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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

DON ADDINGTON, *et al.*; Plaintiffs, vs. US AIRLINE PILOTS ASSOCIATION, and US AIRWAYS, INC., Defendants.	CASE NO. 2:08-CV-1633-NVW **RESPONSE IN OPPOSITION TO** ***US AIRWAYS' MOTION TO DISMISS (doc. 30)***

Plaintiffs ADDINGTON, BOSTIC, BURMAN, IRANPOUR, VELEZ, and WARGOCKI file this *Response In Opposition To US Airways' Motion To Dismiss (doc. 30)*, which is directed only at Counts One and Two. The Court should deny this motion because Plaintiffs have pleaded a valid hybrid action. US Airways makes a circular argument that a plaintiff must engage in futile procedures in order to be excused from exhausting futile procedures. Surely, in cases such as this, where the naked hostility and deliberate indifference to minority members of a union are so extreme, the Court has jurisdiction and Plaintiffs are excused from exhausting futile grievance procedures.

This Response is supported by the Memorandum of Points and Authorities that follows.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. OVERVIEW

This is a seniority dispute between two groups of airline pilots (West Pilots and East Pilots) arising from the merger of US Airways and America West. At the time of the merger, the two airlines and the two pilot groups specifically agreed that none of the approximately 1,700 East Pilots then on furlough would displace any West Pilot then actively flying.[1] These parties also agreed to cooperate to combine the two pilot groups by creating a single integrated pilot seniority list. Until this transition is completed, each group of pilots works under a different collective bargaining agreement ("CBA"). The West Pilots' CBA (the "2004 CBA") provides better wages than the East Pilots CBA.

The West Pilots, although fewer in number, had a recognized right to a fair and equitable seniority integration. The East Pilots asserted that they had a right to integrate by a date-of-hire method that would have placed the 1,700 East Pilots on furlough ahead of a substantial number of West Pilots who were on active (working) status. The airline entities left seniority integration to the pilots, subject to a few conditions—one of which was that pilots then on furlough could not bump or displace any active pilot.

The pilot groups submitted this dispute to what they agreed would be final and binding arbitration. The arbitration created an integrated seniority list. This list placed all working pilots ahead of the pilots on furlough. US Airways accepted this integrated seniority list and reaffirmed its promise to implement it. The East Pilots, however, breached their duty to accept this list. Instead, they obstructed its implementation.

Indeed, to better obstruct implementation of the arbitration seniority list, the East Pilots established a new union, Defendant USAPA, and had this union challenge the representation status of the Air Line Pilots Association, International ("ALPA"). The

[1] A pilot on furlough status has no job but retains a limited right to be recalled to work by the airline.

East Pilots now seek to misuse their majority status within USAPA to impose the date-of-hire seniority scheme that was rejected as unfair and inequitable by the arbitrator.

In the years following the merger, the Company offered recall to all East Pilots on furlough. More than 800 of these pilots accepted recall. The Company also hired approximately 100 new East Pilots. At the same time, it hired only a handful of new West Pilots. The Company is now reducing service and intends to furlough 300 pilots. Regardless that the West Pilot group is one third the size of the East Pilot group, the Company plans to furlough substantially more West Pilots than East Pilots. These numbers show that, contrary to the agreement that furloughed East Pilots would not displace premerger West Pilots, the Company is furloughing well over 100 premerger West Pilots while retaining more than 800 formerly furloughed East Pilots on active status.

Plaintiffs seek to enjoin the Company from furloughing any premerger West Pilot, until and unless it has first furloughed every East Pilots who was either on furlough or not yet hired at the time of the merger. It is futile for Plaintiffs to seek this relief from a System Board. Any System Board would be comprised of members appointed by the Company and USAPA. The Company will appoint members who will deny relief so that the Company can preferentially furlough the more expensive West Pilots. USAPA will appoint members who will deny relief because, in violation of its DFR, USAPA is improperly hostile to the arbitration seniority list. Because the Company and USAPA representatives will agree to deny relief, no neutral arbitrator will sit on the Board.

