No. 13-15000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

US AIRWAYS, INC.,
Appellant,

v.

DON ADDINGTON, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
THE HONORABLE ROSLYN O. SILVER, CHIEF JUDGE
CASE NO. 10-1570-PHX-ROS

ANSWERING BRIEF OF US AIRLINE PILOTS ASSOCIATION

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STATEMENT OF JURISDICTION

This is an appeal from the final judgment of the district court in this case and is therefore within this Court's jurisdiction under 28 U.S.C. § 1295(a).

COUNTER STATEMENT OF THE ISSUES PRESENTED

1. Whether US Airways, which sought and received guidance from the district court on one of three alternative declaratory judgment counts, is an aggrieved party with standing to appeal.

2. Whether US Airways should be permitted to collaterally attack this Court's decision in *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010)("*Addington*") , by claiming, contrary to the facts of the matter, that the district court failed to provide the relief that it sought on the grounds that its claims were not yet ripe.

3. Whether the district court correctly decided that US Airline Pilots Association ("USAPA"), the newly certified collective bargaining representative, is not required to adhere to the Nicolau Award, which was the product of an internal Merger Policy that applied only to the Air Line Pilots Association ("ALPA"), the decertified former bargaining representative that USAPA replaced.

STATEMENT OF THE CASE

Disconnects abound in this appeal. Ostensibly, US Airways brought this declaratory judgment action to seek clarification as to its and USAPA's rights in

negotiating the integration of seniority lists, all the while claiming to be "neutral" as to which seniority integration regime ultimately results. To that question, US Airways received a definitive answer from the district court – that a seniority proposal that does not incorporate the Nicolau Award does not automatically breach USAPA's duty of fair representation ("DFR"). Notwithstanding that it received the guidance sought, US Airways, judging by the appeal herein, would have this Court believe the district court failed to issue this guidance and that it is therefore an aggrieved party. To be sure, while US Airways may be dissatisfied with the district court's guidance (despite professing to be neutral), that dissatisfaction does not make US Airways an aggrieved party for purposes of appeal. Because it received exactly the guidance it sought, US Airways is not aggrieved, and has no standing to appeal the district court order and judgment.

Similarly, judging by the main thrust of its brief, US Airways would have this Court believe the district court *dismissed* its action on grounds of ripeness. That is incorrect. On the contrary, the district court granted one of US Airways' alternative requests for relief, holding, in favor of USAPA, that USAPA does not violate its DFR merely by advancing in negotiations a proposal for seniority integration that is different than the Nicolau Award. The district court order and judgment is precisely the declaration sought by US Airways in Count II, and is consistent with this Court's holding in *Addington*.

US Airways' attempt to characterize the district court's order and judgment as a dismissal on ripeness grounds exposes the inescapable fact that this appeal is nothing less than a collateral attack on this Court's decision in *Addington.* It is only through this prism that it is possible to make sense of US Airways' overriding focus on ripeness in its brief, and its attempt to obscure the fact that it received the relief it sought.

Nor is there any merit to US Airways' collateral attack on *Addington.* *Addington* was well-reasoned and consistent with precedent. It properly decided that, in general, a claim alleging that a particular method of integrating seniority violates a union's duty of fair representation is not ripe for decision while the proposal is still being negotiated and still subject to change and ratification. Only when the integrated seniority list has been ratified and is certain to become effective is there any cognizable injury and only then can a court know what specifically is alleged to violate the duty of fair representation. Any judicial intervention prior to this end point impermissibly interferes with the collective bargaining process and risks the issuance of an advisory opinion on facts that may never transpire.

The district court's order and judgment provides US Airways with exactly the relief it requested, declaring that negotiating with USAPA over something other than the Nicolau Award is not automatically a breach of the duty of fair

representation. In view of that ruling, from which the West Pilots did not take an appeal, US Airways has no legitimate reason to refuse to bargain with USAPA over its seniority proposal. The appeal should be denied and the district court's order and judgment should be affirmed.

STATEMENT OF FACTS[1]

Background. In 2005, US Airways, Inc. and America West Airlines merged to form a single carrier operating under the name US Airways. ER 47, ¶1. At the time of the merger, both pilot groups were represented by ALPA and, through their respective ALPA subordinate bodies ("Master Executive Councils" or "MECs"), each maintained a system seniority list that generally ranked pilots by date of hire. ER 48, ¶¶5 and 6. There were 5,098 pilots at US Airways, 1,691 then on furlough. The US Airways pilots had dates of hire ranging from April 20, 1966 through June 19, 2000. ER 49, ¶8. There were 1,894 pilots at America West, none then on furlough. Their dates of hire ranged from June 1, 1983 through April 4, 2005. ER 49-50, ¶9. Because both pilot groups were part of ALPA, they were governed by

[1]This statement tracks the facts set forth in *Addington*, in which this matter was previously before the Court, through the date of that decision and adds the relevant facts concerning the instant case. As US Airways notes (App.'s Br. 1 n.1), US Airways and American Airlines have announced a merger and a Plan of Reorganization ("POR") approving that merger is pending before the Bankruptcy Court for the Southern District of New York. See US Airways Motion To Hold The Appeal In Abeyance (Dkt. No. 12-1), 4-5 (ECF 6-7). USAPA opposed that motion on the ground that completion of the merger would not moot this appeal (Dkt. 13) and the motion was denied (Dkt. 16).

ALPA's internal Merger Policy, which set forth the procedure for integrating seniority lists in the event of a merger. ER 167, ¶11.

The merging airlines and ALPA entered into a Transition Agreement (USAPA's Supplemental Excerpts of Record ("SER"), 28-55) that established how various terms and conditions of employment would be affected by the merger. Among other things, the parties agreed that the pilot groups would remain separate and covered by their respective collective bargaining agreements until a single collective bargaining agreement was negotiated and ratified. SER 34, § VI.A; ER 51, ¶12. The Transition Agreement recognized that seniority would be integrated in accordance with ALPA's then existing Merger Policy. SER 34-35, § IV. The carriers agreed not to object to the ALPA seniority integration proposal that would result from the Merger Policy provided it did not impose certain additional costs. SER 34, § IV.A. The Transition Agreement further provided that the seniority integration proposal could be implemented only as part of a single collective bargaining agreement that would require the approval of each of the pilot groups, effectively giving each group a veto. SER 34, §§ III.C and IV.A. The Transition Agreement also provided that it could be modified by the agreement of the parties. SER 42, §XII.B.

