiver of bargaining or other consent of the union." Hardin & Higgins, The Developing Labor Law 842 (4th ed. 2001) (emphasis added). "An employer may not implement any changes until an overall impasse has been reached in bargaining for the agreement as a whole. . . . [I]f the parties are at impasse only over certain issues, an employer may not make unilateral changes as to subjects that were tentatively agreed to during negotiations." *Id.* at 927. As the First Circuit explained: "Collective bargaining involves give and take on a number of issues." If a party could implement where they reached

tentative agreement or impasse on only one of those issue, "the effect . . . would be to permit [a party] to remove, one by one, issues from the table and impair the ability to reach an overall agreement through compromise on particular items" *Visiting Nurses v. NLRB* , 177 F.3d 52 (1st Cir. 1999). Thus, absent mutual agreement to do so, it would be unlawful for one party to unilaterally implement one tentatively-agreed-upon item prior to overall impasse or agreement on the entire collective bargaining agreement, or exhaustion of the mandatory bargaining procedures.[3] Thus, there is simply no legal support for AMFA's position that a single T/A is independently enforceable in favor of AMFA.[4]

The history between ATA and AMFA reflects AMFA's understanding that a T/A is not enforceable absent the Company's consent. ATA did on one occasion implement a new seniority policy that partly reflected a T/A on seniority. At that time, ATA stated its understanding that such implementation would be without prejudice to any other T/As : "change is non-precedent setting and non-biding in terms of the Company's discretion to amend the policy during the collective bargaining process between ATA and AMFA. In addition, the decision to implement the T/A is on a non-referral basis regarding any other T/As which may have been reached in the bargaining process." Meyer Decl. ¶ 9 and Exhibit J. AMFA did not protest this statement. Instead, AMFA publicly acknowledged ATA's right to take action. Meyer Decl. ¶10 and Exhibit K. Indeed, prior to the present proceeding AMFA never has

[3] Under the NLRA, absent agreement on all terms, the last mandatory step in collective bargaining process is bargaining to impasse. *NLRB v. Katz*, 369 U.S. 736, 745-46 (1962) (employer violated duty to bargain by unilaterally instituting changes not previously discussed or discussed to impasse) Under the RLA, unless a Presidential Emergency Board is appointed, the last mandatory step is the issuance of a release and expiration of the 30 day cooling off period. *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 149 (1969).

[4] AMFA is equally unfounded when it asks the Court to require that the T/A on moving expenses be either assumed or rejected. Since the pre-conditions to its effectiveness have not been satisfied, there simply is no agreement to be assumed or rejected.

asserted that any T/A is immediately enforceable. To the contrary, several AMFA statements reflect that ATA is free to make changes in terms and conditions of employment until the parties have signed an overall collective bargaining agreement. Meyer Decl. ¶ 10 and Exhibit K.

B. ATA Has Made No Change In The "Status Quo" Because The "Status Quo" Does Not Include Moving Expenses

AMFA's Motion also fails to the extent AMFA premises its Motion on the "status quo" requirements of the RLA. The Supreme Court has explained that the "the status quo extends to those actual, objective working conditions out of which the dispute arose . . ." *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 149 (1969). Here, the actual, objective working condition has been the **non-payment** of moving expenses. ATA's policy for many years has been that Mechanics who are furloughed are responsible for their own moving expenses, and this is the policy set forth in the Employee Handbook. Meyer Decl. ¶ 2. Moreover, on September 1, 2002, ATA restated the policy on moving expenses set forth in the Handbook, stating again its policy that furloughees are responsible for their own moving expenses – with no protest by AMFA. Meyer Decl. ¶ 3 and Exhibits B-D. Several furloughs have been conducted since September 1, 2002 without payment of moving expenses. Meyer Decl. ¶3 and Exhibit E.

C. The RLA Status Quo Provisions Apply Only After The First Collective Bargaining Agreement Is Executed.

Even if ATA had had a policy of paying moving expenses, it is now settled that ATA would be free to change that policy. In *Williams v. Jacksonville Terminal Co.,* 315 U.S. 386 (1942), the Supreme Court squarely held that RLA status quo requirements do not apply

where, as here, the parties have not executed their first collective bargaining agreement[5]. Under *Williams*, ATA is free to change its policy up until the time executes it first collective bargaining agreement with AMFA.

While the Supreme Court has not faced this issue since *Williams*, relatively recent appellate decisions in the Second, Ninth and D.C. Circuits have confirmed that the *Williams* doctrine is still good law today. *Atlas Air, Inc. v. ALPA*, 232 F.3d 218, 223-24 (D.C. Cir. 2000); *AMFA v. Atlantic Coast Airlines*, 55 F.3d 90 (2d Cir. 1995); *Virgin Atlantic Airways, Ltd. v. NMB*, 956 F.2d 1245 (2d Cir. 1992); *Regional Airline Pilots Ass'n v. Wings West Airlines, Inc*., 915 F.2d 1399 (9th Cir. 1990); *Union of Flight Attendants v. Air Micronesia, Inc.,* Civ. No. 85-0125 (D. Haw. August 30, 1988), *aff'd per curiam* , 902 F.2d 1579 (9th Cir. 1990); *IAM v. Trans World Airlines, Inc.*, 839 F.2d 809 (D.C. Cir.1988).