Ultimately, Plaintiffs seek an order directing the Company and USAPA to negotiate a CBA that would implement the arbitration integrated seniority list. The System Board would not have jurisdiction to grant this relief against either Defendant.

II. STANDARD OF DECISION

The Court must determine whether, "assuming all facts and inferences in favor of the nonmoving party, it appears beyond doubt that [Plaintiffs] can prove no set of facts to

support [their] claims." *Libas Ltd. v. Carillo*, 329 F.3d 1128, 1130 (9th Cir. 2003). The Court should consider documents that were referenced to in the Complaint and attached thereto because these are "central" to the claims and US Airways did not question their authenticity. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). The Court should "assume that [the] contents [of these documents] are true for purposes of a motion to dismiss under Rule 12(b)(6)." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). "[W]here the courts are called upon to fulfill their role as the primary guardians of the duty of fair representation, complaints should be construed to avoid dismissals and the plaintiff at the very least should be given the opportunity to file supplemental pleadings…." *Czosek v. O'Mara*, 397 U.S. 25, 27 (1970) (applying RLA).

The United States Supreme Court has thus made clear that this Court should take great care to avoid summarily dismissing this case. Instead, the Court should construe the Complaint in favor of Plaintiffs and give them every opportunity to provide the Court with additional information, if necessary, to support their claims.

Moreover, Plaintiffs demonstrate that other courts faced with similar disputes have granted the precise relief that Plaintiffs seek here. This Court should find, therefore, that it has both subject matter jurisdiction and authority to grant the relief requested.

III. FACTUAL BACKGROUND

A. General Allegations

In September 2005, America West, US Airways, and their pilots entered into the Transition Agreement ("TA") (doc. 1-3), a multilateral contract. *Compl.*, ¶ 27 (doc. 1-1). Between the pilots, the TA was an ordinary commercial contract. *Id.* at ¶ 29. Between the pilots and the airlines, it modified the respective CBAs. *Id.* at ¶¶ 30, 31. The TA established procedures by which the Company and the two pilot groups would integrate the pilots' seniority lists. *Id.* at ¶ 34(k)-(m). The TA states, that "the Airline Parties will accept such integrated seniority list … [so long as] … furloughed pilots may not

bump/displace active pilots." TA at § IV.A. The TA also states that the Company must recall all furloughed East Pilots before it may hire any new pilots. *Compl.* at ¶ 34(b); *see* TA § II.B.6. Finally, the TA states "that the single integrated seniority list … would be created in accordance with ALPA Merger Policy." *Compl.* at ¶ 34(l), (m). ALPA Merger Policy (doc. 1-4) is a written set of policies and procedures created by the union then representing both groups of pilots. *See id.* at ¶¶ 35, 36.

In accordance with ALPA Merger Policy, the pilots underwent binding arbitration before George Nicolau to create an integrated seniority list. *Id.* at ¶ 41. On May 3, 2007, Mr. Nicolau announced the arbitration result in a written Opinion and Award ("Award") (doc. 1-7). *Id.* at ¶ 46. The Award states that the arbitration applied "the fair and equitable standard [of ALPA Merger Policy], … [which] does not rank its stated criteria in any particular order." *Award.* at 25. The Award explained:

> [T]he totality of premerger career expectations weighs in favor of **active pilots** as of the date of the announcement. When one considers the number and length of furloughs on the US Airways side and the dim prospects the airline faced and compares it to the lack of furloughs on the America West side, … **merging active pilots with furloughees**, despite the length of service of some of the latter, is **not** at all fair or equitable under any of the stated criteria.

Id. at 28 (emphasis added). The Award, therefore, placed all 1,751 East Pilots on furlough below the most junior West Pilot. *Id.* (addendum at 26 & 36).