The Merger Committees for the East and West pilots were unable to agree on a merged seniority list, and, as required by ALPA Merger Policy, the

Committees proceeded to arbitration before a three-member Board of Arbitration chaired by George Nicolau as the neutral. ER 53, ¶16. Following hearings conducted in December 2006 and January and February 2007, the Board of Arbitration issued its opinion and award (the "Nicolau Award") on May 1, 2007.[2] ER 51-54, ¶¶14, 15, 17. Among other things, the Nicolau Award placed America West pilots with less than two months of service above US Airways pilots with more than 16 years of service, deprived senior US Airways pilots of better paying wide body flying while giving those positions to America West pilots who had no wide body flying and enabled America West pilots to bid and hold captains' positions 1 to 9 years earlier than they could have expected at America West while the US Airways pilots, with whom they were slotted, many with 16 to17 years of uninterrupted service, had their abilities to bid and hold captains' position delayed by as much as 4 years. ER 56 ¶21. The US Airways pilots strenuously objected to the Nicolau Award and vigorously opposed its implementation. ER 56, 58, ¶¶21, 23-24. The US Airways pilots sought to have ALPA prevent implementation of the Award. ER 58, ¶¶23-24. ALPA's attempts to broker a compromise were unsuccessful. ER 59, ¶26.

[2]Captain James Bruscia, the pilot neutral appointed by USAPA, dissented. ER 239-42.

While the arbitration was pending, the parties commenced negotiations for a single agreement. The airline proposed a comprehensive CBA in May 2007. Cite In late July 2007, the US Airways MEC determined that the East Pilots would never ratify a CBA that incorporated the Nicolau Award. ER 58-59, ¶25. On August 15, 2007, the East Pilots withdrew their representatives from the committee negotiating the new CBA with the airline, halting those negotiations. In late 2007, ALPA submitted the Nicolau Award to the airline, which accepted the award on December 20, 2007. ER 60, ¶32.

In the meantime, several East Pilots, dissatisfied with ALPA's representation, began exploring the possibility of forming a new union that, among other things, would oppose the Nicolau Award. They formed USAPA and, in a secret ballot election conducted by the National Mediation Board ("NMB"), a majority of the combined pilot group voted to replace ALPA with USAPA. USAPA was certified as the new bargaining representative for the entire group of pilots, East and West, on April 18, 2008. ER 60, ¶33.

USAPA's constitution provides that one object of the organization is to "maintain uniform principles of seniority based on date of hire and the perpetuation thereof, with reasonable conditions and restrictions to preserve each pilot's unmerged career expectations." ER 59, ¶28. In late September 2008, USAPA presented a seniority proposal to the airline. The proposal was based on a

date-of-hire list and included significant conditions and restrictions that protected the ability of the West pilots to bid and hold the positions carried over from America West, while otherwise allowing them to bid elsewhere in the combined system based on their date of hire. ER 169-71, ¶¶20-27.

Addington. In 2008, six former America West pilots sued USAPA, alleging, among other things, that USAPA's failure to follow the Nicolau Award violated its duty of fair representation. The district court certified a class of West pilots. A jury returned a verdict for the plaintiffs and, after a hearing on remedy, the district court issued a permanent injunction directing USAPA to adhere to the Nicolau Award in negotiations with the carrier. ER 63, ¶41.

On appeal, USAPA advanced numerous challenges to the district court's ruling.[3] None of the many substantive challenges to the verdict and the district court's decision were decided because this Court held that the duty of fair

[3]In addition to arguing that the DFR claim was not ripe, USAPA challenged the district court's decision because USAPA's date-of-hire proposal with significant protections for West pilots was consistent with precedent holding that integrating seniority based on date-of-hire does not violate a union's DFR; because there was insufficient evidence to establish a DFR; and because the district court incorrectly instructed the jury on several key points and made numerous evidentiary and other errors including prohibiting evidence that the other unions combined their lists based on date-of-hire, directing the jury that it could not consider preference for honoring date-of-hire as a legitimate union objective and declining to instruct the jury that a finding of "bad faith" required a finding of "fraud, deceitful action or dishonest conduct." ER 63-64, ¶42; *see Addington v. USAPA*, 606 F.3d 1174 (9th Cir. 2010), see also Brief of Appellant, at 16-17 in No. 09-16564, Dkt. 15.

representation claim was not ripe and remanded the case to the district court with directions to vacate its judgment and dismiss the action. *Addington*, 606 F.3d at 1184. Plaintiffs' petition for rehearing and rehearing en banc was denied, *Addington v. US Airline Pilots Ass'n*, No. 09-16564, Dkt. Entry 51 (July 8, 2010), as was their petition for writ of certiorari. *Addington v. US Airline Pilots Ass'n*, 131 S.Ct. 908 (2011).

The Instant Case. On July 26, 2010, less than one month after this Court denied rehearing in *Addington*, US Airways filed the declaratory judgment action at issue on this appeal. US Airways asked the district court to issue declaratory judgment on one of three alternative counts: Count I, USAPA violates its duty under the RLA by its continued insistence in collective bargaining negotiations upon an integrated seniority list other than the Nicolau Award, and thus entry into a CBA that does not incorporate the Nicolau Award is a breach of USAPA's DFR to the West Pilots, and US Airways is prohibited from accepting or implementing a non-Nicolau seniority list; Count II, entry into a CBA that does not incorporate the Nicolau Award would not constitute a breach of USAPA's DFR to the West Pilots, and thus USAPA does not violate the RLA if it continues to demand that US Airways agrees to an integrated seniority list other than the Nicolau Award, and US Airways is not prohibited from accepting or implementing a non-Nicolau seniority list; or Count III, US Airways is not liable on any DFR claim without

regard to whatever seniority system it might negotiate with USAPA. ER 202.

