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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 AIRLINE PILOTS ASSOCIATION'S (USAPA'S) MOTION TO DISMISS OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, UNDER RULES 12 AND 56 (doc. 35)***

Plaintiffs ADDINGTON, BOSTIC, BURMAN, IRANPOUR, VELEZ, and WARGOCKI file this *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) (hereinafter, "Motion"), directed at Counts Two and Three. The Court should deny the Motion because USAPA fails to raise any valid objections and it mischaracterizes Plaintiffs' claims. Further, this Court should disregard USAPA's attempt to move for summary judgment because it is inconsistent with the Court's scheduling order and it fails to comply with the Local Rules. 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 lawsuit arises from a three-year long dispute over the merger of pilot seniority lists. The factual background is set out in Section III.A of Plaintiffs' *Response to US Airways' Motion to Dismiss* and is adopted herein by reference to avoid repetition. Count Two seeks to order the Company to "negotiate with USAPA in good faith to institute Integrated Operations by adopting a single collective bargaining agreement that would implement the Nicolau List." *Compl.* at ¶ 90. Count Three claims that USAPA violated the duty of fair representation ("DFR").

II. STANDARD OF DECISION

A. The Court Only Considers Extrinsic Evidence On A Motion To Dismiss Where the Motion Challenges the Truthfulness Of Plaintiff's Jurisdictional Allegations.

Under Rule 12(b)(1) the Court determines subject matter jurisdiction in two-steps.[1] *See McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936). First, the Court determines whether the factual allegations establish jurisdiction. Then, on motion or *sua sponte*, it determines whether those allegations are "justified … by a preponderance of evidence." *Id.* "[T]he existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Kingman Reef Atoll Inv., L.L.C. v. United States*, 2008 WL 4070267, 4 (9th Cir. Sept. 4, 2008). *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) (evaluating "truthfulness" of jurisdictional allegations, not the merits of claims).

USAPA implies that, as a blanket rule under Rule 12(b)(1), "extrinsic evidence may be received." USAPA, *Mot.* at 5:10. The Court in *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136 (9th Cir. 2003), however, merely considered documents "on which the complaint necessarily relies and whose authenticity is not contested." *Id.*

[1] Unless otherwise stated, "Rules" refers to the Federal Rules of Civil Procedure.

at 1141, n.5 (citation and quotation marks omitted). The case offers no support for a blanket rule.

USAPA has submitted extrinsic evidence that does not relate to jurisdiction but rather to the merits of the underlying claims. This includes a declaration by Dennis Brennan (doc. 37), offered to show that John McIlevenna filed a grievance and that Plaintiffs did not. Plaintiffs do not rely on the impossibility of filing a grievance as a basis for jurisdiction. USAPA also submitted a declaration by Michael Cleary (doc. 38) that, in addition to affirming the factual allegations in the Complaint, improperly interprets collateral facts and offers legal opinions. Neither of these declarations contradicts any jurisdictional allegations made in the Complaint. Neither of these declarations, therefore, has material that should be considered on a Rule 12(b)(1) motion. It would be improper, therefore, for the Court to consider these declarations in its evaluation of subject matter jurisdiction.

In sum, because USAPA has not provided the Court with any evidence that contests the truthfulness of the jurisdictional allegations in the Complaint, the Court need only consider whether Plaintiffs' allegations, if true and taken in the most favorable light, support both the jurisdiction of the Court and a valid basis for relief.

B. <u>USAPA's Request for Rule 56 Ruling Is Without Merit. The Court Should Treat This As A Rule 12 Motion.</u>

"[A] motion to dismiss is not automatically converted into a motion for summary judgment whenever matters outside the pleading happen to be filed with the court." *No. Star Intl. v. Ariz. Corp. Commn.*, 720 F.2d 578, 582 (9th Cir. 1983). Rather, the court may disregard such evidence and treat the motion as a motion to dismiss. *Swedberg v. Marotzke*, 339 F.3d 1139, 1142-43 (9th Cir. 2003). In this instance, the Court has compelling reasons to do so. Having agreed to an accelerated briefing schedule for a motion to dismiss, it is unfair to expect Plaintiffs to respond to a summary judgment motion in such a narrow time frame. *See* Min. Entry (Sept. 29, 2008) (doc. 29). A

premature motion for summary judgment would require the court to grant additional time for discovery under the authority of Rule 56(f). Finally, USAPA failed to present its motion in proper form. *See* L.R. 56.1. The Court should therefore disregard the evidence filed by USAPA and decide only whether the Complaint states a valid claim.