The East Pilots, although bound to do so, refused to treat the Award as "final and binding." *Compl.* at ¶ 40(a). Ultimately, the they created USAPA in furtherance of "evading … obligations to treat the [Award] as final, binding, fair and equitable." *Id.* at ¶ 57(a)-(c); *see also id.* at ¶¶ 58, 59(a). USAPA favors the East Pilot majority and gives no consideration to the interests of the West Pilot minority. *Id.* at ¶ 59(b), (c). Moreover, in its campaign to become the NMB certified bargaining representative, USAPA promised that it would disregard the interests of the West Pilot minority in any negotiations with the Company. *Id.* at ¶ 62.

The Company agreed to "accept" the Award. TA at § IV.A. It did so in December 2008. *Id*. at ¶ 89 (incorrectly stating "November"). The Company agreed to negotiate in good faith to implement the Award. *Id.* at ¶ 90. It failed to do so.

B. The Complaint Has Three Counts.

Count One claims that the Company is furloughing out of order. It alleges that the Company: (1) hired 100 new East Pilots after the merger; (2) is furloughing a total of 300 pilots; and (3) is furloughing one or more Plaintiffs. *Id.* at ¶¶ 76, 79, 80. The Company was not allowed to hire any new pilots before it had offered recall to all furloughed East Pilots. *Id.* at ¶ 34(b). With 100 new East Pilots, all furloughed East Pilots offered recall, and an expanded roster of active East Pilots, *see id.* at ¶ 78, the Company has hundreds of pilots who are lower in seniority than the most junior premerger West Pilot. The Company, therefore, must pass over hundreds of less senior East Pilots to furlough a premerger West Pilots. *See id*. at ¶ 83. Count Two claims that the Company must "negotiate with USAPA in good faith to … implement the [Award]." *Id*. at 90. "[S]ince June 2008, Defendant US Airways and USAPA have been negotiating" with other goals. *Id.* at ¶¶ 64, 65. This is a breach of the contract duty to negotiate in good faith. *Id.* at ¶ 91. Count Three claims that USAPA violated the DFR. It is discussed in Plaintiffs' *Response in Opposition to US Airline Pilots Association's (USAPA's) Motion to Dismiss or in the Alternative, for Summary Judgment, Under Rules 12 And 56* (doc. 35).

IV. LEGAL ARGUMENT

The Ninth Circuit uses "hybrid claim" when addressing jurisdiction and "futility exception" when addressing excuse from exhausting administrative remedy:

> For jurisdictional analysis, Croston's **hybrid claim** for breach of the collective bargaining agreement depends ultimately upon his claim against the union for unfair representation. * * * If the employee does not have a triable claim against the union, then all that remains is one against the employer. In that event, the **futility exception** does not apply and the RLA requires that the claim be heard before the Adjustment Board.

Croston v. Burlington No. R. Co., 999 F.2d 381, 387 (9th Cir. 1993), *overruled on unrelated grounds by Hawaiian Airlines v. Norris*, 512 U.S. 246 (1994) (emphasis added; citation, quotation marks and alteration marks omitted). Despite using different nomenclature for these two concepts, it explains both concepts using very similar language. For example, *Bautista v. Pan Am. World Airlines, Inc.*, 828 F.2d 546 (9th Cir. 1987), explained that there was *Glover* hybrid claim jurisdiction where "the Adjustment Board, according to the plaintiffs' allegations, would have been infected with … *invidious discrimination or unjustified hostility.*" *Id.* at 552. Yet, *Croston* explained "futility" by stating that it "requires a showing of *invidious discrimination or unjustified hostility.*" *Id.* at 387. With this in mind, Plaintiffs first explain the operation of the System Board.[2] Plaintiffs then demonstrate that they brought a valid hybrid claim and are excused from exhausting administrative remedies by the *Glover* futility exception. *Glover v. St. Louis-S.F. Ry. Co.*, 393 U.S. 324 (1969).