AMFA apparently relies upon the unique circumstances of 11th Circuit's *Tampa* decision, *IAM v. Transportes Aereos Mercantiles Pan Americandos,* 924 F.2d 1005 (11th Cir. 1991), for the proposition that the *Williams* doctrine is limited to the brief period after a union is certified, and before the parties commence bargaining[6]. Yet the *Williams* decision itself dealt

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[5] The carriers in *Williams* had changed the compensation of employees in response to new minimum wage laws, after two unions were certified under the RLA but before the first agreements were executed. The Court held that the status quo requirements of sections 2, Seventh and 6 of the RLA are "phrased so as to leave no doubt that only agreements reached after collective bargaining were covered" 315 U.S. at 400, and that "the prohibitions of § 6 against changes of wages or conditions pending bargaining and those of § 2, Seventh, are aimed [only] at preventing changes in conditions previously fixed by collective bargaining agreements. *Id*. at 403

[6] *Tampa* is distinguishable on its facts, because there was clear evidence of bad-faith by the employer. The IAM had been elected to replace the IBT. Tampa and IBT had completed a tentative collective bargaining agreement, which was never ratified and executed, but was nonetheless implemented by Tampa. At the onset of IAM bargaining, Tampa advised the IAM that the tentative IBT agreement constituted the status quo, but the carrier later changed its position on what constituted the status quo.

(continued...)

with two sets of facts, a Jacksonville case where there was no prior bargaining, 315 U.S. at 400-1, and a Union Terminal case, in which the bargaining process had at least been initiated through a union request for conferences, but there was no agreement. The Court reached the same result in both situations, because the express language of Section 6 of the RLA imposes a status quo requirement only when there is an existing "agreement." As the Supreme Court noted, collectively-bargained terms in an existing agreement "obviously are entitled to a higher degree of permanency and continuity" than terms implemented by the carrier. 315 U.S. at 403. Thus, the fact that bargaining has commenced does not affect this reasoning. The Second and Ninth Circuits have expressly agreed. *AMFA v. Atlantic Coast Airlines*, 55 F.3d 90 (2d Cir. 1995); *Union of Flight Attendants v. Air Micronesia, Inc.,* Civ. No. 85-0125 (D. Haw. August 30, 1988), *aff'd per curiam* , 902 F.2d 1579 (9th Cir. 1990).

D. The Duty-to-Bargain in RLA Section 2, First Does Not Preclude ATA's Actions

The RLA provides in Section 2, First that a carrier and union must exert every reasonable effort to make and maintain agreements. AMFA apparently argues, as did the union in the Eleventh Circuit *Tampa* case, that ATA is obligated by Section 2, First to bargain with the union before making unilateral changes, based on the decision in *NLRB v. Katz*, 369 U.S. 736 (1962). There are two problems with that argument: (1) ATA has not made any changes; and (2) *Katz* is an NLRA case which has little or no relevance under the RLA. While the *Katz* doctrine precludes unilateral changes prior to bargaining under the NLRA, the Supreme Court's *Williams* case is conclusive that the RLA is different on this issue and that the duty to bargain does not create a "status quo" obligation prior to the first agreement.

(...continued)

In *Williams*, the union claimed the employer's unilateral changes in rates of pay, rules and working conditions violated the "first six paragraphs of § 2 of the Railway Labor Act . . . particularly § 2, First." 315 U.S. at 402. The Supreme Court rejected this argument:

> Because the carrier was, by the act, placed under the duty to exert every effort to make collective agreements , it does not follow that pending those negotiations, where no collective bargaining agreements are or have been in effect, the carrier cannot exercise its authority to arrange its business relations with its employees in the manner shown in this record.

Id. In 1971, nine years after *Katz*, the Supreme Court decided *Chicago & N.W. Ry. v. UTU*, 402 U.S. 570 (1971), holding that the duty to bargain created by Section 2, First of the RLA is judicially enforceable. Yet the Supreme Court did not cite *Katz* as the applicable standard for judicial involvement – to the contrary, the Court emphasized the differences between the RLA and the NLRA:

> While we have no occasion to determine whether § 2, First requires more of the parties than avoidance of "bad faith," . . . we note two caveats. First, parallels between the duty to bargain in good faith and the duty to exert every reasonable effort, like all **parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes.** Second, great circumspection should be used in going beyond cases involving "desire not to reach an agreement" for doing so risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective bargaining agreements.