The West Pilot defendants filed a cross-claim against USAPA for breach of the DFR. ER 11-20. The district court dismissed the cross-claim, finding that the claim "is identical to the claim the Ninth Circuit ruled was not ripe." ER 19.

In October 2012, on cross-motions for summary judgment filed by USAPA and the West Pilots, the district court issued an order and judgment dismissing Counts I and III and entering judgment in favor of USAPA on Count II, stating that "USAPA's seniority proposal does not automatically breach its duty of fair representation." ER 9. In its Order, the district court made the following statements:

> USAPA and US Airways are now engaged in negotiations for an entirely new collective bargaining agreement and there is no obvious impediment to USAPA and US Airways negotiating and agreeing upon any seniority regime they wish. ER 8.
>
> [I]f USAPA wishes to abandon the Nicolau Award and accept the consequences of this course of action, it is free to do so. ER 8.
>
> As for US Airways, it must negotiate with USAPA and it need not insist on any particular seniority regime. ER 2.

Only US Airways appealed from the district court's order and judgment.

STANDARD OF REVIEW

An appellate court reviews a district court's grant of summary judgment *de novo*. *Simo v. Union of Needletrades, Indus. & Textile Employees, Southwest Dist.*

Council, 322 F.3d 602, 609 (9th Cir. 2003). "Viewing the evidence in the light most favorable to the nonmoving party," the appellate court "must determine whether the district court correctly applied the relevant substantive law and whether there are any genuine issues of material fact." *Id.* at 609-610. The appellate court "may affirm a grant of summary judgment on any ground supported by the record." *Id.*

Standing and ripeness are questions of law reviewed *de novo*. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009). "Questions of standing and ripeness may be raised and considered for the first time on appeal, including *sua sponte*." *Id.*, citing *Wash. Legal Found. v. Legal Found. of Wash.,* 271 F.3d 835, 850 (9th Cir. 2001) (en banc), *aff'd sub nom. Brown v. Legal Found. of Wash.,* 538 U.S. 216 (2003); *Columbia Basin Apartment Ass'n v. City of Pasco,* 268 F.3d 791, 796–97 (9th Cir. 2001) (reviewing standing *sua sponte* even though not raised by either party). Standing is not subject to waiver and must be addressed by the court "even if the courts below have not passed on it, and even if the parties fail to raise the issue . . . ." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). "[I]t is the burden of the 'party who seeks the exercise of jurisdiction in his favor,' *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 189 (1936), 'clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.' *Warth v. Seldin,* 422 U.S. 490, 518 (1975)." *Id.*, 493 U.S. at 231.

ARGUMENT

I. US AIRWAYS HAS NO STANDING TO APPEAL

US Airways has no standing to appeal because the district court issued judgment on one of the three alternative counts it alleged in the complaint and thus provided US Airways with the relief it sought. "Standing 'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'" *Hollingsworth v. Perry*, No. 12-144, slip op. at 6 (U.S. June 26, 2013) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)). "[O]nly a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom." *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 333 (1980). "A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Id.*; *United States v. Windsor*, No. 12-307, slip op. at 9 (U.S. June 26, 2013) (same).

US Airways is not aggrieved because it received exactly the relief that it sought. US Airways sought one of three alternative declarations, and in return, the district court granted judgment on Count II, declaring that "USAPA's seniority proposal does not automatically breach its duty of fair representation." ER 9.

Count II of the complaint sought the following declaration:

> (a) entry into a collective bargaining agreement between US Airways and USAPA which does **not** incorporate the Nicolau Award would

> not constitute a breach of USAPA's duty of fair representation to the West Pilots in violation of the Railway Labor Act; and (b) USAPA would therefore **not** violate its duty under Section 2, First, of the Railway Labor Act "to exert every reasonable effort to make an maintain agreements concerning rates of pay, rules, and working conditions" if it continues to demand that US Airways agree to an integrated seniority list other than as reflected in the Nicolau Award, and therefore is **not** prohibited from accepting or implementing a non-Nicolau seniority list.

ER 202 (emphasis in original). In ruling that "USAPA's seniority proposal does not automatically breach its duty of fair representation" and entering judgment on Count II, the district court provided US Airways with precisely what it sought in bringing the lawsuit. If US Airways is, as it claims, "neutral" on the merits of the seniority dispute between USAPA and the West Pilots, then the district court's order and judgment provides it with all that it requested – it can accept a seniority proposal from USAPA that does not incorporate the Nicolau Award. Having received definitive guidance on the question it framed, it is not aggrieved and has no standing to appeal.

Stretching to cast itself as aggrieved, US Airways here mischaracterizes the relief that it sought from the district court. Here, US Airways asserts that the three alternative judicial declarations it sought were:

> (1) USAPA's seniority demand violates its DFR to the West Pilots, and therefore US Airways cannot accept it; (2) USAPA's date-of-hire seniority list does not violate its DFR, and therefore US Airways may accept it; or (3) US Airways will not be liable to the West Pilots regardless of which seniority list it accepts.

App.'s Br. 6.

But, as described above, Count II (and the alternative Count I) sought declaratory judgment only on whether USAPA's *departure* from the Nicolau Award would violate its DFR, not on whether USAPA's then current *proposal* violated its DFR. These are two very different claims and US Airways cannot ask for one thing in its complaint, get what it asked for and now claim to this Court that what it wants is something else. The district court decided this case based on what was alleged in the complaint and this appeal must be decided on that basis not on what US Airways now says it wants.[4]

US Airways can find no solace in the collateral adverse ruling exception to the general rule that a prevailing party cannot appeal. That exception allows an appeal "[i]n an appropriate case . . . from an adverse ruling collateral to the judgment on the merits at the behest of a the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Article III." *Deposit Guaranty*, 445 U.S. at 334; *Windsor*, No. 12-307, slip op. at 9 (U.S. June 16, 2013); *Maciel v. City of Los Angeles*, 336 Fed.Appx. 678, 680 (9th Cir. 2009) ("there is an exception where a prevailing party has standing to appeal a collateral adverse ruling '[i]f the adverse ruling can serve as the basis for collateral

[4]The arguments in this brief are therefore addressed not to what US Airways now characterizes as its claim but to what was actually alleged in the complaint unless otherwise noted.

estoppel in subsequent litigation.'") (quoting *Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 520 (9th Cir. 1999)).