A. <u>The Operation of The System Board</u>

1. A System Board Uses A Neutral Only To Break Ties.

"In 1936, Congress extended the RLA to the then-new airline industry … [and] enacted 45 U.S.C. § 184 to outline adjustment procedures for minor disputes in the airline industry." *Whitaker v. Am. Airlines, Inc.*, 285 F.3d 940, 943 -944 (11th Cir. 2002). Each carrier has its own System Board whose members are appointed by the carrier and its union. Where these carrier and union representatives are in agreement, they decide a grievance without participation by a neutral arbitrator. *See* 45 U.S.C. § 153; *Assn. of Flight Attendants, AFL-CIO v. Aloha Airlines, Inc.*, 158 F.Supp.2d 1200, 1205 (D.Hawaii 2001) ("required to render a valid decision"). Hence, if the carrier and union agree, they control the outcome of the proceeding. Otherwise, a neutral is brought in to break the tie.

[2] In the railroad context, courts refer to this as the "Adjustment Board."

2. America West Grievance Procedure Does Not Involve A Neutral Unless The Company And USAPA Are Deadlocked.

A West Pilot with a grievance first must exhaust company-level procedures. This begins with "a Chief Pilot hearing" the month after the grievance is filed. *2004 CBA* § 20.A.3.b. If denied relief, the pilot refiles the grievance with the Vice President of Flight Operations who holds a hearing the following month. *Id*. at § 20.A.4. If denied again, the pilot submits the grievance to a "Grievance Review Board." *Id.* at § 21.B.1. This board meets quarterly. *Id.* at § 21.B.3. This board, "in an effort to obtain additional information," "may postpone further consideration of a grievance until the next quarterly … meeting." *Id.* at § 21.B.8.c. There is no further appeal unless the Company and USAPA are deadlocked. *Id.* at § 21.D.4.a. Absent a deadlock, the grievance does not reach a neutral arbitrator.

B. The Court Has Jurisdiction To Hear Counts One And Two.

Courts have "jurisdiction over railroad labor disputes when ***resort to*** arbitration would be futile." *Croston*, 999 F.2d at 387 (emphasis added). They also have jurisdiction to provide relief that is beyond System Board jurisdiction. *Glover*, 393 U.S. at 329. The first basis applies to Count One, the first and second apply to Count Two.

1. The Court Has *Glover* (Hybrid) Jurisdiction.

Glover recognized circumstances where "the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures." *Id.* at 330. These circumstances exist where "the effort to proceed formally with contractual or administrative remedies" would be tantamount to submitting the "controversy to a group which is in large part chosen by the defendants against whom their real complaint is made." *Id.* (quotation and alteration marks omitted). "*Glover* was not predicated on mere disagreement between the employees and the union on the merits of a grievance, but on the fact that the Adjustment Board, according to the plaintiffs' allegations, would have been infected with racial bias."

Bautista, 828 F.2d at 551. "[T]he protection afforded by [*Glover*] doctrine," however, "encompass[es] all forms of hostile discrimination." *Gainey v. Bhd. of Ry. and S. S. Clerks, Freight Handlers, Exp. & Station Emp.*, 313 F.2d 318, 323 (3d Cir. 1963). "[H]ostile discrimination … is not limited to discrimination on account of race." *Hardcastle v. W. Greyhound Lines*, 303 F.2d 182 (9th Cir. 1962). The Ninth Circuit, therefore, recognizes a third element to *Glover* doctrine (in addition to union control of grievance outcome and union adversity to employee)—improper hostility motivating the union.

The Court has *Glover* (hybrid) jurisdiction because (1) USAPA **could** prevent Plaintiffs from reaching a neutral arbitrator, (2) USAPA (and the Company) **would** do so; and (3) USAPA would do so **because** it is hostile to Plaintiffs' seniority interests.

a. USAPA **Could** Prevent Plaintiffs From Reaching A Neutral.

