Injunction Junction, What's Your Function?

A review of the US Airways Injunction

"The definition of insanity is doing the same thing over and over and expecting different results."

-various attributions.

The latest casualty of airline pilot unions running into traps set by the management-government axis is USAPA. We can't fault pilots for trying to remedy their seemingly hopeless situation by whatever means appear to be available to them; we only question their tactics. Their hearts are in the right place, but their minds have not caught up to 21st Century labor relations.

OPERATION ORANGE is trying to fix that.

As we all know by now, a federal judge has agreed with just about every complaint lodged by US Airways management against the union representing the "East" pilots in its operations. This should come as a shock to absolutely nobody who has been paying attention since Judge Kendall delivered his ruling in 1998 against the APA - the union representing American Airlines pilots.

Face it. Management has us pinned down with a lopsided enforcement of the RLA and a very hostile federal bench. We can only negotiate on their terms and on their timetable. No rational look at the last 20 years can yield any other conclusion.

Since 1998, pilots at American, Delta, United, and now US Airways have run into a granite wall called the federal judiciary. It matters not if pilots were exercising self-help due to unilateral changes in their CBA, such as the operation of an alter-ego airline in clear violation of a scope clause, using contractual sick leave, or just the admonishment to not rush an operation in the interest of safety, management have snapped their fingers and federal judges have responded.

Rather than reprise the entirety of the past 13 years, we will delve into the latest judicial smack-down, since the arguments are essentially the same from airline to airline, and injunction to injunction. **This is the playbook of modern airline-pilot labor relations, and it will remain so until the pertinent law is changed**.

We will go through the general underpinnings of the 45 page "opinion and order" from Judge Robert Conrad and comment on areas pertinent to the overall strategy of OPERATION ORANGE and the current state of the airline industry, as it relates to pilots seeking to better themselves in the face of an overtly hostile government. Unless otherwise noted, all quotations and page references are to the "Memorandum Opinion and Order" of Judge Robert Conrad, jr., dated September 28, 2011. Any emphasis, unless otherwise noted, is that of The Committee.

RLA 101 - Introduction to Airline Labor Relations

First off, the basics of the RLA:

> *Plaintiff alleges that the defendants have engaged in a campaign "to cause nationwide flight delays and cancellations **in order to put pressure on US Airways in its current collective bargaining negotiations**" with USAPA in violation of the "status quo" provisions of the Railway Labor Act (RLA).* [1] *(p. 1)*
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> *US Airways claims that beginning on May 1, 2011, USAPA has instigated a work slowdown under the guise of a "safety campaign" **in order to put pressure on US Airways in the ongoing contract negotiations**. (p. 2)*

This is why the RLA governs this action. The RLA was specifically installed to prevent transportation (airline) employees from being able to disrupt public commerce, unless an exhaustive and increasingly unreasonable procedure has been completed. Even so, the airline union is prohibited from engaging in any "self help" or "violations of the status quo" unless it has permission from the government. Keep in mind this is the same government that extracts exorbitant taxes from air travel and which is staffed by Congressmen who receive lavish campaign donations from the air transportation industry.

Note that this did not say that pilots were not allowed to engage in political activities, or peaceful activities to get the governing law changed. This injunction, as all other injunctions that preceded it, only deals with a union trying to extract concessions under an existing contract or one which is under amendment proceedings. In other words, pilots can not engage in coercive activities for the purposes of gaining leverage in contract negotiations with the relevant carrier.

[1] For the purposes of this review, we will assume the findings of fact that USAPA did engage in an illegal work action under the RLA. In actuality, we assume no wrongdoing on the part of USAPA, or any pilot assumed to be engaged in such activity. Our position for this review is strictly for the analysis of the judge's opinion and the state of the industry. Do not construe any of our remarks as agreeing with the underlying premise posited by US Airways or Judge Conrad.

As long as a carrier can convince a friendly judge that its pilots are engaging in activities to gain advantage in contract negotiations, the judge will reliably enjoin such activity, and take whatever hostages needed, innocent or not, to satisfy management's bloodlust. This is the very basis of the RLA. In theory, and only in theory, management is likewise prohibited from engaging in activities to bolster its negotiating leverage.

This is why our union leaders have been emasculated, and is why the last 13 years has seen a precipitous decline in pilot career value. This is no accident.

Work Slowdown - A Bolt Out Of The Blue?