This exception does not apply to the district court's statement that "[p]ursuant to the Ninth Circuit's decision, any claim for breach of the duty of fair representation will not be ripe until a collective bargaining agreement is finalized." ER 8. That such a DFR claim is not ripe is a statement of law, not a finding of fact. To the extent that is a statement of law, it is not a holding by the district court but merely a statement of the holding in *Addington*, noting its precedential effect.

Because US Airways received exactly the relief it sought, it is not an aggrieved party and its appeal should be dismissed.

II. THE DISTRICT COURT CORRECTLY FOLLOWED THIS COURT'S DECISION IN *ADDINGTON*

The district court correctly applied this Court's decision in *Addington*, finding that a claim that requires addressing the results of the collective bargaining process is not ripe until that process produces an enforceable agreement on seniority. As the district court explained, it is not possible to "predict what will result from the collective bargaining negotiations" and "it is not possible to determine the viability of any claim for breach of the duty of fair representation until a particular seniority regime is ratified." ER 9.

Accordingly, while granting US Airways the relief it requested in the complaint, the district court properly refused to attempt to apply a DFR analysis to

any particular proposal. This is the same issue presented in *Addington.* Nothing has changed since *Addington* was decided, and thus the same contingencies that made any DFR claim as to the final CBA speculative in *Addington* remain. US Airways attempts to distinguish this Court's holding in *Addington* on the ground that while *Addington* was "dependent on the integrated seniority list actually adopted as part of a single CBA . . . US Airways seeks only a declaratory judgment clarifying whether USAPA's demand . . . violates USAPA's DFR." App.'s Br. 29. As noted above, this mischaracterizes the allegations of the complaint and the relief sought below. That said, there simply is no difference between the DFR issue US Airways is seeking to have this Court address on appeal and the DFR claim at issue in *Addington.*

Like US Airways here, the *Addington* plaintiffs brought their DFR claim after USAPA presented its seniority proposal, which was based on date-of-hire principles, to US Airways. *Addington*, 606 F.3d at 1178. In fact, the initial proposal referenced in *Addington* is the same proposal at issue here. There have been no discussions or negotiations over that proposal since it was submitted to US Airways in late September 2008. SER 117, ¶7.

Nor is there any difference between this case and *Addington* merely because here US Airways asserts the claim in the context of its declaratory judgment action while in *Addington* the claim was asserted by plaintiff pilots. The fact is that the

argument US Airways is attempting to advance on appeal is precisely the claim made by the plaintiff pilots in *Addington*. ER 197-98. The fact that US Airways raises it is a distinction without a difference.[5] The issue is identical, and this Court's holding in *Addington* clearly applies.

III. NO DFR CLAIM BASED ON A BARGAINING PROPOSAL IS RIPE

For the reasons stated in the immediately preceding Point II, US Airways' ripeness arguments are indistinguishable from *Addington* and the district court's decision should be affirmed on that ground alone. As shown in detail below, there is no merit to the arguments made by US Airways that a DFR claim based on a bargaining proposal can be ripe based upon a *de novo* review of the factors considered in *Addington*. Because this is the same DFR issue asserted in *Addington*, these arguments are nothing more than a collateral attack on *Addington* urging that it should be reconsidered and overturned. To the contrary, a *de novo*

[5]In this respect, the DFR argument asserted by US Airways stands in no better position than the DFR claim that was asserted in the cross-claim against USAPA by the individual defendants. In dismissing the cross-claim, the district court noted that "[t]he only material change in circumstances since [the ruling in *Addington*] is the filing of the Declaratory Judgment complaint by US Airways." ER 19. Noting the absence of "any authority stating that the filing of an action by another party can convert an unripe case into a ripe case," the district court dismissed the cross-claim, citing *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) ("If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect. Binding authority must be followed unless and until overruled by a body competent to do so.") ER 19. Exactly the same analysis applies to the DFR issues now asserted by US Airways.

application of the factors considered in *Addington* to facts of this case supports the same result reached in *Addington* and fails to provide any reason to reconsider or overturn that decision.

A. No DFR Claim Based On A Bargaining Proposal Presents An Article III Case or Controversy

As the *Addington* Court noted, the ripeness test rests (1) in part on the Article III requirement that federal court decide only cases and controversies and (2) in part on prudential concerns. *Addington*, 606 F.3d at 1179, citing *Maldonado v. Morales*, 556 F.3d 1037, 1044 (9th Cir. 2009), *cert. denied*, 130 S.Ct. 1139 (2010); *W. Oil & Gas Ass'n v. Sonoma County*, 905 F.2d 1287, 1290 (9th Cir.1990). Article III requires a plaintiff "to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." *Hollingsworth*, No. 12-144, slip op. at 5-6 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). The injury must be "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

In analyzing the "case or controversy" requirement, Supreme Court decisions have required that the controversy be "definite and concrete, touching the legal relations of parties having adverse legal interests"; and that it be "real and substantial" and "admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a

hypothetical state of facts." *Haworth*, 300 U.S. at 240-41. "The limitations that Article III imposes upon federal court jurisdiction are not relaxed in the declaratory judgment context." *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005). Thus, in a declaratory judgment action, "a plaintiff must establish standing by showing 'that there is a substantial controversy, between parties having adverse interests, of sufficient immediacy and reality to warrant issuance of a declaratory judgment.'" *Scott v. Pasadena United School Dist.*, 306 F.3d 646, 658 (9th Cir. 2002) (quoting *Western Min. Council v. Watts*, 643 F.2d 618, 624 (9th Cir. 1981)).