America West grievance procedure does not involve a neutral arbitrator unless USAPA supports the pilot's grievance. *See* TA at § 21.D.4.a. The System Board has a neutral member, therefore, only if there is "deadlocking of the four-member Board, the adjournment of the Grievance Review Board meeting, or the close of a Mediation Conference wherein a settlement could not be reached, as applicable." *Id.* If USAPA supports the Company, a neutral does not participate at any stage.

b. USAPA **Would** Prevent Plaintiffs From Reaching A Neutral.

Counts One and Two seek to implement the equities of the Award, which provides America West pilots higher seniority than premerger US Airways furloughees. USAPA exists to place former US Airways furloughees senior to active America West pilots. *See Compl.* at ¶ 57(c). A neutral arbitrator, George Nicolau, already found that this "is not at all fair or equitable." *Award* at 28. It logically follows that USAPA would not risk neutral arbitration again.

The Company's disingenuous use of the McIlvenna Grievance shows that it too will deny Plaintiffs a hearing before a neutral. *See* E. Allen Hemenway, *Decl*. Ex. 2 (doc. 30-2) (J. McIlvenna, *Ltr. to K. Wood & Steve Bradford*, 2 (Jul. 30, 2008)); *see also* J. McIlvenna, *Aff.*, ¶ 6 (Oct. 10, 2008). This grievance sought as remedy:

> That US Airways cease and desist from continuing with the West displacement bid [a process that includes the furloughs placed at issue in Count One] until it completes the "Operational Pilot Integration" as required by the CBA's modified by the Transition Agreement using the merged seniority list (the "Nicolau Award") that has been presented to, and accepted by US Airways management."

Id. at ¶ 8.

On September 26, 2008, in open Court, the Company stated that Mr. McIlvenna had the opportunity to obtain the same relief from the System Board that Plaintiffs sought in court. That same day, the Company sent a letter to Mr. McIlvenna in which it denied that he had a right to even file a grievance. *See id.* at ¶¶ 13-16. Contradicting its assertions to the Court, the Company asserted that it had to consent before an individual pilot could bring a grievance because the TA "provides for the submission of issues for resolution by the 'parties' … (i.e., the airline(s) and the union)." *Id*. at ¶ 15.[3] The Company also omitted telling the Court that it denied Mr. McIlvenna's grievance in that same letter *Id.* at ¶ 17. Three days later, the Company filed a misleading declaration with the Court in which it dissembled by stating that "[t]he Company is currently processing" Mr. McIlvenna's Nicolau Award grievance. Hemenway, *Decl*. at ¶ 4. As of September 26, the Company was not "currently processing" anything.

The Company has also been **evasive** on the issue of a neutral arbitration. The Company never informed the Court that Mr. McIlvenna requested "that a neutral

[3] This is a startling position for the Company to take. If an individual pilot does not have a right to bring a grievance how can the Company complain that Plaintiffs have not exhausted grievance procedures? Moreover, USAPA, if it succeeds ALPA in the Transition Agreement, does so only because "a principle of the Railway Labor Act [is] that agreements are between the employees and the carrier." *Assn. of Flight Attendants, AFL-CIO v. USAir, Inc.*, 24 F.3d 1432, 1438 (C.A.D.C. 1994). .

arbitrator only hear this case, with no sitting system board members from either management or USAPA in order to avoid any perceived or real conflict of interest." McIlvenna, *Aff.* at ¶¶ 9, 20. It has also failed to respond to Mr. McIlvenna in this regard. *Id.* at ¶ 21. (USAPA indicated that it will not consent to such a hearing. *Id.* at ¶ 12.)

c. USAPA Is Motivated by Hostility To Plaintiffs' Seniority Interests.

