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**RIPE, RIPER, RIPEST? THE NINTH CIRCUIT'S DECISION
IN *ADDINGTON V. U.S. AIRLINE PILOTS ASSOCIATION*
SETS A MISGUIDED RIPENESS STANDARD FOR
DUTY OF FAIR REPRESENTATION CLAIMS**

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IN *ADDINGTON v. U.S. Airline Pilots Ass'n*, the Ninth Circuit held that, as a matter of first impression, a plaintiff pilot group's duty of fair-representation (DFR) claim against a pilot union arising out of an ongoing labor dispute was not ripe before the ratification of a collective bargaining agreement (CBA) with the airline.¹ Though it was faced with a difficult set of facts, the court's decision to dismiss the case was misguided. In its analysis, the Ninth Circuit cast aside the most applicable case law available to it, relying instead on an overly narrow view of what constitutes a breach of the DFR to support its holding.²

In 2005, U.S. Airways, Inc. and America West Airlines (AWA) merged to form a single carrier, U.S. Airways (the airline).³ Following the merger, the Air Line Pilots Association (ALPA), the collective bargaining representative for both the U.S. Airways, Inc. pilots (East Pilots) and the AWA pilots (West Pilots), entered into a Transition Agreement (TA) with the two merging airlines.⁴ The separate seniority lists of the airlines' respective pilot groups had to be integrated to create a single list for the new airline.⁵ Under the TA, the lists were to be integrated under ALPA's Merger Policy and then implemented as part of a single CBA, which was subject to approval by each group's

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¹ 606 F.3d 1174, 1180 (9th Cir. 2010).

² See *id.* at 1182–83 (distinguishing *Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269, 279 (2d Cir. 2004); *Teamsters Local Union No. 42 v. NLRB*, 825 F.2d 608, 615–16 (1st Cir. 1987)).

³ *Id.* at 1177.

⁴ *Id.*

⁵ *Id.*

Master Executive Council and a majority of each group's membership.⁶ The East Pilots, who had generally been hired earlier and favored a strict date-of-hire list, began negotiations with the West Pilots, who wanted a list that reflected the relative pre-merger strength of their airline over U.S. Airways, Inc.⁷ When the negotiations failed, the union submitted the seniority list issue to "final and binding" arbitration, under its Merger Policy, the result of which was a seniority integration proposal called the Nicolau award.⁸

Displeased with the Nicolau award, the East Pilots, who outnumbered the West Pilots 5,100 to 1,900, led a successful effort to decertify ALPA and replace it with a newly formed union called the U.S. Airline Pilots Association (USAPA), which was led by an East pilot and was constitutionally committed to pursuing the East Pilots' favored date-of-hire seniority list in contrast to ALPA, whose merger policy committed it to pursuing the arbitrated Nicolau award.⁹ Five months after its certification, USAPA presented a date-of-hire seniority proposal to the airline that was not nearly as favorable to the West Pilots as the Nicolau award.¹⁰ While the two pilot groups have continued to operate under their separate CBAs, economic considerations have forced the airline to furlough 300 pilots, 175 of which are West Pilots.¹¹ Under a CBA incorporating the Nicolau award, none of the West Pilots would have been furloughed.¹²

Six individual West Pilots brought suit against USAPA on behalf of a class of West Pilots, alleging that USAPA breached its DFR by negotiating a contract that favored the East Pilots at the expense of the West Pilots.¹³ A jury found in favor of the West Pilots, finding that USAPA had breached its DFR to the West Pilots "by abandoning an arbitrated seniority list in favor of a date-of-hire list solely to benefit one group of pilots at the expense of another."¹⁴ After a bench trial on remedies, the district court granted the West Pilots an injunction against USAPA compelling the union to bargain for seniority terms based on the

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 1178.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Addington v. U.S. Airline Pilots Ass'n*, No. CV08-1728-PHX-NVW, 2009 WL 2169164, at *7 (D. Ariz. July 17, 2009), *rev'd*, 606 F.3d 1174 (9th Cir. 2010).

¹⁴ *Id.* at *2.

Nicolau award.¹⁵ USAPA appealed, contending that the district court never had jurisdiction because the West Pilots' claim was not ripe.¹⁶

The Ninth Circuit was asked to decide whether, as a matter of first impression, a DFR claim based on a union's promotion of a policy was ripe before the union had completed its negotiations with an employer.¹⁷ In a two-to-one split decision, the Ninth Circuit held that the West Pilots' DFR claim was not yet ripe.¹⁸ The court qualified its decision, however, writing that it was not holding "that a DFR claim based on a union's promotion of a policy is never ripe until that policy is effectuated," but that "in this case, there is too much uncertainty standing in the way of effectuation of Plaintiffs' harm to warrant judicial intervention at this stage."¹⁹

The Ninth Circuit considered the two ripeness factors—(1) "the fitness of the issues for judicial decision," and (2) "the hardship to the parties of withholding court consideration"—and determined that the Pilots' DFR claim was not ripe.²⁰ First, the majority reasoned that the claim was not fit for decision because contingencies existed that could prevent the implementation of a final CBA containing USAPA's date-of-hire seniority proposal.²¹ In the opinion of the majority, the West Pilots would not "actually be affected by USAPA's seniority proposal" until there was a ratified CBA, and it was uncertain that the date-of-hire seniority list would ultimately be accepted by both USAPA and the airline as part of a final CBA or that such a CBA would be ratified by the union's membership.²² Second, the majority held that dismissing the claim did not work a direct and immediate hardship on the West Pilots.²³ It rejected the West Pilots' position that they suffered harm by losing the opportunity to have a CBA incorporating the Nicolau award put to a ratification vote, reasoning that even though certain furloughed West Pilots would still be working under a CBA incorporating the Nicolau

¹⁵ *Id.* at *28.

¹⁶ *Addington*, 606 F.3d at 1178.

¹⁷ *Id.* at 1179.

¹⁸ *Id.* at 1184.

¹⁹ *Id.* at 1181.

²⁰ *Id.* at 1179 (quoting *Yahoo! Inc. v. Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1211–12 (9th Cir. 2006)).

²¹ *Id.* at 1179–80.

²² *Id.*

²³ *Id.* at 1180.

award, it was “at best, speculative that [such a CBA] would be ratified if presented to the [USAPA’s] membership.”²⁴

The *Addington* majority relied primarily on its Ninth Circuit DFR decisions and on the language of the Supreme Court’s decision in *Air Line Pilots Ass’n, International v. O’Neill* to support its holding.²⁵ According to the majority, dismissing the West Pilots’ claim was consistent with the Ninth Circuit decisions in *Williams v. Pacific Maritime Ass’n*, *Bernard v. Air Line Pilots Ass’n, International*, and *Hendricks v. Airline Pilots Ass’n, International*, where DFR violations were found after contracts were agreed upon.²⁶ Additionally, for the majority, the language of the Supreme Court’s holding in *O’Neill*, which established that the DFR was applicable during contract negotiations, implied that a DFR “claim can be brought only after negotiations are complete and a ‘final product’ has been reached.”²⁷

The *Addington* majority went on to distinguish the Second and First Circuit decisions in *Ramey v. District 141, International Ass’n of Machinists & Aerospace Workers*, and *Teamsters Local Union No. 42 v. NLRB* from the West Pilots’ claim by noting differences between the ripeness and statute of limitations inquiries and factual differences between the cases.²⁸ Even though the *Ramey* and *Teamsters* courts both held that the respective DFR claims accrued before finalization of the policy at issue for the purpose of the running of the statute of limitations, the *Addington* majority suggested that the holdings were not persuasive because in *Ramey*, the airline had already accepted the union’s seniority system, and in *Teamsters*, “shifts had been assigned according to [the] union’s seniority system.”²⁹ Additionally, the majority was “hesitant to transplant a rule” from statute of limitations-claim-accrual cases because in those cases, the injury has culminated, and those “courts often decline to identify a specific date on

²⁴ *Id.*

²⁵ *Id.* at 1181–82 (citing *Air Line Pilots Ass’n, Int’l v. O’Neill*, 499 U.S. 65, 78 (1991)).

²⁶ *Addington*, 606 F.3d at 1181–82 (citing *Bernard v. Air Line Pilots Ass’n, Int’l*, 873 F.2d 213, 215 (9th Cir. 1989); *Hendricks v. Airline Pilots Ass’n, Int’l*, 696 F.2d 673, 674–75 (9th Cir. 1983); *Williams v. Pac. Mar. Ass’n*, 617 F.2d 1321, 1328 (9th Cir. 1980)).

²⁷ *Id.* at 1182 (citing *O’Neill*, 499 U.S. at 78).

²⁸ *Id.* at 1182–83 (citing *Ramey v. Dist. 141, Int’l Ass’n of Machinists & Aerospace Workers*, 378 F.3d 269, 279 (2d Cir. 2004); *Teamsters Local Union No. 42 v. NLRB*, 825 F.2d 608, 615–16 (1st Cir. 1987)).

