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December 2, 2009

Ms. Molly Dwyer
Clerk of the Court
U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT
95 Seventh Avenue
San Francisco, CA 94103-1526

RE: *Addington v. US Airline Pilots Ass'n*
Case No.: 09-16564
Hearing Date: Dec. 8, 2009

Dear Ms. Dwyer:

Pursuant to FRAP 28(j) and Ninth Circuit Rule 28-6, Plaintiffs-Appellees Addington, *et al.*, submit additional authority in support of their opposition to this appeal.

Contrary to USAPA's contention that a DFR claim cannot be ripe before there is a final product of collective bargaining (*Op. Br.* at 18), the DFR claim in *Teamsters Local Union No. 42 v. NLRB*, 825 F.2d 608 (1st Cir. 1987), accrued two months before the union and company held their "final negotiating session to conclude" the relevant collective bargaining.

Contrary to USAPA's repeated representation to the district court that it may make again at oral argument—"that no union has ever faced liability based on pursuit of date of hire principles," (1ER31:1-2)—*Smith v. Hussmann*, 619 F.2d 1229, 1240 (8th Cir. 1980), is an example

where a court recognized that it could be "inappropriate for a union to tie its own hands by blind adherence to a policy of favoring employees with seniority in order to avoid disputes between employees."

Contrary to USAPA's argument for a narrow definition of bad faith (*Op. Br.* at 42, 50), *Lindsay v. Association of Professional Flight Attendants,* 581 F.3d 47, 61 (2d Cir. Sept. 21, 2009), relying on *Spellacy v. Airline Pilots Ass'n, Int'l*, 156 F.3d 120 (2d. Cir. 1998), explained that bad faith was acting with "improper intent, purpose, or motive." It also defined bad faith broadly by stating that it "encompasses fraud, dishonesty, and other intentionally misleading conduct." *Id.*

Contrary to USAPA's argument that a jury ought not to hear evidence of pre-certification conduct (*Reply* at 24), *Haerum v. Airline Pilots Ass'n, Int'l*, 892 F.2d 216, 219 (2d Cir. 1989), allowed such evidence. The decision explained that the Supreme Court has "accepted that events occurring outside of the six-month limitations period 'may be utilized to shed light on the true character of matters occurring within the limitations period.'" *Id.*, citing *Local Lodge No. 1424, International Association of Machinists v. NLRB*, 362 U.S. 411 (1960).

Very truly yours,

/s/ Andrew S. Jacob
Andrew S. Jacob

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ASJ: