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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, Plaintiffs, vs. US AIRLINE PILOTS ASSOCIATION, and US AIRWAYS, INC., Defendants.	Case No. 2:08-cv-1633-NVW **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF US AIRLINE PILOTS ASSOCIATION'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, UNDER RULES 12 AND 56** (Oral Argument Requested)

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I. SUMMARY.

For the sake of convenience and judicial economy, the US Airline Pilots Association ("USAPA") hereby adopts and incorporates the arguments set forth by Defendant US Airways ("Company" or "US Airways") in its motion to dismiss (Docket No. 30 "MTD") that this Court does not have subject matter jurisdiction under the Railway Labor Act, 45 U.S.C. § 151 *et seq*. and because Plaintiffs' claims are not ripe. Therefore, based on the arguments set forth herein and those contained in the motion to dismiss of US Airways, Plaintiffs' Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction.

Additionally, Count III of Plaintiffs' Complaint should be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(6) because it fails to state a claim, or, in the alternative, pursuant to Fed. R. Civ. P. 56, because there are no genuine disputes of material fact and USAPA is entitled to judgment by law, for reasons set forth herein.

II. STATEMENT OF FACTS[1]

On May 19, 2005, US Airways merged with America West Airlines and the merged airline became US Airways. Subsequently, the process of integrating the employee workgroups from the two airlines began. The major unionized employee groups from the two airlines, including flight attendants, mechanics and related employees, stock clerks, and flight dispatchers, were integrated on the basis of date-of-

[1] Because USAPA does not concede the truth of the facts alleged in the Complaint on their merits and reserves the right to dispute their veracity, if necessary, these facts are taken solely for the purpose of this motion.

hire seniority principles also referred to as "dovetailing."[2] (Cleary Decl. ¶ 9). Federal courts, including the Supreme Court and the Ninth Circuit, have consistently held seniority integration on the basis of date-of-hire to be both fair and equitable. At US Airways, the one notable exception to this date of hire integration method was the pilots.

At the time of the merger, the pilot groups at US Airways and America West Airlines were each represented by the Air Line Pilots Association ("ALPA"), which designates to political subdivisions called Master Executive Councils ("MEC") the daily obligations of servicing the airline-specific pilot groups. (*Id*. at ¶ 10). Unlike most major airline unions, ALPA's internal seniority integration policy has departed from the date-of-hire seniority integration method. Instead, ALPA allows its MEC's to negotiate a joint position on seniority integration. (*Id*. at ¶ 11). In the absence of an agreement, the two MEC's submit their dispute to an ALPA-designated arbitrator. In the instant case, the ALPA arbitration process culminated in what the Plaintiffs refer to as the "Nicolau Award." (*Id*.).

In rendering his decision, an ALPA-designated arbitrator must adhere to criteria established under the ALPA Merger Policy. That policy historically placed special emphasis on date-of-hire seniority. (Cleary Decl. ¶ 12). In 1991, however, "the preference for date of hire was deleted from ALPA merger policy entirely. … No [ALPA] pilot seniority integration since this change has emphasized the pilots' date of hire or length of service." (Cleary Decl. ¶ 13, Ex. A). Thus, the "Nicolau Award" reflects

[2] "Date of hire" refers to seniority that is based on a Pilot's employment commencement date.

ALPA Merger Policy: instead of favoring date-of-hire seniority, it granted super seniority to more junior, pre-merger America West pilots based on the supposedly superior economic position of America West Airlines. (Cleary Decl. ¶ 14). The decision of the ALPA-designated arbitrator is not properly characterized as an "arbitration award." Rather, it is merely a "bargaining position to be presented to the Company, but which (like a union bargaining position on any matter), the Company is not required to accept." (Cleary Decl. ¶ 17, Ex. B).

Although ALPA adopted the "Nicolau Award" as its bargaining position with respect to seniority integration, the implementation of this proposal has always been dependent on the negotiation of a single collective bargaining agreement to replace the two contracts governing the pre-merger America West and US Airways pilots. (Cleary Decl. ¶ 18; Complaint, Ex. B; Trans. Agmt. §§ VI.A, IV.C). Prior to the de-certification of ALPA, the US Airways MEC was able to indefinitely defer the implementation of ALPA's bargaining position due to its ability to delay joint contract negotiations. (Cleary Decl. ¶ 19; State Complaint ¶¶ 90-94.[3]).