US Airways' claim that it will suffer "irreparable harm whatever it does" (App.'s Br. 14) is speculative. US Airways claims that on the one hand it will be subject to strike action if it fails to include the Nicolau Award and that on the other it hand it will be subject to a lawsuit if it does not. There is nothing definite or immediate about either of these eventualities.

With respect to the alleged "threats" by USAPA, there is no truth to the assertion that it has "threatened work stoppages . . . if US Airways does not accept USAPA's date-of-hire list." (App.'s Br. 11). SER 9, ¶33, SER 117, ¶6. Rather, because USAPA pilots have been significantly underpaid relative to their peers at other major U.S. airlines and have gone years without receiving any wage increase, USAPA indicated that it would strike if could not achieve a contract that met the

Union's goal of an industry standard contract. Moreover, any work stoppage or other self-help measure by USAPA would first require the NMB to release USAPA and US Airways from the Section 6 process, and the NMB has yet to do that despite years of negotiations. 45 U.S.C. § 156. If released by the NMB, USAPA could, at that point, lawfully engage in self-help for any number of reasons and not solely, if at all, because of the parties' failure to reach an agreement concerning seniority.

Any lawsuit by the West Pilots' against US Airways for allegedly aiding and abetting an alleged breach of the DFR by USAPA is at best far in the future. The threat to file such an action, which existed in *Addington* (when the West Pilots commenced a hybrid DFR action against USAPA and US Airways), does not create any definite or immediate harm for several reasons. First, depending on its exact nature, such a claim may be subject to dismissal just as a similar claim against US Airways was dismissed in *Addington*. *Addington*, 588 F.Supp.2d 1051, 1063-64 (D. Ariz. 2008). Thus, it is highly likely that should the West Pilots commence another action against US Airways, US Airways would move to dismiss on the same ground and be successful.[6]

[6] On March 6, 2013, in what USAPA has asserted is merely another attempt to collaterally attack this Court's ruling in *Addington*, nine individual West Pilots (six of whom were the individual plaintiffs in *Addington*), commenced a hybrid DFR action against USAPA and US Airways in the United States District Court for the District of Arizona. 2:13-cv-00471-PGR, Dkt. Entry 1. On April 4, 2013, US

Second, any claim the West Pilots may have against US Airways would first require a finding that USAPA breached its DFR, and, aside from what USAPA believes would be the lack of merit of any such claim, a DFR claim will not be ripe until there is agreement on a new seniority system as this Court held in *Addington*. *See Bishop v. Air Line Pilots Ass'n, Int'l*, 1998 WL 474076 (N.D. Cal. Aug. 4, 1998) (In order for an employer to be found jointly liable with a union for breach of the DFR, "it is essential that the union be found to have violated its duty.") (internal citations omitted), *aff'd* 211 F.3d 1272(9th Cir. 2000). In addition, a carrier is liable in such a case only where the plaintiffs can prove that the carrier affirmatively colluded with the offending bargaining representative. *See Davenport v. Int'l Bhd. of Teamsters*, 166 F.3d 356, 361-62 (D.C. Cir. 1999) (cited by the district court, ER 9); *United Indep. Flight Officers, Inc. v. United Airlines, Inc.*, 756 F.2d 1274, 1283 (7th Cir. 1985) ("An employer is liable together with the union for the union's breach of its DFR if it acts in collusion with the union."). And, as the Seventh Circuit went on to explain, in *United Independent Flight Officers*, the mere fact that an employer agrees to a union proposal does not prove collusion. Id. ("it is patently fallacious that negotiation necessarily entails collusion"); *see generally Rakestraw v. United Airlines, Inc.*, 765 F.Supp. 474,

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Airways moved to dismiss the complaint on the ground that plaintiffs' claim against it is a minor dispute within the exclusive jurisdiction of the System Board of Adjustment. *Id.*, Dkt. Entry 28.

493-94 (N.D. Ill. 1991) (carrier did not collude by agreeing to union's seniority list demand where it did not act out of hostility toward minority pilot group), *aff'd*, 981 F.2d 1524 (7th Cir. 1992).

Third, US Airways has not suggested that any evidence of collusion exists in this case and the longstanding adversarial nature of the relationship between the parties belies any such concern. Indeed, this lawsuit is itself direct evidence of the absence of collusion between US Airways and USAPA.

Last, this Court's observations in *Addington* remain true today – "[a]t this point, neither the West Pilots nor USAPA can be certain what seniority proposal ultimately will be acceptable to both USAPA and the airline as part of a final CBA." *Addington*, 606 F.3d at 1179. "USAPA's final proposal may yet be one that does not work the disadvantages . . . [the West Pilots] fear, even if that proposal is not the Nicolau Award." *Id.* at 1181. For these reasons, there is no direct and immediate possibility of any imminent civil action against US Airways or any direct and immediate possibility of the liability it claims it will sustain.

The facts and procedural history of this appeal and the underlying action are distinguishable from *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), and *National Basketball Ass'n v. SDC Basketball Club, Inc.*, 815 F.2d 562 (9th Cir. 1987), both of which US Airways relies upon in asserting ripeness.

The disputes in *MedImmune*, a patent infringement case, and in *NBA*, an anti-trust case, were "definite and concrete" and were between parties with "adverse legal interests." The respondent in *MedImmune* believed it had a valid and enforceable patent requiring the royalties to be paid to it by petitioner. Petitioner disagreed and did not think royalties were owed because the patent was invalid and unenforceable. The NBA in *NBA v. SDC Basketball Club, Inc.*, believed it had the right to investigate and sanction the Clippers for contemplating a move without NBA approval. The Clippers held the view that such an investigation and sanction would violate antitrust laws.