What would be the motivation for pilots to wish to bring pressure to hasten the conclusion of a new labor agreement? Are they just petulant children, or is there something else at work?

> *Soon after USAPA's certification, US Airways and USAPA began meeting regarding a single CBA in **June 2008**. Since January 2010, these negotiations have been mediated by the National Mediation Board (NMB). The NMB has authority to determine the pace of negotiations, including where and how often negotiations occur. **The NMB has the unfettered authority to release the parties from negotiations if and when it determines that agreement cannot be reached,** and, only following such a release (and a 30-day "cooling off" period), would USAPA be permitted to engage in a work stoppage. **In short, it has been almost six years since US Airways and America West merged, and it seems the parties have never been further from reaching an agreement**. (pp 5-6)*

What does it take to meet the threshold of "impasse" or when the NMB determines if an agreement can not be reached? One would think that anywhere from two to six years, depending on the metric used, where both parties stand at irreconcilable positions would meet that threshold. It isn't as if the USAPA pilots engaged in illegal self-help or violations of the status quo at the outset of the negotiations. By any measure, these actions have come no less than three years after negotiations commenced, against the backdrop of an airline and pilot group that have not created any substantial common ground. What is a pilot group to do? How long must it wait?

What is the NMB looking for? What does it take to actually get released from mediation?

If you wish to look for a reason these pilots engaged in this activity, look no further than management abusing the "perpetual contract" provisions of the RLA, so as to only negotiate in good faith when the macro-economic picture favors their position.

Fix that, and you fix almost all of these illegal slow-downs. A union uses these as a last resort because its true "last resort" (strike) has been denied by a government funded by the union's counterparty. **Pilots only engage in such tactics out of frustration because all other avenues of getting a new contract are denied.** This is the natural result of an uneven application of law and a general miscarriage of common decency.

This is part of the OPERATION ORANGE "Fair Treatment Of Experienced Pilots Act - Part 2" we are attempting to push through Congress, via a nationwide "SOS."[2]

We would expect no other entity to have to endure such delays. Certainly no federal judge would tolerate a lazy implementation of a TRO. $45,000,000 seems to be a hauntingly familiar number to thousands of union pilots who didn't clear from their sick status in a manner favorable to a federal judge. Pilots have been legally stripped of any leverage to attain new working agreements on terms favorable to them - a frustration a federal judge knows nothing about.

To Be Safe, or Not To Be Safe: That Is The Question

> *The [safety] campaign became USAPA's primary focus in the fall of 2010, but USAPA laid the groundwork for a slowdown much earlier, through various communications. (p. 6)*

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[2] See "Fair Treatment of Experienced Pilots Act - Part 2" (FTOEPA2), Section 1.A.1.b, available at the operationorange2011.org website.

The following is footnoted as amplification of the above statement.

> *USAPA unconvincingly argues that communications before May 1, 2011 should not be considered because US Airways offers no empirical data demonstrating an operational slowdown prior to this date. This evidence is relevant in linking safety to the labor action;* ***the mere fact that these communications did not immediately result in a slowdown does not mean that they did not contribute to it.*** *(p. 6)*

Safety has been a longstanding priority of organized pilot labor since the inception of passenger air service. Are we to conclude that all safety statements by USAPA, or its ALPA predecessor, can be construed as a clandestine job action against their employer? At what point do safety admonitions no longer become evidence of a sinister plot to hamper airline operations? US Airways offered no data to suggest that pre May 2011 slowdown was in the works, yet the union is on the hook for it? If statements from late 2010 are used, why not any statement during the entirety of the open contract? What about prior to 2005? Where do we draw the line? When is safety not really safety, but an illegal job action in disguise, and when is it safety? The Court offers no guidance in such matters. The union is left in a substantive grey area (a recurring theme of such injunctions, as we will see). Given the itchy trigger finger nature of the federal bench, it is prudent not to issue admonitions regarding safety.

The potential managerial abuse of such an arrangement is incalculable. **Safety costs money** and pilot unions have steadfastly organized around keeping the operation safe, even if it costs the company money to do so. To say that increasing safety is tantamount to an illegal job action, and by having a blank check from a black robe, management can push pilots to become more and more efficient and to take more risks, all the while absolving themselves of the responsibility for such pressures.