On April 18, 2008, the National Mediation Board (NMB) certified the US Airline Pilots Association ("USAPA") as the collective bargaining representative of all US Airways pilots (including pre-merger America West pilots), replacing ALPA. (Cleary

[3] On the same day Plaintiffs filed the present action, they filed an action in the Superior Court of the State of Arizona in the County of Maricopa. That action contains the same Plaintiffs. Defendants in that case removed the action to this Court, which is case number CV08-1728-PHX-NVW. A copy of Plaintiffs' Complaint in that action was filed along with Defendants' removal papers and is Exhibit 1 to Docket entry No. 1. (hereinafter "State Complaint").

Decl. ¶ 20; Ex. C). With respect to seniority integration, USAPA's Constitution and Bylaws establishes as an objective, the negotiation of seniority integration on a date-of-hire basis with "reasonable conditions and restrictions to preserve each pilot's un-merged career expectations." (Cleary Decl. ¶ 21; Ex. D). USAPA and US Airways are currently engaged in negotiations for a single pilot collective bargaining agreement, and no final agreement has been reached or is expected to be reached for several months to come. (Cleary Decl. ¶ 22).

The two existing collective bargaining agreements, applicable to the former America West ("West") pilots and pre-merger US Airways ("East") pilots respectively, have been modified by the collectively bargained-for Transition Agreement, which addresses operational issues during the pendency of negotiations for a single collective bargaining agreement for all US Airways pilots. (Cleary Decl. ¶ 23). Section VI.A of the Transition Agreement provides that the operational pilot integration of the two pre-merger carriers cannot occur until a single pilot collective bargaining agreement has been negotiated. (Cleary Decl. ¶ 24; Complaint, Ex. B.). Section IV.C of the Transition Agreement mandates that an integrated pilot seniority list may not be used prior to operational pilot integration, which is conditioned upon a single CBA. (*Id.* at ¶ 25).

In June of this year the Company announced a layoff to begin in October. (Complaint, ¶ 79). In July, a pre-merger America West Airlines Pilot, John McIlvenna, initiated an individual grievance challenging the planned furlough, and USAPA has processed it. (Brennan Decl. ¶ 10). In August, USAPA initiated a union grievance on

behalf of all pilots to be affected by the furlough. (*Id*. at ¶ 18). Both grievances are pending as they await a labor arbitration hearing before the System Board of Adjustment that has full jurisdiction to remedy any alleged breach as a result of the furlough. (*Id*. at ¶ 21) (Company MTD at 4). Plaintiffs have not initiated any grievance on their behalf, or any other pilot's behalf, nor have they requested USAPA do so. (*Id*. at ¶ 27).

III. STANDARD

Under a Rule 12(b)(1) challenge, the plaintiff bears the burden of establishing jurisdiction. *Tosco Corp. v. Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001). Extrinsic evidence be may received and considered. *Warren v. Fox Family Worldwide, Inc*., 328 F.3d 1136, 1141 n.5 (9th Cir. 2003). To avoid dismissal on a Rule 12(b)(6) failure to state a claim motion, facts pled must be sufficient to give rise to a "reasonably founded hope that the discovery process will reveal relevant evidence" in support of the claims, and must allege enough facts to raise claims beyond the level of speculation, rather they must "nudge [] their claims across the line from conceivable to plausible." *Bell Atlantic Corp. v. Twonbly*, __ US __, 127 S.Ct. 1955, 1966-67, 167 L.Ed.2d 929 (2007); *Williston v. Exclusive Leasehold*, 524 F.3d 1090, 1096 (9th Cir. 2008).

Under Rule 56, summary judgment is appropriate where the movant establishes that there is no material fact in dispute and, viewing the facts most favorably to the non-movant, the movant is entitled to judgment by law. *Cleary v. News Corp.*, 30 F.3d 1255, 1259 (9th Cir. 1994).