C. The Court Should Consider The Documents Plaintiffs Attached To The Complaint As Part Of The Factual Allegations.

Under Rule 12(b)(6), the Court determines 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). It considers documents referenced in the Complaint and attached thereto where, as here, these are "central" to the claims and defendant did not question their authenticity. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). It should "assume that [the] contents 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). Defendants have provided the Court with no reason to question the validity of the documents attached as exhibits to the Complaint.

D. The Court Cannot Dismiss With Prejudice.

The Defendants have moved to dismiss on jurisdictional grounds, but seek dismissal with prejudice. This is improper. "It is … error to rule on a summary judgment motion or any other matter going to the merits where a court determines that it lacks jurisdiction over the subject matter." *O'Donnell v. Wien Air Alaska, Inc.*, 551 F.2d 1141, 1145 (9th Cir. 1977). *See also Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d 1107, 1118 (9th Cir. 1982) (same). In the context of DFR claims "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). Under no circumstances, therefore, should this Court dismiss this action with prejudice.

III. LEGAL ARGUMENT[2]

A. USAPA Has Ignored Plaintiffs' DFR Claim as Alleged

Rather than treat the allegations of the Complaint and the attached exhibits as true, USAPA has ignored those well pleaded facts, and tries to recast Plaintiffs' DFR claim into something it is not. USAPA first argues that Plaintiffs are merely a disgruntled minority, trying to "interfere" with USAPA's negotiating rights under the RLA. Not true. USAPA's argument demonstrates the problem. USAPA cannot exercise its negotiating rights for the pilots without giving fair consideration to all pilots, not just those who agree with the Union's position. The allegations of the Complaint, taken as true, demonstrate that USAPA has indeed treated Plaintiffs as a "disgruntled minority" that USAPA believes it may completely ignore without consequence. Plaintiff has not alleged that USAPA does not have negotiating rights as the union for the pilots, but rather that USAPA is exercising that right in a specific way that results in Plaintiffs losing their jobs and careers, while those favored by USAPA do not. The allegations of the Complaint describe conduct by USAPA that is breathtaking in both its arrogance and blatant disregard for the rights of Plaintiffs. The Court should not permit USAPA to get away with avoiding the allegations of the Complaint and recasting the claims in a way that USAPA thinks it can defend.

USAPA also argues that it has "discretion" to renegotiate the issue of seniority integration, and that a challenge to such discretion is not a valid DFR claim. USAPA's discretion is neither unrestricted nor insulated from judicial review, especially under the facts alleged in the Complaint. Plaintiffs have specifically alleged that USAPA was formed to embody and perpetuate interests of the East Pilots whose date-of-hire position was deemed "unfair and inequitable" at the Nicolau arbitration. Plaintiff has described

[2] Plaintiffs' *Response to US Airways Motion to Dismiss* demonstrates that they brought a valid hybrid claim and are excused from exhausting administrative remedies. They adopt those arguments by reference and do not repeat them here.

the factual basis for that allegation and USAPA has not refuted it in any material way. The fact that these improper motives of the US Airways pilots are now expressed by a new union does not change the fact alleged by Plaintiffs that the union was formed for the sole, express and *published* purpose to evade their promise to be bound by the Nicolau Award.

As more fully set forth in Plaintiffs' *Response to US Airways' Motion to Dismiss*, after the Nicolau Award was issued US Airways pilots used their majority status to form a new union whose express purpose was to ensure that the Nicolau award was not implemented and "would never see the light of day" after the East Pilots exercised their majority voting rights. The union promised its members that the US Airways pilots' date-of-hire preference would be implemented, regardless that this issue had been decided against them in the Nicolau Award. Plaintiffs' DFR claim is therefore focused on the fact that the new union was formed for the express purpose of rejecting a final and binding arbitration award. USAPA has some discretion when it acts properly, but it is not permitted to breach its duty of fair representation and hide behind labels like "disgruntled minority" and "discretion."