Anyone who had a reckless squadron commander knows how this game is played. You are pushed to "get the job done," which makes your commander look good. If something goes awry, every rule in every book is brought out to hang the pilot, should it be found he cut a corner to "get the job done." If a pilot is devoted to the safety regulations, he is replaced by another who will cut the corner.

If we revisit the footnoted passage #4 on page 6 we begin to see the mindset of the judge. A conclusion has been reached and the evidence is interpreted in that context. A safety admonition coincidental to a drop in performance is considered a stealth job action, but if the admonition precedes the statistical drop, it is also evidence of an illegal job action. No matter what, safety admonitions are evidence of illegal job actions, regardless of the ambient performance of the airline. Conclusion precedes evidence.

Many statements from USAPA are submitted to show that the union is using the safety issue to gum up the operations at US Airways. Some are more convincing than others, but we wonder if the judge lacks the proper understanding of what it takes to run an inherently dangerous operation in a manner safe enough to transport a billion people all over the globe, in any weather condition, at 83% the speed of sound, without losing a single life. This isn't a matter of giving a convincing brief, or filing regulatory paperwork with the proper court. It is a matter of developing proper habits, and exercising the proper judgment to err on the side of caution, lest 200 people lose their lives due to seemingly trivial carelessness.

This is called "Safety Culture," and is at the center of how to operate in an environment where the forces of nature are acting in concert to kill you.

We are told the "most damaging" of all the USAPA statements regarding their work actions masquerading as a safety campaign reads thusly:

> *Friends, it is time for us to make a concise and powerful statement that we will no longer tolerate unfair working conditions at our airline. What should you do? There are many things that we must focus on as we move forward. First and foremost is the safety culture. With our pilots experiencing extreme levels of stress, we must make every effort to keep ourselves out of the red. . . . We must MEET OR EXCEED the safety standards of the [Flight Operations Manual] and [Federal Aviation Regulations] in every single decision that we make. . . . A storm approaches, my friends. (pp. 7-8)*

This comes from the USAPA's Strike Preparedness Committee, and the judge concludes that there is "no conceivable reason" for the Strike Prep Committee to discuss the safety culture in this context unless it were related to stormy contract negotiations.

We applaud the judge for wishing to be well informed and issue opinions and edicts which descend from such a broad scope of the understanding of human endeavor, but the idea that a SPC can't admonish fellow pilots to follow and indulge the safety culture is very much off the mark. This mistake comes from believing that safety is not a culture that is shared by all pilots, regardless of committee, or even airline to airline. Safety has been an area where data has been shared across corporate lines for the purposes of increasing the broader scope of safety culture throughout the industry.

SPC's role in contract acquisition is largely misunderstood by the general public, and we believe The Court is no exception. It is the Negotiating Committee that secures the contract, not the SPC. The SPC is often working to prepare the membership for an eventual job action, and part of that effort is to shepherd the pilot group through the difficult time of negotiations, lest they fail and the SPC is called to carry out their tasking. Pilots are universally disturbed by protracted contract negotiations and must start to balance the pressures of family and career against the rumors and fear grenades thrown at the pilot group. Many pilots will be out of work if outsourcing is expanded, or forced to change domiciles. Pay can be cut, which causes pilots to have to roll back their standard of living, or take on moonlighting jobs. All this serves as distractions in the cockpit, and distractions are anathema to safety culture.

The SPC, as are most committees, is part of the safety culture. There is nothing incongruent between preparing pilots for a cantankerous end game (strike or other job action) and telling them to keep their heads and keep the operation safe, regardless of the status of the negotiations.

Even OPERATION ORANGE published a "Pilot To Do" list almost one year ago, and among the list is an admonition for interested pilots to do their jobs to perfection and "not screw up." That is us telling everyone to be safe and not let this distraction kill anyone.

Passengers will often thank pilots when they leave the aircraft. They never thank us for getting them to their destination cheaply, or quickly. They only thank us for getting them to their destination safely.

Perhaps management could take this object lesson and realize protracted contract negotiations, fear grenades, and pilot pushing are inherently distracting and pose a threat to the safety of their operation. **Perhaps it is in the public interest to conclude pilot contract negotiations in a timely manner**,[3] but such concerns seem not to rise to the attention of lawmakers or judges. The onus is on the pilot to put up with half-decade long negotiations, keep things genuinely safe, operate at the pace dictated by management, and not complain about it.

The Search For A Smoking Gun

USAPA is being held hostage by this injunction because some of its members (presumably) have been engaging in communications contrary to the wishes of the airline. The "anonymous" emails and texts are assigned to USAPA, regardless of a lack of direct linkage. While it may be reasonable to assume that some "East" pilots are behind the messaging, it is unreasonable to hold the union accountable for such action. The union lacks sufficient police powers to investigate such actions, should they be criminal in nature, and they certainly are not staffed nor funded for extensive undercover operations that ultimately benefit management. It is certainly convenient to assign culpability to the union, but has there been any direct link, or smoking gun to the USAPA? One would think that if The Court had sufficient evidence of such linkage it would have proudly displayed it in its memorandum. All it has is a handful of nameless, "pissed off pilots," which comes as no surprise to anyone familiar with the unreasonably protracted pilot negotiations. Bottom line: management needs a hostage and USAPA is going to be it, no matter the facts. Somewhere out there exists an 8 digit fine that management would love to sink its teeth into.

If You Write It Up, We Will Write You Up.

The US Airways operation had seen a sharp rise in MEL write ups

[3] See FTOEPA2 Section 1.A.1

subsequent to the May 1, 2011 "safety campaign." They allege this passage from a USAPA video caused the spike in write ups.

> *Use your experience and judgment when confronted with an MEL. Do not accept one that puts you and your crew into the yellow and compromises safety. Take all factors into consideration and never be intimidated by anyone whether from dispatch, maintenance, or the Chief Pilots' office. Our safety culture is flawed, and we must put a stop to it. We make the final call on the MEL items we accept. (p, 14)*

The Court opines on this phenomena:

> *This Court finds that USAPA's statements about MEL maintenance went beyond merely reminding pilots to use good judgment and instead encouraged them to collectively reject aircraft with MELs in order to disturb operations. (p.15)*

What if management is "taking hostages" (spike in disciplinary actions during pilot negotiations) or the FAA gets a burr under its saddle and starts ramp-checking "East" pilots at a higher than normal rate, and the pilot wishes to protect his certificate and career by exercising overzealous regulatory compliance? If it is rumored that the FAA is on the rampage on maintenance and pilot compliance (regardless if it is true or false), is the pilot required to hire an investigator and statistician, such as Dr. Darrin Lee, to show that it is not the case?

What is to prevent management from using The Court's order to push out maintenance, knowing that the pilots will be reluctant to write up the aircraft? This would save them money in the short term.

What is a pilot to do? If he can point to a policy or regulation showing that the aircraft certainly can be written up, is it The Court's opinion that such regulations should be ignored in the interest of operational efficiency? If so, how often and by what standards? Should "East" pilots call their supervisor to ask if a write up is keeping with company policy and operational efficiencies? Should they call Judge Conrad and ask him?

If pilots are to defer such decisions to others, in the interest of operational efficiency, has not The Court just removed part of the captain's authority to

be the final and binding authority as to the safety and airworthiness of the aircraft? Such an arrangement is a managerial wet dream, as the goal of transforming pilots into malleable functionaries has been a longstanding managerial imperative for the entire history of scheduled passenger air service.

One wonders what Dr. Darrin Lee was told when he was tasked by US Airways to analyze the operation. Was he told to objectively look at the data, or was he told to find pilot mischief in the statistical record? Perhaps the Court, if so concerned with the public interest, could direct Dr. Lee to do a likewise statistical analysis of exactly how "random" the time to negotiate new contracts happens to be when compared with the macro economy. What are the odds that management is willing to move only when economic forces favor their position, versus when they are profitable and pilots are coming off a decade long retrenchment of their standard of living? We wonder how likely the pattern of stalling for better economic leverage happens to align with random patterns?

Some questions will never be answered.

Fatiguing of Fatigue

On March 30, 2011, USAPA's Safety Committee released a video addressing pilot fatigue in which Captain Kubik states:

> *If you are fatigued, you are done flying . . . The operational safety guidance is simply this: Don't fly fatigued! If you are a reserve pilot, don't accept a trip if you are fatigued. If you are called for a ridiculous pairing that you know will put you in a fatigued state, don't accept it . . . Your union will be with you each step of the way. (p. 16)*

This is the standard position of all airline pilot unions across the industry, without regard to where they are in the contract negotiating cycle, or the relative honor of their management teams. Just because US Airways is in negotiations with its pilots does not preclude the union from telling pilots to lay aside their "can do/mission hacker" proclivities and do what is safe for the operation. The pressure to fly fatigued is enormous and relentless at all airlines. They do have "no fault" fatigue policies, but these policies are all

about legal cover rather than for actual health and safety concerns. Anyone who doubts this reality need only check the recent FAA Flightcrew Member Duty and Rest Requirements, which we link on our website.