IV. ARGUMENT

1. Count III Of Plaintiffs' Complaint Should Be Dismissed For Failure To State A Claim.

a) Plaintiffs Do Not State A Facially Valid Claim Against USAPA For Breach Of The Duty Of Fair Representation

It will be held that a union has breached its duty of fair representation *only* when its conduct is found to be arbitrary, discriminatory, or in bad faith. *Bautista v. Pan Am. World Airlines, Inc*, 828 F.2d 546, 549 (9th Cir. 1987) (*quoting Vaca v. Sipes,* 386 U.S. 171, 190 (1967)). A union's conduct in negotiations will be deemed arbitrary only if such conduct "can be fairly characterized as so far outside a 'wide range of reasonableness' that it is wholly irrational. . ." *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 78 (1991). In assessing claims for breach of the duty of fair representation, the Ninth Circuit has expressed the urgent need to preserve union discretion in the negotiation process:

> "The Supreme Court has long recognized that unions must retain wide discretion to act in what they perceive to be their members' best interests. *See*, *e.g.*, *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38, 73 S. Ct. 681, 685-86, 97 L. Ed. 1048 (1953). To that end, we have "stressed the importance of preserving union discretion by narrowly construing the unfair representation doctrine." *Johnson v. United States Postal Service*, 756 F.2d 1461, 1465 (9th Cir. 1985)."

Peterson v. Kennedy, 771 F.2d 1244, 1253 (9th Cir. 1985). *See also*, *Bautista*, 828 F.2d at 549 ("In the context of representing its members at the bargaining table, a union must be allowed 'a wide degree of reasonableness' because it must be able to focus on the needs of its membership as a whole without undue fear of lawsuits from individuals disgruntled by the result of the collective process."). Count III of Plaintiffs' Complaint against

USAPA for breach of the duty of fair representation should be dismissed for failure to state a claim – especially in light of the narrow construction given to such claims in the Ninth Circuit.

Plaintiffs' Complaint assumes that USAPA is bound by the seniority proposal developed through the internal policies of USAPA's de-certified predecessor, ALPA. Federal case law provides, however, that USAPA is free to re-visit the issue of seniority integration in the context of ongoing negotiations for a single collective bargaining agreement. Moreover, the current effort to prohibit USAPA from conducting negotiations, as directed by its members and constitutional mandates, unlawfully interferes with USAPA's negotiating rights under Section 2, Ninth of the RLA and the NMB's election certification process. (45 U.S.C. § 152).

The Ninth Circuit has held in no uncertain terms that there is no permanency inherent in the concept of seniority:

> "It is quite well established in this Circuit that *seniority rights are creations of the collective bargaining agreement, and so may be revised or abrogated by later negotiated changes in this agreement*. Employee seniority rights are not 'vested' property rights which lie beyond the reach of subsequent union-employer negotiations conducted in the course of their evolving bargaining relationship. *A union thus may renegotiate seniority provisions of a collective bargaining agreement*, even though the resulting changes are essentially retroactive or affect different employees unequally." [emphasis added]

Hass v. Darigold Dairy Prod. Co., 751 F.2d 1096, 1099 (9th Cir. 1985) (citing cases) (internal citations omitted) (emphasis added). *See also Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1535 (7th Cir. 1992); *In re Continental Airlines*, 484 F.3d 173, 182 (3d Cir. 2007); *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 232 (1st Cir.

1996); *United Food & Commercial Workers Int'l Union v. Gold Star Sausage Co*., 897 F.2d 1022, 1026 (10th Cir. 1990) (*citing Cooper v. General Motors Corp*., 651 F.2d 249, 251 (5th Cir. 1981)); *Baker v. Newspaper and Graphic Communication Union, Local 6*, 628 F.2d 156, 160 (D.C. Cir. 1980).

Consistent with this case law, the express language of the Transition Agreement, which governs the process of negotiating a single Pilot CBA at US Airways, provides that its terms can be modified by the union and the airlines. (Complaint, Ex. B, Transition Agreement § XII(B)). Therefore, seniority remains an appropriate subject of bargaining, both as a matter of federal labor law and under the specific terms of the Transition Agreement itself.