²⁹ *Id.* at 1182.

which the claim accrued.”³⁰ The majority finally concluded that the West Pilots’ claim would not be ripe “until the airline responds to [USAPA’s seniority] proposal, the parties complete negotiations, and the membership ratifies the CBA.”³¹

The *Addington* majority’s ripeness analysis was flawed and its decision was misguided because it relied on an overly narrow view of what constitutes a breach of a union’s DFR. In contrast to the majority’s view that the West Pilots would not “actually be affected by USAPA’s seniority proposal”³² until there was a ratified CBA, a claim for loss of fair representation during bargaining asserts a ripe claim “without any requirement of a showing of further injury”³³ because the DFR extends to “challenges leveled not only at a union’s contract administration and enforcement efforts but at its negotiation activities as well.”³⁴ For example, in *Automotive, Petroleum & Allied Industries Employees Union, Local 618 v. Gelco Corp.*, the Eighth Circuit held that a DFR claim against a union arising out of the union’s decision to submit a grievance between two members to arbitration was ripe before the final result of the arbitration.³⁵ The *Gelco* court rejected the union’s argument that the plaintiff union member had not yet suffered an injury, finding “that it was the [u]nion’s decision to take [the] grievance to arbitration and the manner in which that decision was made which constituted the breach.”³⁶ Similarly, in *Addington*, a finalized CBA is not essential for ripeness because USAPA had already constitutionally adopted an “objective” of maintaining date-of-hire seniority principles and presented a date-of-hire seniority proposal to the airline.³⁷ As the dissent recognizes, no further factual development is required because this is “actual ‘act[ion] against the interest[s] of the West pilots—the precise point at which . . . a DFR breach occurs.”³⁸ While waiting until there is a CBA might make the

³⁰ *Id.* at 1183 n.6.

³¹ *Id.* at 1180.

³² *Id.*

³³ *Bertulli v. Indep. Ass’n of Cont’l Pilots*, 242 F.3d 290, 295 (5th Cir. 2001).

³⁴ *Commc’ns Workers of Am. v. Beck*, 487 U.S. 735, 743 (1988).

³⁵ 758 F.2d 1272, 1275 (8th Cir. 1985).

³⁶ *Id.*

³⁷ *Addington*, 606 F.3d at 1178.

³⁸ *Id.* at 1188 (Bybee, J., dissenting) (quoting *Ramey v. Dist. 141, Int’l Ass’n of Machinists & Aerospace Workers*, 378 F.3d 269, 278 (2d Cir. 2004)).

West Pilots' claim "riper," there is no need to show any future injury.³⁹

The majority's reliance on the Supreme Court's holding in *Air Line Pilots Ass'n, International v. O'Neill* and on existing Ninth Circuit DFR decisions presents similar problems. In its opinion, the *Addington* majority suggested that the Supreme Court's language in *O'Neill* implies that "a claim can be brought only after negotiations are complete and a 'final product' has been reached."⁴⁰ As the dissent astutely points out, this is a stretch in reasoning and "overstates what [*O'Neill*] said."⁴¹ Nothing in *O'Neill* suggests that a DFR claim cannot accrue before the signing of a CBA because *O'Neill* did not address the ripeness of DFR claims but merely held that a union's DFR "applies to all union activity, including contract negotiation."⁴² The fact that a CBA "may constitute evidence" of a violation of the DFR hardly suggests that "a claim can *only* be brought' once there is a CBA."⁴³ If anything, the *O'Neill* decision implies that a breach of the DFR may arise before the signing of a CBA because for the *O'Neill* Court, the CBA "is only considered as 'evidence' of a breach rather than the breach itself."⁴⁴ The majority's reference to the Ninth Circuit DFR decisions in *Williams*, *Bernard*, and *Hendricks* only lends support to the same empty proposition as *O'Neill*.⁴⁵ Like *O'Neill*, none of those decisions mention ripeness or are relevant to the question of whether a DFR claim is ripe before the signing of a CBA.⁴⁶ In effect, the majority's use of *O'Neill* and Ninth Circuit DFR cases does not support its decision, but merely confirms that the question before the court is a matter of first impression.

The majority's attempt to distinguish the *Ramey* and *Teamsters* statute of limitations-claim-accrual cases is also unconvincing because it ignores the logical relationship between the statute of

³⁹ *Id.*; *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 295 (5th Cir. 2001).