USAPA was formed to prevent implementation of the Award. *Compl.* at ¶ 57. USAPA is, therefore, hostile to the interests that Plaintiffs seek to vindicate. *See also Compl.* at ¶¶ 55-59, 65-66. USAPA's DFR violations are further evidence of its hostility. Finally, the conduct of the East Pilot majority, *see*, e.g., *id.* at ¶¶ 55-57, illustrates USAPA's hostility. *See Alvey v. General Elec. Co.*, 622 F.2d 1279, 1290 (7th Cir. 1980) (holding that a determination of "whether a union official acted contrary to his duty [of fair representation]" should take into account the "political process that may have helped produce the subjugation of one group's interests in favor of another group's interests"). *See also Glover*, 393 U.S. at 326-27 (a history that the plaintiffs "were treated with condescension" by individuals, "sometimes laughed at and sometimes 'cussed,' but never taken seriously" showed union hostility).

If the Court requires additional allegations of USAPA's hostile motivation, therefore, Plaintiffs can allege the following:

1. At a July 25, 2007, meeting of the US Airways pilots, a majority of those attending made it abundantly clear that they would never ratify a CBA that uses the Nicolau list.
2. At a July 27, 2007, meeting of US Airways pilots, those attending resolved to keep the two premerger airlines in separate operations to prevent implementation of the Nicolau list.
3. On July 29, 2007, a leader of the US Airways pilots avowed, in writing, that "the Nicolau Award will never see the light of day."
4. On August 15, 2007, the US Airways pilots withdrew their representatives from the joint committee seeking to negotiate the terms of a merged operation of US Airways so as to prevent implementation of the Nicolau list.
5. Soon thereafter a number of US Airways pilots decided that they could form USAPA and use their greater numbers to take over the

representation of the bargaining and negotiate a single CBA that would ignore the Nicolau list—all without needing the cooperation of the America West pilots.

6. On January 23, 2008, USAPA was advised by its counsel that it could negotiate a date-of-hire seniority agreement with the Company.

7. USAPA has stated that it will negotiate a contract with US Airways that "will not contain any reference to recent Nicolau document" and "When the majority of member pilots in good standing vote yes on our new agreement, then [the Nicolau list] dies on the shelf."

All three elements of futility, therefore, are satisfied: (1) USAPA has the power to keep a grievance from a neutral; (2) USAPA (and the Company) would keep a grievance from a neutral; and (3) USAPA would do so because of hostile motivation.

2. Plaintiffs State A Valid DFR Claim.

Plaintiffs discuss their DFR claim in their *Response In Opposition To US Airline Pilots Association's (USAPA's) Motion To Dismiss Or In The Alternative, For Summary Judgment, Under Rules 12 And 56* (doc. 35).

3. The Court Has Jurisdiction Because A System Board Would Not Have Jurisdiction To Order US Airways To Negotiate.

Count Two seeks to order the Company to negotiate CBA changes that would implement the Nicolau Award. *Compl.* at ¶ 113(B). The Court has jurisdiction to provide such relief because the System Board lacks jurisdiction. A "right without a remedy" has long been disfavored, even in the context of the RLA. *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 207 (1944).

a. The System Board Does **Not** Have Jurisdiction.

In *Glover*, the Supreme Court noted that the System Board would have jurisdiction to remedy expressly discriminatory CBA provisions. 393 U.S. at 329. It held that jurisdiction should be the same for wrongs that have the same effect. "[N]o meaningful distinction can be drawn between discriminatory action in negotiating the terms of an agreement and discriminatory enforcement of terms that are fair on their face." *Id.* The

same logic applies here to obtain an order directing US Airways to negotiate a CBA implementing the Award.

The CBA and TA expressly preclude obtaining such relief from the System Board. The CBA states that "[t]he jurisdiction of the Board shall not extend to proposed changes in hours of employment, rates of compensation or working conditions covered by existing Agreements between the parties or as subsequently executed." *2004 CBA* at § 21.A.3 (doc 1-2). The TA states that "[a] Board of Adjustment under this Letter of Agreement … has no jurisdiction to modify or supplement any term of this Letter of Agreement or any other agreement between any of the parties to this Letter of Agreement." TA at § X.F.