USAPA's bargaining objective – a seniority integration consistent with its constitutional date-of-hire mandate – has consistently been held to be well within the wide range of reasonableness accorded to labor unions on this issue. *See*, *e.g*., *Humphrey v. Moore*, 375 U.S. 335, 347 (1964) (describing dovetailing as "a familiar and frequently equitable solution to the inevitably conflicting interests which arise in the wake of a merger..."); *Laturner v. Burlington Northern, Inc.*, 501 F.2d 593, 599 (9th Cir. 1974) ("It has long been recognized that the use of [dovetailing] to integrate seniority rosters is an equitable arrangement for resolving the inevitable conflicts which arise whenever a merger occurs"); *De Boles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1014 (3d Cir. 1992) (Dovetailing is valid even where it "disadvantage[s] the union members who ha[ve] been employed by the younger of the two consolidated companies."); *Truck Drivers and Helpers, Local Union 568 v. N.L.R.B.*, 379 F.2d 137, 143 n.10 (D.C. Cir.

1967) *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1533 (7th Cir. 1992); *Ekas v. Carling Nat'l Breweries, Inc*., 602 F.2d 664 (4th Cir. 1979).

As set forth in US Airways' Motion to Dismiss, the Ninth Circuit is clear that where, as here, Plaintiffs have failed to state a claim upon which relief can be granted against USAPA for breach of the duty of fair representation, the breach of contract claims must also be dismissed in deference to the exclusive jurisdiction of the System Board. (Company MTD at 11) (citing cases).

b) Plaintiffs' DFR Claim Would Nonetheless Be Barred By The Six Month Statue Of Limitations**.**

It is well settled that the time to bring a DFR claim under the RLA is six (6) months. *DelCostello v Teamsters*, 462 U.S. 151 (1983); *West v. Conrail*, 481 U.S. 35 (1987); *Kelly v. Burlington N. R.R. Co.*, 896 F.2d 1194 (9th Cir. 1990). The six month limitations period begins to run when the employee *knows*, or *should have known*, of the alleged breach of the duty of fair representation by his union. *Galindo v. Stoody Co.*, 793 F.2d 1502, 1509 (9th Cir. 1986).

In the present case, Plaintiffs' State Court filing demonstrates that they *knew* or *should have known* of the alleged DFR breach in July, 2007. (State Compl. ¶¶ 88-94). It was this date upon which Plaintiffs allege, in their state court filing, that the July 25, 2007, meeting minutes of the US Airways ALPA MEC demonstrate "concerted action ... to breach [the] obligation to *treat the Nicolau Award as final and binding*." (*Id.* at 89).[4]

[4] Paragraphs 88-94 of Plaintiffs' state court Complaint allege numerous incidents between July-August 2007 in which the US Airways ALPA MEC expressed intent to stall implementation of a single CBA, which under the terms of the Transition Agreement, is a

Plaintiffs make this exact allegation against USAPA in their Complaint in this matter. (Complaint ¶ 105).

The basis upon which Plaintiffs' alleged DFR claim is centered – not treating the Nicolau Award as binding and final – was known to Plaintiffs in July 2007. This was at a time when ALPA, not USAPA, was the certified bargaining representative of Pilots at US Airways. Furthermore, ALPA, unlike USAPA, was obligated under its internal merger policy, to "use all reasonable means at its disposal to compel the company to accept and implement the merged seniority list." (Compl. Ex. C; ALPA Merger & Fragmentation Policy, p. 8, § I(1)). Plaintiffs had six months, until January 2008, to bring an alleged DFR claim against ALPA on this basis. Therefore, Plaintiffs are not only time-barred in bringing this DFR claim against USAPA, but they have sought it against the wrong union.

2. Plaintiffs' Complaint Should Be Dismissed For Lack Of Jurisdiction.

a) A Failure To Exhaust Mandatory Contractual Procedures Bars A Hybrid DFR Suit Unless Exhaustion Would Be Futile[5]

Prior to the filing of the instant lawsuit, USAPA initiated a grievance that seeks the same furlough-related relief sought by the Plaintiffs in their First Cause of Action: that no pre-merger West pilot should be furloughed while any post-merger new hire is still employed. (Brennan Decl. ¶¶ 18-20, Ex. B) Moreover, USAPA has sought and obtained the accelerated processing of this grievance. (Brennan Decl. ¶ 21). Simply put,

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precursor to implementation of integrated seniority. (Cleary Decl. ¶¶ 18-19).