B. Count Three States A Valid DFR Claim.

"[T]he legal duty of fair representation is oriented toward the concerns of minorities." *Air Wisconsin Pilots Protection Committee v. Sanderson,* 909 F.2d 213, 217 (7th Cir. 1990). This is so because, "[i]ndividual employees have no separate negotiating rights; they must look exclusively to the union for protection of their interests." *Letter Carriers v. NLRB*, 595 F.2d 808, 811 (D.C.Cir. 1979).

1. USAPA Failed To Give Plaintiffs' Interests Due Consideration When Implementing Its Seniority Policy.

"[T]he essence of the duty of fair representation" is that the union, after ascertaining the preferences of the majority, must in some reasonable way evaluate whether it should "carry out the majority will at the expense of the minority." *Alvey v.*

General Elec. Co., 622 F.2d 1279, 1289 (7th Cir. 1980). Before a union "lawfully could follow the dictates of the majority" it must "determine[] in good faith that the decision [of the majority] reflected a proper resolution of conflicting but legitimate interests." *Id.* Failure to do so is to act "arbitrary, discriminatory or in bad faith." *Id*. *See also Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) (same).

A decision of the majority does not reflect a proper consideration of the legitimate interest of the minority if the majority decides by voting its individual interests. *Letter Carrier*s, 595 F.2d at 811.

> [I]t was contemplated that each union member would vote his personal preference. The union had committed itself to adopt the outcome of the union members' referendum as its selection for the days-off policy to be instituted by the employer. There was to be no further negotiation with the employer, who was indifferent to the choice of a days-off policy.

Id. When this occurs, "the union membership d[oes] not function in a representative capacity." *Id*. Where, as in *Letter Carriers*, the procedure itself is flawed, a court should find a DFR violation and reject the policy without looking at its merits: "Given the understanding that each union member would vote his personal preferences, evidence of disparate impact is unnecessary to prove that the interests of non-members have been ignored." *Id*.

Seniority disputes in particular cannot be decided solely by considering the preference of the majority. *See Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 798-99 (7th Cir. 1976). In that context, because the members know how the resolution of the dispute will personally affect them, courts presume that members vote their personal preference.

> [S]uch decisions **may not be made solely for the benefit of a stronger, more politically favored group over a minority group.** To allow such arbitrary decision-making is contrary to the union's duty of fair representation….

Id. at 798-99 (citations omitted, emphasis added). Along these same lines, a state court found that "it would undoubtedly have resulted in a vote to give themselves [the union

majority] preference" where there was a seniority dispute between the majority and a minority. *O'Donnell v. Pabst Brewing Co.*, 107 N.W.2d 484, 489 (Wis. 1961).

In Count Three, Plaintiffs claim that USAPA violated the DFR because it "failed to give due consideration to the[ir] interests … when deciding USAPA Seniority Policy." *Compl.* at ¶ 99. There is no question that USAPA Seniority Policy directly conflicts with the findings and Award made in the Nicolau arbitration. Directly contrary to the Award, USAPA Seniority Policy favors the East Pilot majority group, whose arguments Nicolau rejected as inequitable and unfair, over the minority West Pilots.

Plaintiffs also allege that after USAPA became the certified labor representative (April 18, 2008) it "[r]e-affirmed [its] Seniority Policy without making any effort to give due consideration to West Pilot interests." *Id.* at ¶ 66(a). *See also id.* at ¶ 66(e) (USAPA stated that it would never negotiate a CBA that made any reference to the Nicolau seniority award). These actions were undertaken without making any attempt to give consideration to the interests of the West Pilots. This was akin to the procedures in *Letter Carriers* and *Barton Brands* because USAPA gave consideration only to the preferences of the majority. This lack of procedural due consideration was USAPA's first DFR violation.

2. USAPA's Authority is Being Misused by Its Majority Members (East Pilots).

Under circumstances closely analogous to this matter, the Seventh Circuit recognized, in *Air Wisconsin*, that a union violates the DFR if it is a tool misused by the majority in a seniority integration dispute. In *Air Wisconsin* an arbitration conducted according to ALPA Merger policy established an integrated seniority list (just as occurred in this case). In response, the larger of the two merging pilot groups tried, unsuccessfully, to prevent implementation of that seniority list by "ousting ALPA in favor of a union not pledged to defend the arbitrators' award." 909 F.2d at 217. The

court held that, had the majority been successful, the new union would have been in violation of the DFR:

> [A]n attempt by a majority of the employees in a collective bargaining unit to gang up against a minority of employees in the fashion apparently envisaged by the plaintiffs could itself be thought a violation of the duty of fair representation by the union that the majority used as its tool.

Id.

Other courts have correctly held that a union should be charged with the improper motives of an outspoken majority that is the driving force behind the union's actions, even where the union makes some attempt to give the appearance of due consideration to minority interests. *See Alvey*, 622 F.2d at 1289.

> The determination of whether [union] officials subsequently acted arbitrarily, discriminatorily or in bad faith or subjugated their own judgments to majority hostile pressures … [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. To ask a jury to determine whether a union official acted contrary to his duty by presenting a proposal for negotiation without reference to the origins of the proposal is unnecessary and misleading.

Id. at 1290.

Plaintiffs alleged that USAPA was created and then used by the East Pilot majority to evade their contractual obligations to treat the Nicolau List as "final, binding, fair and equitable." *Compl.* at ¶¶ 104, 57(b). They alleged, therefore, that the East Pilots succeeded where the *Air Wisconsin* majority failed. This demonstrates USAPA's second DFR violation by demonstrating that USAPA is merely a tool used to perpetuate the improper motives of the East Pilot majority who refuse to abide by the Nicolau Award.

3. USAPA Promised To Disregard The Minority's Interests If Elected The Bargaining Representative.

A union violates the DFR if, during a representation contest, it promises to favor the majority on seniority issues. *Truck Drivers & Helpers, Loc. Union 568 v. NLRB*, 379 F.2d 137, 144 (C.A.D.C. 1967). *Truck Drivers* looked at union certification following a merger. UTE represented the larger group of workers. The Teamsters represented the

other. Both unions sought certification from the NMB. UTE's "campaign promise to discriminate against the Teamster employees [on seniority was] an unfair labor practice" because a "threatened action which would violate a union's fair representation duty" itself "constitutes an unfair labor practice." *Id.* Plaintiffs alleged that USAPA promised to pursue a date-of-hire seniority policy (that favored East Pilots and harmed West Pilots disproportionately) if elected the bargaining representative. *Compl.* at ¶¶ 62, 107. USAPA, therefore, made the same improper promise that was held to be a breach of the DFR in *Truck Drivers.* This demonstrates USAPA's third DFR violation.

4. Plaintiffs Have Standing to Challenge USAPA's Motives.

In *Ford Motor Co.*, 345 U.S. 330, the Supreme Court, stated that a union has a statutory obligation to serve the interests of all workers "without hostility to any." *Id.* at 337. Where a union "is engaging in hostile discrimination against a portion of the membership…, the employee so discriminated against has a cause of action." *Mount v. Grand Intl. Bhd. of Locomotive Engrs.*, 226 F.2d 604, 607-08 (6th Cir. 1955). "[H]ostile discrimination of any kind is prohibited and that the prohibition is not limited to discrimination on account of race." *Hardcastle v. Western Greyhound Lines*, 303 F.2d 182, 185 (9th Cir. 1962). "[U]nder the Railway Labor Act, the protection afforded by this doctrine … encompass[es] all forms of hostile discrimination." *Gainey v. Brotherhood of Ry. and S. S. Clerks, Freight Handlers, Exp. and Station Emp.*, 313 F.2d 318, 323 (3d Cir. 1963). "[T]he gravamen of the rule is 'hostile discrimination.'" *Id.*

Plaintiffs allege hostile discrimination without challenging either the merits of USAPA's seniority policies or whether USAPA can properly revisit seniority. *Contra.* USAPA, *Mot.* at 7:6-8 (mischaracterizing claims). Rather, Plaintiffs allege that USAPA **improperly** revisited the seniority issue. *See, e.g., Barton Brands*, 529 F.2d at 798-99 (holding that it was improper for union to revisit seniority issue for political reasons).

Plaintiffs alleged three bases to prove the hostile element of discrimination: (1) ignoring the minority when forming a seniority policy; (2) forming a new union committed to defeat the minority's seniority interests; and (3) promising to violate the DFR if elected. Because USAPA does not address any of these points, the Court should find that USAPA conceded that the allegations of Count Three state a claim within the Court's subject matter jurisdiction.

5. Count Three Is Timely Because The Duty Arose And Misconduct Occurred After March 2008.

USAPA incongruously argues that Plaintiffs' claims are both too early and too late. With respect to the latter point, Plaintiffs' claims are timely because they were brought within six months of USAPA's DFR violations. "[A] six-month limitations period … governs hybrid suits brought under the RLA." *Kelly v. Burlington Northern R. Co.*, 896 F.2d 1194, 1197 (9th Cir. 1990). This limitation is met when the complaint is filed. *West v. Conrail*, 481 U.S. 35, 39 (1987). USAPA's arguments about ALPA are frivolous because ALPA's DFR violations are irrelevant. What is relevant is the accrual of *this* DFR claim, which could not accrue before USAPA had a duty that it could breach.

USAPA did not owe a duty before April 18, 2008, because "a labor organization that is not the exclusive representative of a bargaining unit owes no duty of fair representation to the members of the unit." *McNamara-Blad, v. The Assn. of Professional Flight Attendants*, 275 F.3d 1165, 1169-70 (9th Cir. 2002) (quotation and alteration marks omitted). Count Three, therefore, did not accrue prior to April 18, 2008. Plaintiffs, therefore, had at least until October 18, 2008, to file. They timely filed on September 4, 2008.

C. <u>USAPA's Jurisdictional Arguments Are Without Merit</u>

1. USAPA Itself Demonstrates Grievance Procedures Are Futile.

USAPA makes a disingenuous argument that its handling of John McIlvenna's grievance demonstrates that resort to the System Board to vindicate West Pilot seniority

rights is not futile. *See* USAPA, *Mot.* at 11:7-12:1. In fact, USAPA has already determined, whether Mr. McIlvenna is technically "afforded access to a System Board to hear his case," *id*. at 11:17-18, that he will **not** be permitted to present his case to a neutral. J. McIlvenna, *Aff.*, ¶ 12 (Oct. 10, 2008); *see also Plt.'s Resp. to US Airways' Mot.* at § IV.A.2 (discussing operation of System Board).

Moreover, the procedures that USAPA opened to Mr. McIlvenna have little bearing to show what procedures would be open to other West Pilots because the Company asserts that these procedures were opened to him "*on a non-precedential, non-referable basis, to allow [his] grievance to proceed through the dispute resolution processes of the Transition Agreement*." McIlvenna, *Aff.* at ¶ 16. Of course, Defendants made this exception for Mr. McIlvenna **after** this lawsuit was filed, apparently to create an appearance of fairness for this Court.

According to Defendants, the Transition Agreement arbitration clause does not cover individual claims. If so, then those claims are within the jurisdiction of the courts. *See Renneisen v. Am. Airlines, Inc.*, 990 F.2d 918, 923 (7th Cir. 1993). "[W]here the adjustment board cannot provide a remedy that will protect a party from the consequences of a violation of the Railway Labor Act, the district court has an equitable jurisdiction to do so, whether or not the violation seems 'major' or 'minor' in an ordinary-language sense." *Air Line Pilots Assn., Intl. v. UAL Corp., Intl. Assn. of Machinists & Aerospace Workers*, 874 F.2d 439, 445 (7th Cir. 1989) (Posner, CJ).