Either way, the System Board does **not** have jurisdiction to direct the Company to negotiate a CBA that would implement the Award.

b. This Court Does Have Jurisdiction.

The Ninth Circuit recognizes that a district court has jurisdiction to issue an order analogous to that sought here in Count Two. *See, e.g., Bernard v. Air Line Pilots Assn., Intl.*, 873 F.2d 213 (9th Cir. 1989). *Bernard* concerned a seniority dispute arising from the merger of two different sized airlines. *Id.* at 214 (noting that 100 Jet America pilots had merged with 500 Alaska Air pilots). The court determined that the CBA that had been negotiated between the post-merger carrier and the union, ALPA, was "tainted by the duty of fair representation violation." *Id.* at 218. "By way of remedy, the district court … vacated and set aside the … seniority integration agreement between ALPA and Alaska Airlines[,] … specified the basis by which pilots would be furloughed, promoted and given flying assignments in the interim period until a new agreement could be reached" and directed ALPA and Alaska Airlines to implement a new agreement that used a seniority list created according to ALPA Merger Policy. *Id.* at 215. *Bernard*, therefore, stands for the principle that, under the RLA, a court has jurisdiction to order a

carrier and union to negotiate a contract that would implement a fair and equitable post-merger seniority list—a list that would be created according to ALPA Merger Policy. Plaintiffs seek such relief in Count Two.

C. <u>The Ninth Circuit Does Not Require Time-Consuming Formalities Before Seeking Redress In The Courts.</u>

Employees should not be required to submit their controversy to "a group which is in large part chosen by the [defendants] against whom their real complaint is made." *Steele*, 323 U.S. at 206.

a. <u>The Ninth Circuit Has One Standard For Futility</u>.

The Ninth Circuit applies the *Glover* futility exception no more narrowly in RLA cases. *Contra. Def.'s Mot.* at 7:25-27. As one court recently observed:

> [T]he same standards with respect to futility are applied under both Acts, as evident in *Bautista* and *Glover* itself. *Glover* is in fact an RLA case, but its reasoning was based largely on *Vaca* (an LMRA case), and Glover has been relied upon as the basis for the futility exception under the LMRA. Analogies are frequently drawn between the two acts, and the Supreme Court has noted that it refers to the LMRA in construing the RLA.

Vera v. Saks & Co., 424 F.Supp. 2d 694, 707 (S.D.N.Y. 2006) (alteration and quotation marks and citations omitted). For example, *Crusos v. United Transp. Union, Loc. 1201*, 786 F.2d 970 (9th Cir. 1985), is an RLA case that cited *Lusk v. Eastern Products Corp.*, 427 F.2d 705, 708 (4th Cir. 1970), an non-RLA case, to illustrate futility. *Lusk* sounded as if it was explaining *Glover*:

> [A]n employee member of a union … cannot be forced to submit that issue to arbitration between the employer and the union since such procedure would entrust representation of the complaining employee to the very **union which he claims refused him fair representation** and because it would present as adversaries in the arbitration proceeding the two parties charged by the employee with combining to defraud him.

Lusk, 427 F.2d at 708 (emphasis added). Along similar lines, *Ritza v. Intl. Longshoremen's & Warehousemen's Union*, 837 F.2d 365 (9th Cir. 1988), a non-RLA case, cited *Glover* to explain the futility exception.

Ritza found that the union's hostility did not support futility because, despite the hostility, the grievance would be decided by a neutral arbitrator. 837 F.2d at 370. The Circuit explained by drawing a contrast to *Williams v. Pac. Maritime Assn.*, 617 F.2d 1321 (9th Cir. 1980):

> Here, the district court rejected the claim of hostility because the Coastwide Rules provide for a neutral arbitrator as the final step in the grievance procedures. The grievance procedures at issue in *Williams* had no such provision; neutral arbitration was available only if the Joint Coast LCR failed to reach an agreement. The district court's conclusion that any hostility … is cured by the availability of neutral arbitration was neither clearly erroneous nor incorrect as a matter of law.