[5] In an effort to avoid burdening the Court with duplicative legal argument, USAPA adopts and incorporates Defendant US Airways' points and authorities on this issue set

with respect to the Plaintiffs' First Cause of Action, the Plaintiffs and USAPA are seeking the same relief; however, USAPA is seeking that relief in the appropriate forum as dictated by contract and statute. In an effort to avoid further frivolous litigation, USAPA put Plaintiffs' counsel on formal notice of this grievance by letter dated September 12, 2008. (Brennan Decl. ¶ 29, Ex. E). To date, no response to this letter has been received.

On July 30, 2008, former ALPA America West MEC Chairman John McIlvenna[6] filed a grievance articulating the same legal arguments and seeking the same additional furlough relief sought in Plaintiffs' Complaint, namely that, based upon the language contained in the Transition Agreement, no pre-merger West pilots should be furloughed until US Airways implemented the merged seniority list set forth by the ALPA-generated bargaining position (i.e. "Nicolau award"). (Brennan Decl. ¶¶ 10-14, Ex. A) (Complaint ¶ 113). Mr. McIlvenna's grievance has been received and processed by USAPA, and, on September 24, 2008, a first step grievance hearing was held in this matter. (Brennan Decl. ¶ 16). Although USAPA does not consider the grievance to state a viable claim under the applicable agreements, Mr. McIlvenna will be afforded access to a System Board to hear his case.[7] In an effort to avoid further frivolous litigation, USAPA put Plaintiffs' counsel on formal notice of the McIlvenna grievance by letter dated September 24, 2008. (*Id*. at ¶

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forth in its Motion to Dismiss.

[6] Mr. McIlvenna was also a director of the America West Airlines Pilot Protective Alliance, an Arizona limited liability company operated and funded by pre-merger America West pilots for the sole purpose of protecting the seniority interests of West pilots. (Brennan Decl. ¶ 11).

[7] Another individual Pilot grievance has also been filed relating to these issues.

30 , Ex. F). To date, no response to this letter has been received.

b) Plaintiffs Have Failed To Show That Resort To The System Board Would be Futile

None of the named Plaintiffs in this action have filed a grievance over the contractual issues set forth in their Complaint prior to seeking the intervention of this Court. (Brennan Decl. ¶ 27). In addition, Plaintiffs' Complaint fails to allege that resort to these contractual procedures would be futile.[8]

Even if Plaintiffs had properly pled that it was futile for them to exhaust their contractual grievance procedures, any argument that a System Board is made up of employer and union appointed members, without more, does not establish the requisite futility. *United Farm Workers v. Arizona Agric. Employment Relations Bd.*, 727 F.2d 1475, 1478 (9th Cir. 1984).[9]

c) Plaintiffs' DFR Claim Is Not Ripe For Adjudication.

Under Article II of the United States Constitution, federal courts may adjudicate "only actual ongoing cases or controversies." *Lewis v. Cont'l Bank Corp*., 494 U.S. 472,

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(Company MTD at 4).

[8] As set forth in the Company's motion to dismiss, Plaintiffs have also failed to allege that the union and employer have acted in concert or collusion. (Company MTD at 3). This allegation is absent from Plaintiffs' Complaint because no such collusion exists. This is evidenced by the processing of the grievances on these exact issues.

[9] *See also*., *Edwards v. United Parcel Service Inc*., 974 F. Supp. 1043, 1050 (W.D. Ky. 1997), *remanded on other grounds*, 181 F.3d 100 (6th Cir. 1999) ("we cannot be so cavalier about predicting how four members will react to days of testimony and evidence"); *Del Casal v. Eastern Airlines, Inc.*, 634 F.2d 295, 299 (5th Cir. 1975) ("[a]bsent a showing of partiality or bias on the part of individual members of the System Board, this court will not disturb its conclusions"); *Arnold v. United Air Lines, Inc*., 296 F.2d 191, 195 (7th Cir. 1961) (*same*); *Stumo v. United Air Lines, Inc*., 382 F.2d 780, 787 (7th Cir. 1967) (*same*).