Rather than go into an exhaustive rebuttal of that Orwellian tripe in this review, we published our response over a year ago. We have also published Section 2 of the "FTOEPA2," which deals with genuine fatigue abatement, rather than the codified pilot pushing and legal eyewash the FAA is putting out under the guise of making flying safer.

The various airlines and their trade groups have spent millions trying to water down an already weak and counterproductive flight duty and rest requirements.[4] To say that airlines have **any interest at all** in fatigue abatement, when all that interests them is legal cover, is pathologically naive or knowingly false. On these matters, the record is absolutely conclusive. Follow their money and see what they are attempting to buy in the Halls of Congress - more flying by fewer pilots with categorical legal immunity from the consequences of such.

We now move to concerns over hotel selection:

> *The [USAPA safety] video also expressly discusses a subject of the collective bargaining between USAPA and US Airways: hotel selection. In discussing the requirement that pilots not fly fatigued, Kubik states, "When enough of our pilots fully understand this requirement, and more importantly, act upon this requirement, then our substandard hotel situation will disappear with a speed you likely thought was not possible." He also tells pilots, "If you make the decision to fly fatigued . . . you can absolutely expect the continued poor scheduling practices and hotel selections to continue." Though Defendants argue that low quality hotels lead to fatigue, the Court is unconvinced that USAPA's sole concern was safety rather than gaining leverage in negotiations over hotel selection. (pp 16-17)*

This falls under the category of "no good deed goes unpunished."

[4] As of this writing, the airlines and trade groups are lobbying for the government to hold back the new flight time and crew rest requirements. This FAA regulation is now in its third month of delay.

The union is very clearly stating that they have issues with substandard hotels, which they categorize as such because of fatigue issues. They are very clearly stating that pilots flying fatigued are masking the need for a new hotel, and as long as pilots continue to violate the FARs in this issue, the company will continue to use a substandard hotel.

In other words, unless the company sees the need to change hotels, the hotel selection won't change and fatigue will continue. Flying fatigued begets more fatiguing conditions. If the company has to absorb the true cost of that fatiguing hotel, they will change it. If the pilots absorb the cost (flying fatigued), it will never change.

Once again, we are left to wonder what The Court would have us do when fatigued? Are we the sole determinate, or are we to consult a statistical model prior to fatiguing-out? We are not given guidance by The Court in such matters, only that "East" pilots are statistically beyond their bag limit on fatigue.

The Court cites what every pilot in the industry already knows:

> *Under US Airways's policies as well as FAA standards, a fatigued pilot should not fly an airplane.* ***It is ultimately the individual pilot's responsibility to determine his or her level of fatigue****, and pilots who report that they are fatigued are released from their trip. (p. 16)*

Actually, the regulations state that a fatigued pilot "shall" not fly an airplane. What is a fatigued pilot to do? His union is telling him not to fly fatigued. His company says not to fly fatigued. His government says not to fly fatigued. His passengers don't want him flying fatigued. But an industry expert witness says too many pilots are calling out fatigued and a judge agrees.

What are the metrics to determine fatigue? From the citation above, The Court says that it is "ultimately the individual pilot's responsibility to determine his or her level of fatigue." No mention of squaring it with Dr. Lee's statistical models…no mention of what factors are used in determining fatigue…We only have that the **individual** pilot is responsible for that determination.

That's all the guidance we are given, yet we have run afoul of the court. The confusion is palpable and, quite frankly, unworkable. It is just a convenient pretext to hold USAPA hostage for the individual determinations of its member pilots, solely because the fatigue patterns don't fit a convenient statistical model of an industry chosen expert.

Hurry Up! What Could Go Wrong?