Id. at 579 n. 11 (citations omitted; emphasis added). *Accord Regional Airline Pilots Ass'n v. Wings West Airlines, Inc*., *supra*, 915 F.2d at 1403 (9th Cir. 1990) (union argued that, unilateral changes by the carrier were prohibited by the RLA duty to bargain in good faith; Ninth Circuit concluded that "the interjection of the federal courts in the bargaining process is not authorized by section 2, First, as interpreted by *Williams* . . .."); *Virgin, supra*, 956 F.2d at 1253 ("the unilateral alteration of rates of pay by an employer does not violate the section 2, First duty to

'exert every reasonable effort' to make agreements."); *Air Micronesia,* No. 85-0125, slip op. at 19 (D. Haw. Aug. 30, 1988), *aff'd per curiam*, 902 F.2d 1579 (9th Cir. 1990) (9th Cir. 1988); *IAM v. TWA*, 839 F.2d at 815 (D.C. Cir. 1988).

E. Any AMFA Claim Regarding The Status Quo Is Time Barred

If AMFA wished to bring a claim that AFA has an obligation to pay moving expenses as part of the status quo, it should have brought that claim within six months of September 1, 2002, when ATA reiterated its policy. *Lorance v. AT&T Technologies, Inc*., 490 U.S. 900, 912 (1989) (action accrues at time allegedly discriminatory seniority policy is adopted, not at time of subsequent layoff based on that policy). At the very latest, a status quo claim would have accrued either on September 15, 2002, when ATA implemented furloughs according to the September 1, 2002 policy and did not pay moving expenses. Exhibit E. Certainly AMFA knew or, with the exercise of reasonable diligence, should have known of the alleged breach of labor law far longer than six months ago.[7] AMFA's claim for such a status quo violation is now out of time. *See Railway Labor Executives' Ass'n v. Southern Ry.*, 860 F.2d 1038, 1041 42 (11th Cir. 1988) (applying 6-month statute of limitations to union claim that carrier violated status quo by starting to conduct drug screen urinalyses during routine medical examinations, based on

[7] *Arnold v. Air Midwest*, 100 F 3d 857 (CA 10, 1996) (RLA action accrued in November 1992 because "Both the alleged deficiency in [the union's] representation of [plaintiff], including possible conflict of interest, and [plaintiff's] termination from employment allegedly resulting from that deficiency, were known by him no later than his receipt of Air Midwest's letter dated November 6, 1992"); *Gvozdenovic v. United Air Lines, Inc*., 933 F 2d 1100, 1106 (2d Cir. 1991) (action challenging seniority integration, brought by flight attendants who had been employed by another airline, accrued when seniority integration agreement was ratified because "the 1202 incoming flight attendants already had begun working for [the surviving carrier] and were aware of the terms of the . . . Agreement"); *Ratkosky v. United Transportation Union,* 843 F.2d 869, 874 (6th Cir. 1988) (challenge to modification of seniority system accrued on date when the system went into effect; second challenge to union's decision not to reopen bargaining in view of repeal of legislation giving layoff benefits accrued on date of union letter stating seniority system would not be reopened).

DelCostello[8]); *Locomotive Eng'rs v. Atchison, T. & S.F. Ry.*, 768 F.2d 914, 919(7th Cir. 1985) (6 month statute of limitations, based on *DelCostello,* applied where carrier refused to comply with the union's interpretation of agreement); *Machinists v. Aloha Airlines*, 790 F.2d 727, 734 (9th Cir 1986) (6 months where union alleges carrier status quo violation); *RLEA v. Southern Ry Co*. 860 F.2d 1038 (11th Cir. 1988) (same). *Cf. West v. Conrail*, 481 U.S. 35 (1987) (6 month NLRA Sec 10(b) limitations period applies to actions to enforce the RLA).

IV. CONCLUSION

For all of the foregoing reasons, AMFA's Motion should be denied.

[8] In *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 170 (1983), the Supreme Court inferred that a six-month statute of limitations based in federal law should be applied where an employee sued his union for failing to fairly represent him in a grievance proceeding, and sued the employer for breach of contract, even though there was no statute of limitations expressly stated in the labor laws. Instead of using analogous state law time limits, the Supreme Court held that the six-month time limit on filing charges of unfair labor practices was the closest analogy in federal law to the situation at issue – therefore, a federal six-month limitations period applied. Subsequently, the six-month statute of limitations has been applied to a wide variety of labor law causes of action under the Railway Labor Act where there is no express time limit. *See*. *e.g.*, *BLE v. Atchison, T & SF Ry.*, 768 F.2d 914 (7th Cir. 1985) (six month limitation applied in hybrid breach of contract action against carrier and fair representation claim against union); *Robinson v. Pan Am*, W.A. 777 F2d 84 (2d Cir 1985) (six months for interference claims) *Benoni v. Boston Corp.*, 828 F2d 52, 56 (1st Cir. 1987) (six months for interference claims); *Fell v. Ind. Ass'n of Continental Pilots*, 26 F.Supp. 2d 1272, 1272-78 (D.Co. 1998) (six months for agency-fee-payors' challenges to union expenditure)..

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served this 28th day of March, 2005, by electronic mail on the Core Group, 2002 List, and the Appearance List.

/s/James M. Carr