The dispute here is clearly distinguishable. US Airways and USAPA and the West Pilots do not the kind of "adverse legal interests" that demonstrate a ripe dispute rather than one that could materialize at some unspecified point in the future. Indeed, if the kind of dispute that is present here were sufficient to create a ripe claim, any employer negotiating for a collective bargaining agreement could bypass the carefully constructed remedies under the RLA or the National Labor Relations Act any time they contended a proposal made by a party was unlawful or unpopular with some portion of the bargaining unit. That USAPA and US Airways do not have this kind of immediate adverse legal interests is demonstrated by the fact that US Airways claims it is "neutral" regarding the seniority dispute. App.'s Br. 21. It is the West Pilots who claim they *may* have "adverse legal

interests" with USAPA and this Court has already deemed that their dispute is not ripe. Moreover, because any DFR claim is not ripe until there is a final agreement, the West Pilots' claimed dispute itself is purely speculative and not "definite and concrete" because, when all is said and done, they may be satisfied with the final agreement, or not dissatisfied enough to pursue further meritless litigation and so that there may be no dispute at all.

B. Prudential Considerations Establish That A DFR Claim Based On A Bargaining Proposal Is Not Ripe

On this point, again as noted in *Addington*, two factors are important: (a) "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Addington*, 606 F.3d at 1179, quoting *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1211-12 (9th Cir.2006) (en banc) (per curiam). Here, as in *Addington* itself, both factors show that any DFR claim based on a particular bargaining proposal is premature. No such DFR claim is fit for judicial decision because there are "contingent future events that may or may not occur as anticipated, or indeed may not occur at all." *Addington*, 606 F.3d at 1179, quoting *Cardenas v. Anzai*, 311 F.3d 929, 934 (9th Cir. 2002). As the *Addington* Court further explained, "Not until the airline responds to the proposal, the parties complete negotiations, and the membership ratifies the CBA will the West Pilots actually be affected by USAPA's seniority proposal – whatever USAPA's final proposal ultimately is." *Id.* at 1180.

The same contingencies that existed in *Addington* are present here. Any harm to US Airways is contingent upon whether the West Pilots could have a legally cognizable claim in the future, and that cannot be known until there is a final agreement incorporating an integrated seniority list that injures West Pilots in a legally cognizable way. Whether the West Pilots will actually commence a non-frivolous hybrid DFR claim against US Airways is contingent upon: (1) a final agreement; (2) that the West Pilots disagree with; and (3) the existence of a good faith plausible claim that USAPA breached its DFR. A potential work stoppage by USAPA is contingent upon the NMB releasing US Airways and USAPA from further negotiations, at which point USAPA is legally free to resort to self-help. *See Detroit & Toledo Shore Line R.R. v. United Trans. Union*, 396 U.S. 142, 149 (1969). Moreover, judicial efficiency and restraint disfavors judicial interference during contract negotiations.

Nor will US Airways suffer any hardship if a judgment concerning its claim is withheld. Indeed, it is the request by US Airways for declaratory relief with respect to its bargaining obligations that is extraordinary and withholding such a declaration concerning contingent matters will simply leave US Airways where every other carrier is left –to fulfill its statutory duty to bargain with the exclusive representative of its employees.

Thus, Section 2, Ninth, of the RLA provides that "the carrier shall treat with

the representative so certified as the representative of the craft or class for the purposes of this chapter." 45 U.S.C. § 152, Ninth. "To treat is to bargain." *Order of Ry. Conductors & Brakemen v. Switchmen's Union*, 269 F.2d 726, 732 (5th Cir. 1959). To the same effect is Section 2, Second, which provides that "[a]ll disputes between a carrier . . . and its . . . employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer . . . ." 45 U.S.C. § 152, Second. The RLA obligation to bargain extends to all "mandatory" subjects of bargaining and seniority is a "mandatory" subject of bargaining. *Rakestraw v. United Airlines*, 981 F.2d 1524, 1535 (7th Cir. 1992) ("Like wages and fringe benefits, seniority is a legitimate subject of discussion and compromise in collective bargaining.").

Courts have routinely declined to relieve carriers of their absolute bargaining duty, *see, e.g.*, *America West Airlines v. NMB*, 119 F.3d 772, 778 (9th Cir.1997), *reh'g denied*, 124 F.3d 211 (1997), *cert. denied*, 523 U.S. 1021 (1998), *aff'g* 153 L.R.R.M. 2176, 2180-81 (D. Ariz. 1996), even when the carrier becomes subject to primary and secondary strike pressures. *See United Airlines v. Airline Div., Int'l Bhd. of Teamsters*, 874 F.2d 110, 114-15 (2d Cir. 1989); *Virgin Atl. Airways v. NMB*, 956 F.2d 1245, 1252 (2d Cir. 1992).

Moreover, as explained above, US Airways' claim that the seniority dispute puts it in "a difficult position" is speculative, contingent upon unknown future

events, and would have to entail more than possible financial loss. App.'s Br. 11; *see Addington*, 606 F.3d at 1180 (finding that "withholding judicial consideration does not work a direct and immediate hardship on the West Pilots" and must entail more than possible financial loss). Moreover, even if true, the fact that US Airways is placed in a difficult position is not, in itself, grounds for a finding of ripeness. *See Addington*, 606 F.3d at 1180 n.1 (rejecting the dissent's assertion that "the parties' interest would be well served by a prompt resolution of the West Pilots' claim" because "prompt resolution of the seniority dispute . . . is not the same as prompt resolution of the DFR claim," thus "[b]y deferring judicial intervention, we leave USAPA to bargain in good faith pursuant to its DFR, with the interests of all members both East and West – in mind . . . ."). As the Supreme Court reiterated in *Hollingsworth*, "[t]he presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." No. 12-144, slip op. at 6 (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)).

Having received a definitive declaration from the district court that USAPA is free to pursue any seniority proposal it wishes during collective bargaining, and that there is no violation of the RLA for USAPA and US Airways to agree upon a seniority regime that differs from the Nicolau Award, US Airways "must negotiate with USAPA and it need not insist on any particular seniority regime." ER 2. A

judicial declaration directing USAPA to propose one bargaining proposal or another would impermissibly interfere with the collective bargaining process required by the RLA.