> *Pilots exercise **considerable discretion in the speed at which they taxi the aircraft** before take-off and after landing. However, because prolonged taxi times leads to flight delays that diminish overall operational performance, US Airways closely monitors the taxi times of each of its flights. (p. 17)*

Pilots are regulated as to the proper taxi speed in certain areas of the airport. There is no speedometer, as are found in automobiles, so pilots must use judgment, born of experience, to taxi at a safe speed commensurate with the governing FAA regulations. The FAA mandates that taxis speeds be no faster than a man can walk, in congested ramp areas, and no faster than a man can jog on taxiways. Most pilots taxi considerably faster than mandated, and do so at risk to other aircraft and their pilot license.

There are many things pilots must do to comply with FAA regulations regarding taxiing, such as avoidance of non-task oriented chatter, having an airport diagram readily available, completing checklist items, communicating with cabin crews, communicating with the FAA, communicating with the airline, and constantly evaluating the takeoff conditions. Sometimes, these tasks take longer than the statistical norm, but that's not what we are discussing in this case.

The Court is concerned with the statistical aberration of longer taxi times by "East" pilots and sees it as yet another nefarious plot by the USAPA to disrupt the airline operations. It is also interested in how pilots may sequester themselves in the cockpit to finalize pre-departure preparations. Of note is the video from the USAPA Safety Committee that gives guidance to pilots to combat scheduling pressures to ensure the safe operation of the aircraft.

When all you have is a hammer, everything starts to look like a nail, and The Court didn't find an exception in the preflight preparations. Of course, it found that this was a feature of the USAPA's slowdown campaign.

Why? Because the USAPA Safety Committee (note that it didn't cite the "Efficiency Committee") released a video advising pilots to close the cockpit door to finish the preflight preparations. This was to make the process safer by reducing distractions and insulating pilots from the ever-present scheduling pressures. These scheduling pressures are often at odds with the safe operation of the aircraft, because doing things rapidly often invites omission in procedures.

It does not occur to The Court that perhaps pilots do not wish to taxi rapidly while they complete complex preflight checks, lest they end up in a smoking crater at the end of the runway because bug speeds and flap configurations didn't get set properly.

When a judge commits a careless error, an appellate judge is called. When a pilot commits a careless error, the undertaker is called. The airline will spend millions deflecting all the blame onto the pilot and how he had the authority to slow down and get things done correctly. After all, nobody asked him to jeopardize safety to shave two minutes off the taxi time.

Airlines like slow downs too, but only when their lawyers tell them to do so.

This brings us to another of the recurring themes of this opinion and order: statistical assignment of culpability and conclusion preceding evidence. More importantly, it illustrates again, along with fatigue, and MEL write ups, that there are realities that are simply beyond the reasonable application of judicial fiat.

Once again, what is the guidance? Are pilots now forbidden to close the cockpit door to conduct pre-flight checks? What is the minimum taxi speed in the ramp and on the taxiways? What happens if an aircraft is taxiing rapidly (to comply with a federal judge's edict), cockpit preparations were not done at the gate, and now have to be done "heads down" while taxiing? If a mishap occurs, who is to blame?

Can a pilot use this Memorandum of Opinion and Order as legal immunity in an enforcement action hearing because they were taxiing to fast, or off the taxiway because they were "heads down" completing pre-flight checks they would rather have done at the gate? Will Judge Conrad testify on the pilot's behalf at the FAA hearing?

What happens if a pilot gets to the gate 16 minutes behind schedule? If he doesn't think he can get to his destination by A+14, should he just refuse the flight, or divert?

What of lanyards or luggage tags that suggest safety is a priority for the piloting group? Are they also contraband? Is the mere presence of such material now evidence of a dark union plot? Can the union be fined if a member says "safety first" to another member? Can saying "I'm on board," be construed as a criminal offense or an actionable tort?

The Injunctions Will Continue Until Morale Improves

To what degree must the union go to clean up after its membership? What policing powers does the union have to enforce this order?

Guidance is lacking.

Any rational pilot should take the admonition of a federal judge, as to how to operate an aircraft, especially beyond his own judgment or that allowed by the FARs, with a healthy dose of profane defiance. This is where these kinds of injunctions eventually lead.

This "damned if you do; damned if you don't" scenarios imposed by management through the various courts will eventually cause the entire system to break down. It won't take long before someone cites one of these orders as the reason their aircraft was imperiled.

Then what? The judiciary and management will wash their hands of the situation and throw the pilot into the gaping maw of the FAA enforcement mechanism.

Doubtful? Read for yourself:

> *To the extent that USAPA is concerned that an injunction would hamper its legitimate safety efforts, this Court declares that it in no way intends to interfere with the duty of pilots in command to ensure the safety of their passengers and equipment. The court's injunction therefore should not dissuade good faith efforts to ensure the safe operation of the airline. (p. 42)*

Here is the problem. The court spends pages upon pages finding fault with USAPA for engaging in a pattern of slowing down the operation of the airline. Its findings are not without merit, taken on the whole. The problem descends from the court insinuating that a pilot is at fault for operating his aircraft in a manner inconsistent with the wishes of US Airways, but consistent with the command authority granted by the FAA. As specified on page 42 of the order, the court in no way intends to interfere with the command authority.

We now have it both ways.

This is an area where judicial relief is difficult. If another slowdown is evidenced in Dr. Lee's statistical model (and you can bet US Airways will be looking for it so as to cash in on an eight figure payout), but the union puts much effort into quashing such practices, what then? Who is the new hostage? Who writes the check for $45,000,000?

If USAPA admonishes pilots to "be safe" and that correlates strongly with deteriorating performance at US Airways, that is ruled in violation of the RLA. What is the difference if a bunch of angry "East" pilots still refuse to taxi fast, or complete checklists on the fly? What if the union calls for everyone to not call in fatigued, yet the numbers still go up? What if, out of defiance of the current regulatory paradigm, grass-roots pilots conduct their own operational slowdown? What if US Airways argues that the union, in actively admonishing pilots NOT to slow down, fatigue out, or write up MELs, is really just engaging in another clever program to communicate the opposite?[5]

[5] If The Court finds that safety admonitions that didn't correspond to airline performance degradation were

What happens if there is no concerted, organized effort, grass-roots or otherwise, but enough pilots are acting on their own accord and irritating US Airways management? Does US Airways then fire them for taxiing too slow, or calling in fatigued more than Dr. Lee's model suggests they should? Is this also a violation of the "status quo" on the part of US Airways, or does that only go one way?

Imagine the irony if Dr. Lee determined an operational slowdown of the US Airways operation correlated with USAPA conspicuously displaying the following on its website:

> *To the extent that USAPA is concerned that an injunction would hamper its legitimate safety efforts, this Court declares that it in no way intends to interfere with the duty of pilots in command to ensure the safety of their passengers and equipment. The court's injunction therefore should not dissuade good faith efforts to ensure the safe operation of the airline.*
>
> -Judge Joseph Conrad, jr., September 28, 2011

That would be a Shakespearean comedy for modern times; much like how the USAPA website now instructs that "voluntary" flying is now mandatory. It is amazing that the "status quo" trumps actual contract language.

We sympathize with The Court in it efforts to ferret our mischief in the implementation of established law - in this case, the RLA. What is troubling is that The Court finds practical difficulty in ordering one legal entity (the USAPA) to cease actions which can also be reasonably construed to be in keeping with its legitimate founding objectives, such as the maintenance of the "Safety Culture."

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just as much "code" for a slowdown as admonitions that were correlated, what is to stop The Court from finding that the opposing admonitions were just as coded as the originals? US Airways has approximately 45,000,000 reasons to attempt to make that case.

The remainder of the examples of The Court's Memorandum and Order follow the same pattern. Statistics are linked with cryptic communications, or actions which do not trace back to USAPA are assigned to USAPA by inference. Command authority is upheld, as long as it isn't upheld to the distaste of management. Above all, no guidance is given - just threats.

If it isn't Judge Conrad, US Airways, and USAPA, it will be another judge, another airline, and another hostage. The arguments will be the same, since management is coordinated across corporate lines in this regard. Judges all read the precedents and essentially dust off the previous incarnations, and issue them under their own signature.

We believe that USAPA was fairly clumsy, given the past 15 years of judicial bullying in this regard. Giving the appearance of linking safety culture to operational slowdown was red meat for a management group that has the sympathy of the judiciary.

We also believe that the limits of judicial fiat have been reached, as we have outlined above. The Court washes its hands of any micromanaging of command authority while at the same time holds the union to statistical models supplied by the airline.

The union is now in the very surreal position of not advocating for safety culture and for enforcing management edicts - both right out of the wish list for airline management. If a grass-roots campaign of "pissed off pilots" were to emerge, the union would be taken as hostage for the balance of the negotiations.

Management could very easily defer maintenance to incur a higher than normal amount of MEL's, schedule several onerous crew pairings to induce fatigue, or hire provocateurs to feign an intimidation campaign against the most productive pilots to get the union on the wrong side of Dr. Lee's statistical models. The Court would certainly take this as a direct affront to its authority and start slicing away tens of millions of dollars from the union and remanding union officers to the criminal justice system. All this would certainly be well rewarded in concessionary contracts that favor management. The only defense for the union would be for it to gain internal

memos of the airline - a far fetched proposition, or bring its own models to The Court in the perishing hope that The Court will reverse itself from its previous opinion and order - an even more preposterous proposition. Even so, senior management would undoubtedly have plausible deniability and enjoy the benefit of the doubt that unions no longer have.

This is the basic playbook of 21st Century labor relations. Have the government hold down uppity employees while management works them over. If the employees, either individually or en masse, violate any of the laws, regulations, or policies in the volumes of directives governing their operation, they get thrown to the gaping maw of the governing enforcement mechanism. If they adhere too closely, they are destroyed by the federal bench.

Who decides? Management.

Convenient, isn't it?

You Reap What You Sow

It won't take much to turn "pissed off pilots" at "East," along with kindred spirits at the other dysfunctional airlines, into an uncontrollable grass-roots effort. Once the pilots step out from the auspices of their unions, the courts won't have any legitimate hostages to take. The unions will have lost control because the courts stripped them of their relevance. They are viewed by the courts as extensions of the managerial effort to control pilots during protracted pilot negotiations, and the pilots are noticing. If a pan-industry grass-roots effort is ever successful at changing the RLA, you can bet the first casualty will be the current union leadership. The new era unions will be much, much more strident, militant, and savvy than the current crop.

Be careful for what you wish for.

We once used operational pressures to balance out the uneven nature of the RLA "perpetual contract" mechanism. When enough pilots got "pissed off,"

they would gum up the works and management would get serious about a new contract.[6] It was a flawed system that functioned for both parties. The public would get used to "pissed off" employees, but wouldn't care because tickets were cheap.

Now that management has used the judiciary to grab the remaining bit of leverage, they have no need to negotiate in good faith. 20 years ago, pilot contracts would last 2-3 years. Now, negotiations last 4-6. As an example, American Airlines pilots have been in negotiations 7 of the last 10 years, with the only three years being in a concessionary contract that was forced at the threat of bankruptcy. United management is in no hurry to conclude negotiations, while they cherry-pick the most regressive parts of both bankruptcy contracts. Alaska Airlines only concluded their pilot contract when the NMB threatened to release the pilot group. Other airlines follow the same pattern.

This isn't going to change until someone changes it. Management is going to lobby against it. Passengers don't care, as long as they can fly cheap. Judges are not going to reinterpret the RLA, nor use statistical models to declare management in violation of the "status quo" when managers take hostages or only negotiate when employees fear financial ruin.

Who is left to fix the RLA and the phenomena of judges parroting the managerial dreams of employee relations?

You…and several thousand others just like you.

When the pilots of this nation stand together and demand Congress fix the laws and narrow the scope of judicial power and opinion, things will get fixed…and fixed in a hurry.

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[6] Has anyone in the legal community ever asked why we don't see this kind of "slowdown" at Southwest Airlines? Why is it at American, United, Delta, and US Airways, but not Southwest? Could it be that SWA management sees no reason to drag out negotiations, take hostages, and harass pilots? Could it be that they understand that their longer term interest is in keeping its employees loyal and productive by faithfully amending the pilot contract to reflect the economics of SWA? SWAPA has no motivation to engage in such foolishness because it routinely deals with a management team that is honorable and practices good faith labor relations.

Judges can't issue injunctions against peaceful protest of existing laws. They can't deny peaceful assembly. There is no law requiring you to fly an airplane against your will.

The FIRST AMENDMENT prohibits these injunctions.

It is time to act. Support OPERATION ORANGE. Our "Fair Treatment of Experienced Pilots Act - Part 2" deals with these judicial power grabs.[7] By withdrawing our services en masse, as a protest of the existing regulatory paradigm, we will bring pressure to Congress to pass our legislative agenda and correct the injustices and irresponsibility in the system.

Please visit operationorange.org for more information.

The future of your profession is in your hands. Nobody else will fix it for you.

THIS IS OUR TIME.

[7] See FTOEPA2 Sections 1.B and 6.A