Ritza, 837 F.2d at 370.

The futility exception, therefore, is no more demanding under the RLA. Any difference from one case to another depends on the degree to which "the union controls grievance procedures," not on the RLA. *Dean v. Trans World Airlines, Inc.*, 924 F.2d 805, 810 (9th Cir. 1991). The standards were set out in *Clayton v. Intl. Union, United Auto., Aerospace, & Agr. Implement Workers of Am.*, 451 U.S. 679 (1981):

> [A]t least three factors should be relevant: first, whether **union officials are so hostile to the employee** that he could not hope to obtain a fair hearing on his claim; second, whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to **award him the full relief** he seeks under § 301; and third, whether exhaustion of internal procedures would **unreasonably delay** the employee's opportunity to obtain a judicial hearing on the merits of his claim. If any of these factors are found to exist, the court may properly excuse the employee's failure to exhaust.

Id. at 689 (emphasis added). *Clayton* applies here because it applies to RLA hybrid claims. *See*, e.g., *Jones v. Union Pacific R. Co.*, 968 F.2d 937, 940 (9th Cir. 1992); *see id.* at 942 (applying *Clayton*). Plaintiffs have already demonstrated that two of the three *Clayton* factors (hostility and full relief) apply here.

b. The Ninth Circuit Does Not **Require** "Collusion."

The *Glover* futility exception applies where "a formal effort to pursue contractual or administrative remedies would be absolutely futile." 393 U.S. at 331. A union acting

in concert with the carrier in furtherance of policies that are themselves a DFR violation is a common example of what qualifies for futility. However, to paraphrase *Glover*, 393 U.S. at 329, "no meaningful distinction can be drawn between discriminatory action" undertaken in concert with the carrier and that which is undertaken independent of the carrier. The result is the same—efforts to obtain relief through a grievance process controlled by the union will be futile.

US Airways' flawed argument is disproven by *Jones*. In that case, the Ninth Circuit reversed a dismissal finding that evidence that could prove that "union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim" was sufficient to establish futility. *Jones*, 968 F.2d at 942.

US Airways' flawed argument is not supported by case law. *Croston*, for example, explained that the *Glover* exception applies where the union has "unjustified hostility." 999 F.2d at 387. *Croston* merely indicated that "unjustified hostility" might be shown by evidence of collusion between the union and the railroad. *Id*. It added that mere conclusory allegations of collusion would not suffice. *Id*. This has no relevance here because Plaintiffs do not make such conclusory allegations.

Moreover, to say that Plaintiffs have "not even attempted to file a grievance and pursue arbitration" is disingenuous. Plaintiffs have been struggling to defend their seniority interests for three years. Plaintiffs fully availed themselves of the internal union procedures, as did the US Airways pilots, from September 2005 to April 2008. Now, where the US Airways pilots have essentially changed the rules for the purpose of preventing Plaintiffs from defending their interests, it is unreasonable to the point of absurdity to suggest that they should try one more time to pursue the grievance procedures. *See* Def.'s *Mot*. at 9:1-3 (demanding same).

It is time for the Court to step in.

V. CONCLUSION

For all the reasons set out above and incorporated by reference to Plaintiffs' Response in Opposition to *US Airline Pilots Association's Motion And Motion To Dismiss Or, In The Alternative, For Summary Judgment, Under Rules 12 And 56* (doc.36), Plaintiffs respectfully ask this Court to deny Defendant US Airways' Motion to Dismiss Counts One and Two.

Dated this _10th_ day of October, 2008.

SHUGHART THOMSON & KILROY, P.C.

/s/ Andrew S. Jacob

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2008, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant(s):

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s/ *Andrew S. Jacob*