IV. THE DISTRICT COURT CORRECTLY DECIDED THAT USAPA IS NOT BOUND BY THE NICOLAU AWARD[7]

A. US Airways And USAPA Are Free To Negotiate A Different Seniority System From That Determined By APLA Merger Policy

The district court's conclusion that USAPA "is free to pursue any seniority position it wishes during the collective bargaining negotiations" (ER 2)is based on a clearly correct interpretation of the Transition Agreement that was negotiated at the time of the 2005 merger and which provided that the parties would recognize the results of ALPA Merger Policy. As the district court found, "[i]t is undisputed that the Transition Agreement can be modified at any time 'by written agreement of [USAPA] and the [US Airways].'" ER 8. The district court went on to explain:

[7] The only appeal filed in this case is by US Airways and we do not read the US Airways brief as questioning the district court's ruling that USAPA is not bound by the Nicolau Award and is free to negotiate something other than the Nicolau Award. That ruling should therefore be summarily affirmed. Nevertheless, this point is included out of an abundance of caution to explain why that ruling is obviously correct given that the West Pilots are due to file its brief at the same time this brief is submitted and that throughout this litigation the West Pilots have included in its various filings all manner of unsupported attacks on USAPA and on any decision that might in any way suggest that USAPA is not required to follow the Nicolau Award exactly as it was issued.

> USAPA and US Airways are now engaged in negotiations for an entirely new collective bargaining agreement and there is no obvious impediment to USAPA and US Airways negotiating and agreeing upon any seniority regime they wish. As explained by the Ninth Circuit, "seniority rights are creations of the collective bargaining agreement, and so may be revised or abrogated by later negotiated changes in this agreement." *Hass v. Darigold Dairy Products Co.*, 751 F.2d 1096, 1099 (9th Cir. 1985). And a union "may renegotiate seniority provisions of a collective bargaining agreement, even though the resulting changes are essentially retroactive or affect different employees unequally." *Id.*

ER 8.

In fact, paragraph XII.B of the Transition Agreement explicitly provides: "This Letter of Agreement . . . may be modified by written agreement of the Association [ALPA] and the Airline Parties collectively." SER 42. The district court's decision that USAPA is free to depart from the Nicolau Award clearly correct based on this reasoning alone.

B. USAPA Is Not Limited By Any Agreement Made By The Previous Bargaining Representative

The holding that the Nicolau Award is not binding on USAPA and that a departure from the Nicolau Award is not, by itself, a breach of the duty of fair representation is also supported by black-letter law under the RLA.

As noted above, Section 2, Ninth, of the RLA provides that, "[u]pon receipt of . . . a certification" issued by the NMB, "the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter." 45 U.S.C. § 152, Ninth. "To treat is to bargain." *Order of Ry.*

Conductors & Brakemen v. Switchmen's Union, 269 F.2d 726, 732 (5th Cir. 1959). RLA Section 2, Ninth "imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other." *Virginian Ry. Co. v. System Fed'n No. 40,* 300 U.S. 515, 546, 548 (1937). To the same effect is RLA Section 2, Second, which provides that "[a]ll disputes between a carrier . . . and its . . . employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer . . . ." 45 U.S.C. § 152, Second.

Once the NMB certified USAPA as the exclusive representative of the merged pilot craft replacing ALPA, US Airways became obligated to treat and bargain with USAPA, and only with USAPA, over "rates of pay, rules, and working conditions." 45 U.S.C. § 152, Ninth (once the NMB certifies a representative, a "carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Chapter"); *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 575 (1971) ("the duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union," quoting *NLRB v. Insurance Agents' Int'l*, 361 U.S. 477, 484-85 (1960)). US Airways thus became required to treat with USAPA (and no other union) on all "mandatory" subjects of bargaining, including seniority. *Rakestraw v. United Airlines*, 981 F.2d 1524, 1535 (7th Cir. 1992) ("Like wages and fringe

benefits, seniority is a legitimate subject of discussion and compromise in collective bargaining.").

Most importantly for the purposes of this case, the law under the RLA is the fact that a carrier is required to bargain with a newly certified bargaining representative such as USAPA without regard to any agreement that might have been made by the prior representative. This principle was not presented by counsel for USAPA in *Addington* either in the district court or to this Court. As Judge Edwards held in *Ass'n of Flight Attendants (AFA) v. USAir*, 24 F.3d 1432, 1440 (D.C. Cir. 1994), a newly certified representative "has full bargaining rights" and is not "in any way limited by the [previous] contract in pursuit of new terms of employment." A*ccord, Order of Ry. Conductors & Brakeman*, 269 F.2d at 730 (successor bargaining agent can negotiate changes to agreements entered into by former bargaining agent).

To be sure, the actual objective working conditions established by the previous agreements constitute the status quo that must be maintained while the process of negotiation required by the RLA takes place. *Id.* at 1493; *Detroit & Toledo Shore Line R.R. v. United Transportation Union ("Shore Line"),* 396 U.S. 142, 150-53 (1969). But neither the status quo nor any agreement made by ALPA limits "in any way" USAPA's "pursuit of new terms of employment." *AFA v. US Air*, 24 F.3d at 1440.

Applied to the facts of this case, these well settled principles show that USAPA, as a newly certified bargaining representative, is not limited by the Transition Agreement in negotiating with US Airways and is not required to adhere to the Nicolau Award which was the result of an internal ALPA procedure (the ALPA Merger Policy) and, with respect to US Airways, was, as this Court referred to it in *Addington*, "a seniority integration proposal ALPA arrived at through the union's internal arbitration." 606 F.3d at 1177. That proposal was accepted by US Airways in late 2007 while the proceedings to choose between USAPA and ALPA were pending before the NMB but before USAPA was certified as the exclusive representative and replaced ALPA. But the proposal to incorporate the Nicolau seniority award in a final integrated collective bargaining agreement contained in the Transition Agreement was never ratified and never became part of the RLA status quo because it was never an "actual, objective working condition[]" that was ever "in effect." *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 153 (1969); *Goclowiski v. Penn Cen. Transp. Co.*, 571 F.2d 747 (3rd Cir. 1978) (denying defendants' motion for summary judgment where factual issues exist as to whether the agreement is invalid because it was never ratified by the membership); *Transport Workers Union v. Haw. Airlines*, 2009 WL 972483 (D.Haw. April 8, 2009), *aff'd without opinion*, 344 Fed. Appx. 351 (9th Cir. 2009) (tentative agreement which was

subject to ratification and had not been ratified never became effective and was not part of the RLA status quo).