477 (1990). As a result, federal courts may not entertain actions that are not yet ripe. The Supreme Court and the Ninth Circuit have consistently recognized that it is the "*final product* of the bargaining process [that] may constitute evidence of a breach of duty [of fair representation]. *O'Neil*, 499 U.S. at 78 (emphasis added); *Rugemer v. American Nat'l Can Co*., 2000 U.S. App. LEXIS 8681 at *9-10 (9th Cir. 2000); *Marquez v. Screen Actors Guild, Inc*., 124 F.3d 1034, 1037 (9th Cir. 1997); *Dolan v. Ass'n of Flight Attendants*, 1996 U.S. Dist. LEXIS 3342 at *14 (N.D. Ill. 1996) (whether a "union has acted in an arbitrary, discriminatory, or bad faith manner by adopting a particular bargaining position is an issue that is not appropriate for a judicial decision.").

The alleged DFR claim against USAPA is based not on any "final product" of negotiation, but rather only on Plaintiffs' allegation that "Defendant US Airways and USAPA *intend* to: (a) not implement integrated operations and/or (b) not adopt the Nicolau List." (Complaint ¶ 65) (emphasis added). Since the entire claim is based on nothing more than an alleged *intention* that USAPA and US Airways will bargain in a particular manner, this case is not ripe for adjudication.[10]

d) Section 8 Of The Norris-LaGuardia Act Requires Plaintiffs To First Exhaust RLA Mandated Administrative Remedies Before Seeking Judicial Relief

The Norris-LaGuardia Act ("NLGA"), 29 U.S.C. §§ 101 *et seq.*, "severely restrict[s] the jurisdiction of the federal courts to issue injunctions in any labor dispute." *Camping Constr. Co. v. Dist. Council of Iron Workers*, 915 F.2d 1333, 1341 (9th Cir. 1990). Specifically, Section 7 of the NLGA restricts the jurisdiction of the federal courts

[10] *See* US Airways Motion to Dismiss at p. 8, fn 3 (citing cases relating to ripeness).

"to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute." 29 U.S.C. § 107.[11] The Ninth Circuit has specifically recognized the broad application of the term "labor dispute:"

> "The Supreme Court has consistently characterized Norris-LaGuardia's definition of 'labor dispute' as 'broad.' Equally expansive is the test that the Supreme Court fashioned for determining whether a particular controversy is a labor dispute. Simply, 'the employer-employee relationship must be at the matrix of the controversy.'" [emphasis added]

Burlington Northern Santa Fe Ry. Co. v. Int'l Bhd. of Teamsters Local 174, 203 F.3d 703, 709 (9th Cir. 2000) (internal citations omitted) (emphasis added). Plaintiffs' Complaint, on its face, addresses the terms and conditions of employment of US Airways Pilots and is, therefore, a "labor dispute" covered by the NLGA.

The Plaintiffs' Complaint seeks both the issuance of preliminary and permanent injunctive relief. (Complaint ¶ 113). However, Plaintiffs' failure to exhaust the RLA mandated contractual grievance procedure forecloses issuance of such relief. The "clean hands" provision of the NLGA, Section 8, states that:

> "*No restraining order or injunctive relief shall be granted to any complainant* who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed **to** *make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.*" [emphasis added]

[11] NLGA § 113(a) defines the term "labor dispute" broadly to include, *inter alia*, disputes "between one or more employees or associations of employees and one or more employees or associations of employees," 29 U.S.C. § 113(a)(3), and § 113(c) adds that this term encompasses "any controversy . . . concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113(c).

29 U.S.C. § 108. (emphasis added). The Supreme Court has held that resort to *voluntary* arbitration under the RLA constitutes a "reasonable effort to settle" a labor dispute, and Section 8 of the NLGA "demands this method be exhausted before a complainant to whom it is available may have injunctive relief." *Bhd. of R.R. Trainmen, Enter. Lodge, No. 27 v. Toledo*, 321 U.S. 50, 56 (1944).