⁴⁰ *Addington*, 606 F.3d at 1182 (quoting *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991)).

⁴¹ *Id.* at 1186 (quoting *id.* at 1182).

⁴² *Addington v. U.S. Airline Pilots Ass'n*, No. CV08-1728-PHX-NVW, 2009 WL 2169164, at *25 (D. Ariz. July 17, 2009), *rev'd*, 606 F.3d 1174 (9th Cir. 2010) (quoting *O'Neill*, 499 U.S. at 67).

⁴³ *Addington*, 606 F.3d at 1187.

⁴⁴ *Addington*, 2009 WL 2169164, at *25 (emphasis added).

⁴⁵ *Addington*, 606 F.3d at 1186.

⁴⁶ *Id.*

limitations and ripeness inquiries.⁴⁷ As the *Addington* district court and the Ninth Circuit have previously recognized, “[c]laims are ripe, at the latest, when the statute of limitations begins to run.”⁴⁸ Further, “[t]he statute of limitations runs on [DFR] claims from the time that the asserted injury becomes ‘fixed and reasonably certain.’”⁴⁹ Both the *Ramey* court and the *Teamsters* court concluded that the respective DFR claims accrued before effectuation of the policy at issue for statute of limitations purposes.⁵⁰ Given that “[d]etermining when the cause of action accrues is merely the corollary to the ripeness inquiry,”⁵¹ those holdings logically weigh in favor of finding that the West Pilots’ claim is ripe. The majority suggested that the courts’ holdings were not persuasive, however, because of differences in the posture of ripeness and claim accrual cases and because, in *Ramey*, the airline had already accepted the union’s seniority system, and, in *Teamsters*, “shifts had been assigned according to [the] union’s seniority system.”⁵² But as the *Addington* district court pointed out, “[t]his contention misses the point” as it ignores the logical relationship between ripeness and claim accrual.⁵³ The majority should have found that the West Pilots’ claim was ripe because “[c]laims are ripe, at the latest, when the statute of limitations begins to run,” and the *Ramey* and *Teamsters* plaintiffs’ claims—like the West Pilots’ claim in *Addington*—accrued before the completion of the union’s negotiations with the employer.⁵⁴

Moving forward, the decision to dismiss the West Pilots’ claim will result in continuing hardship to the West Pilots because the future events that the majority cited are unlikely to occur anytime soon.⁵⁵ It has been five years since the airlines merged, and the pilot groups are no closer now to a CBA that reflects the

⁴⁷ See, e.g., *Norco Constr., Inc. v. King Cnty.*, 801 F.2d 1143, 1146 (9th Cir. 1986) (“The conclusion that a claim is premature for adjudication controls as well the determination that the claim has not accrued for purposes of limitations of actions.”).

⁴⁸ *Addington*, 2009 WL 2169164, at *24 (citing *Norco*, 801 F.2d at 1146).

⁴⁹ *Id.* (quoting *Archer v. Airline Pilots Ass’n Int’l*, 609 F.2d 934, 937 (9th Cir. 1979)).

⁵⁰ *Addington*, 606 F.3d at 1182 (majority opinion).

⁵¹ *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687 (9th Cir. 1993).

⁵² *Addington*, 606 F.3d at 1182.

⁵³ *Addington*, 2009 WL 2169164, at *24.

⁵⁴ *Id.* (citing *Norco Constr., Inc. v. King Cnty.*, 801 F.2d 1143, 1146 (9th Cir. 1986)).

⁵⁵ See *Addington*, 606 F.3d at 1188 (Bybee, J., dissenting).

interests of both pilot groups than they were the day of the merger.⁵⁶ Additionally, the Ninth Circuit's decision causes undue delay to the parties because if a CBA ever is signed, and it contains a seniority list that is less favorable to the West Pilots than the Nicolau award—as will be the case with USAPA representing the pilots—then USAPA will be subject to a ripe DFR claim at that time.

In conclusion, the Ninth Circuit's decision was misguided. It set a ripeness standard that restricts the scope of the DFR, erodes union members' essential protection from arbitrary and discriminatory conduct by their bargaining representative, and muddles the logical relationship between DFR claim accrual for statute of limitations purposes and DFR ripeness. Instead of issuing a holding premised on doubts about its own ability to provide relief that would actually result in a finalized CBA, the Ninth Circuit should have held that the West Pilots' DFR claim was ripe and decided it on its merits.

⁵⁶ *Id.* at 1184–85.