Accordingly, the ruling below, holding that USAPA was not bound by the Nicolau Award is correct both for the reasons articulated by the district court and well-settled principles under the RLA with respect to the rights of a newly certified bargaining representative.

C. USAPA Does Not Breach Its DFR By Making A Seniority Proposal Based Upon Date-of-Hire Principles.

Finally, there is no evidence here to show that USAPA breached its duty of fair representation by deciding either to depart from the Nicolau Award or to pursue a seniority system based on date-of-hire. In order to make out a DFR claim, the West Pilots (the only party with standing to assert such a claim[8]) must show that USAPA's conduct "can fairly be characterized as so far outside a 'wide range of reasonableness,' *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), that it is wholly 'irrational' or 'arbitrary.'" *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 78 (1991). "Any substantive examination of a union's performance . . . must be

[8] The district court ruled that USAPA was not bound to negotiate for the Nicolau Award. The West Pilots took no appeal from that ruling. While USAPA owes a duty of fair representation to its members (*Bensel v. Allied Pilots Association*, 387 F.3d 298, 312 (3d Cir. 2004); *see also Humphrey v. Moore*, 375 U.S. at 342; *Vaca v. Sipes*, 386 U.S. 171, 186 (1967)), it owes no duty to US Airways. To the extent that US Airways is now claiming it seeks a declaration that the failure to advance the Nicolau Award somehow violates USAPA's duty of fair representation, US Airways lacks standing to request such a declaration.

highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their responsibilities." Id. "Unions are given broad discretion by the courts in their collective bargaining decisions." *Ratkovsky v. United Transp. Union*, 843 F.2d 869, 876 (6th Cir. 1988); accord *Bautista v. Pan American World Airline, Inc.*, 828 F.2d 546, 550 (9th Cir. 1987) (union reasonably agreed to change what plaintiffs alleged was a vested contractual right to permanent lifetime employment as a "rational accommodation[] to changed economic circumstances").

Any analysis of the DFR claim must take into account the current landscape and the facts and circumstances that have transpired since the ALPA/Nicolau list was created. *See O'Neill*, 499 U.S. 65, 67 (1991) (alleged DFR claim must be assessed "in light of the factual and legal landscape at the time of the union's actions"); *Addington*, 606 F.3d at 1181 (stating, "USAPA's final proposal may yet be one that does not work the disadvantages Plaintiffs fear, even if that proposal is not the Nicolau Award."); *Hendricks v. Airline Pilots Ass'n Int'l*, 696 F.2d 673 (9th Cir. 1983); *Hays v. Nat'l Elec. Contractors Ass'n*, 781 F.2d 1321, 1324 (9th Cir. 1985). In particular, a union does not violate its DFR simply by proposing a seniority system based on length of service, and indeed date-of-hire is the preferred method

to integrate seniority.[9] *Laturner v. Burlington N., Inc.*, 501 F.2d 593, 599 (9th Cir. 1974) ("It has long been recognized that the use of such a method to integrate seniority rosters is an equitable arrangement for resolving the inevitable conflicts which arise whenever a merger occurs.") (citing *Humphrey v. Moore*, 375 U.S. 335, 347(1964)), *cert denied*, 419 U.S. 1109 (1975); *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1533 (7th Cir. 1992) ("A rational person could conclude that dovetailing seniority lists [date-of-hire] in a merger . . . serves the interests of labor as a whole."); *Truck Drivers and Helpers, Local Union 568 v. NLRB*, 379 F.2d 137, 143 n. 10 (D.C. Cir. 1967) ("Apparently most employees have come to accept dovetailing [date-of-hire] as the preferred procedure when mergers occur.").

All seniority systems rely on some measure of length of service and therefore necessarily and inherently discriminate against junior employees. *Cal. Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980); *Humphrey v. Moore*, 375 U.S. 335 (1964). It is firmly established that this "discrimination," which is inherent in the operation of every *bona fide* seniority system, does not by itself establish a violation of the non-discrimination provisions of federal law. *Cal. Brewers Ass'n*, 444 U.S. at 600. The mere existence of differences "in the manner and degree to which the terms of any negotiated agreement affect individual employees and

[9]Illustrating this point is the fact that all of the other crafts involved in the merger, including the flight attendants, dispatchers and mechanics, merged their seniority lists according to date of hire. ER 57-58, ¶22.

classes of employees" does not make them invalid. *Hardcastle v. W. Greyhound Lines,* 303 F.2d 182,185 (9th Cir. 1962).

A seniority proposal based on date-of-hire that favors more senior pilots over less senior pilots is not by itself evidence of arbitrary, discriminatory, or bad faith conduct. *See Rakestraw*, 981 F.2d at 1533 (In discussing the majority's preference for seniority based on date-of-hire, "[e]qual treatment does not become forbidden because the majority prefers equality, even if formal equality bears more harshly on the minority.").

Given the subsequent and intervening circumstances, there was no evidence that USAPA's decision to depart from the Nicolau Award was a breach of its DFR to the West Pilots.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed in all respects.

Respectfully submitted this 5th day of July 2013.

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CERTIFICATE OF COMPLIANCE
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I, Patrick J. Szymanski, certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,360 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

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Date: July 5, 2013

/s/ Patrick J. Szymanski
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STATEMENT OF RELATED CASES

Counsel for Appellee US Airline Pilots Association is not aware of any related case currently pending before this Court.

Date: July 5, 2013

/s/ Patrick J. Szymanski
Patrick J. Szymanski

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 5, 2013.

I certify that the following counsel for the parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system:

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