It is undisputed that none of the Plaintiffs have filed a grievance relating to the minor disputes alleged in their Complaint. (Brennan Decl. ¶ X) (Company MTD at 3). As distinguished from the failure of the plaintiff in the Supreme Court's *Toledo* case to avail itself of *voluntary* arbitration, the disregarded arbitration process in the instant case is *mandatory*. Therefore pursuant to Section 8 of the NLGA, jurisdiction is lacking, because Plaintiffs failed to come to this Court with clean hands by not first exhausting their RLA-mandated contractual remedies. *Int'l Ass'n of Machinists v. Northwest Airlines, Inc*., 304 F.2d 206, 211 (8th Cir. 1962) ("Unless the party seeking an injunction has exhausted the administrative remedies available to him, jurisdiction to grant the injunction is lacking by virtue of the Norris LaGuardia Act").

e) The National Mediation Board Has Exclusive Jurisdiction Over Airline Representation Disputes

Plaintiffs' Application seeks to challenge the NMB's certification of USAPA as the exclusive bargaining representative of all US Airways Pilots by basing its request for relief, in part, on allegations that USAPA made unlawful campaign promises during the inter-union election. (Complaint ¶ 107).

Federal courts, including the Ninth Circuit, have consistently recognized the

exclusive jurisdiction of the NMB to decide representation disputes in the airline industry:

> "The National Mediation Board ("NMB") has exclusive jurisdiction to determine union representation disputes under the RLA; *an NMB representation determination is essentially unreviewable in federal court*. *Switchmen's Union v. NMB*, 320 U.S. 297, 303-07, 88 L. Ed. 61, 64 S. Ct. 95 (1943) (holding that Congress intended for NMB determinations of union representation to be final and not subject to judicial review, and declining to review an NMB determination)." [emphasis added]

McNamara-Blad v. Ass'n of Prof'l Flight Attendants, 275 F.3d 1165, 1170 n. 1 (9th Cir. 2002) (emphasis added). In fact, the jurisdiction of the NMB in this respect is so exclusive that courts have declined to entertain otherwise justiciable claims that involve issues related to an NMB representation dispute. *Landry v. Air Line Pilots Ass'n, Int'l*, 901 F.2d 404, 414 (5th Cir. 1990); *Independent Fed'n of Flight Attendants v. Cooper*, 141 F.3d 900 (8th Cir. 1998).

NMB procedures required allegations of improper election-related conduct to be submitted within seven business days of the date of the vote tally conducted on April 17, 2008. *See* NMB Representation Manual §17 (2007).[12] No allegations of any such election interference were filed with the NMB following the tally of votes and certification of USAPA. (Cleary Decl. ¶ 20). If a party believed that USAPA had interfered with the NMB election process through the making of "unlawful campaign promises," the NMB was the proper forum to file those complaints. No cause of action in this Court can be based on such election-related allegations.

[12] The NMB Representation Manual may be found at: http://www.nmb.gov/documents/docsup.html

f) Plaintiffs Lack Standing To Pursue Their Count II Claim.

Standing is a jurisdictional issue, and therefore federal courts treat such motions to dismiss under Rule 12(b)(1). *See Alliance for Environmental Renewal, Inc. v. Pyramid Crossgates Co*., 436 F.3d 82, 88 at n.6 (2d Cir. 2006). Count II of Plaintiffs' Complaint alleges a breach of the West CBA by US Airways "because it has not been negotiating with USAPA in good faith . . ." (Complaint ¶ 91). As individual employees, however, the Plaintiffs lack the standing necessary under the RLA to pursue such a claim. *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 319 (3d Cir. 2004), *cert. denied* 544 U.S. 1018 (2005) (individual pilots "lack[ed] an implied private right of action to bring claims asserting breaches of the duty to bargain and duty to negotiate in good faith . . . because they are not and have never been a certified representative of the. . . pilots."); *see also Marcoux v. American Airlines, Inc*., 2008 U.S. Dist. LEXIS 55751 at *51-52 (E.D.N.Y. 2008); *Cooper v. TWA Airlines, LLC*, 349 F. Supp. 2d 495, 503 (E.D.N.Y. 2004).

V. REQUESTED REMEDY

Based on the pleadings, evidence, arguments, record, and any live testimony, or evidence to be presented in the hearing, USAPA respectfully requests the Court grant its motion and dismiss Count III, with prejudice, for failure to state a claim, or in the alternative, grant USAPA summary judgment.

Respectfully Submitted,

Dated: October 1, 2008 By: **/s/ *Lee Seham***

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