It is particularly disappointing to see that on September 26, 2008, the same day that USAPA asserted in open court that Mr. McIlvenna's grievance might obtain the relief sought by Plaintiffs in this action, USAPA knew that the Company had already denied his grievance and knew that he would not be able to appeal his grievance to a neutral arbitrator. McIlvenna, *Aff.* at ¶¶ 18-21. After receiving the Company's denial of his grievance, Mr. McIlvenna requested an appeal, "conditional on BOTH the Company's, and USAPA's, agreement to have a fair and impartial hearing with a hearing

board solely comprised of the neutral arbitrator." *Id*. at¶ 20. Mr. McIlvenna does not expect that USAPA will agree to this. *See id.* at ¶ 21. USAPA could not do more to prove futility if that was its goal.[3]

2. Plaintiffs Have Demonstrated that It Would Be Futile To Use The Grievance Procedures.

Plaintiffs do not rely on the mere composition of the System Board to demonstrate futility. *Contra*. USAPA, *Mot.* at 12:8-11. Rather, Plaintiffs' argument (as made more fully in their response to US Airways' Motion) is that futility is demonstrated by three elements: (1) that the US Airways' grievance procedures enable USAPA to prevent a neutral from hearing a grievance; (2) that USAPA would prevent a neutral from hearing a grievance similar to this action; and (3) that USAPA is motivated to do so by improper hostility to the interests that Plaintiffs would vindicate in this action. *See* Plts.' *Resp. to US Airways' Mot.* at § IV.B.1. That argument is incorporated here by reference and, therefore, not repeated.

3. Plaintiffs' DFR Claim Is Ripe.

USAPA argues that despite being brought too late, Plaintiffs' claim has also been brought too early. Not so. A DFR claim becomes ripe at "the point at which any injury to (the union member) allegedly caused by the Union became fixed and reasonably certain." *Archer v. Airline Pilots Assn. Intl.*, 609 F.2d 934, 937 (9th Cir. 1979) (internal quotation marks omitted), *accord Price v. So. Pac. Trans. Co.*, 586 F.2d 750, 752-53 (9th Cir. 1978). A DFR "cause of action … is deemed to have accrued" and limitations begin to run once "it is possible to prove the extent of future injuries without resorting to undue speculation." *Id.* at 938. Hence, injury can occur in the future, so long as it can be proven. It has long been the case, under the RLA, that "[a] person does not have to await

[3] Plaintiffs note that John McIlvenna is not seeking quite the same relief that they seek here, which is an order directing US Airways and USAPA "to negotiate and implement a single collective bargaining agreement that fully implements the Nicolau List." *Compl*. at ¶ 113(C).

the consummation of threatened injury to obtain preventive relief. *Mount*, 226 F.2d at 608. Rather, "[i]f the injury is certainly impending that is enough." *Id.*

Plaintiffs' injuries are furloughs and missed promotions. *Compl.* at ¶¶ 67-71. These furloughs and missed promotions occurred because US Airways failed to negotiate in good faith. *See id.* at ¶ 91 (alleging that US Airways "has not been negotiating with USAPA in good faith"). USAPA's decision to resist implementation of the Nicolau Award has already caused missed-promotion injuries. Had USAPA not made this improper decision, the Company would by now be promoting West Pilots according to the Nicolau seniority list. *Id.* at ¶ 69. The furlough-injuries became "reasonably certain" on August 21, 2008, when US Airways sent out furlough letters. *Id.* at ¶¶ 81, 84. Some West Pilots were furloughed on October 1. More West Pilots are scheduled for furlough on November 1, 2008. The Company would not have selected premerger West Pilots for furlough if it had adopted the Nicolau Award seniority list that binds these parties. That is enough to make this claim ripe.

USAPA misleads the Court by suggesting that DFR claims arising from wrongful negotiations are not ripe until there is an executed contract. That simply is not the case. Indeed, *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262 (7th Cir. 1985), recognized the accrual of a DFR claim where the consequence of wrongful negotiation was "the failure of ALPA and United to reach agreement." *Id.* at 1273. It does not matter, therefore, that *Flight Officers* recognized a second, alternative cognizable injury, one that accrued several months later when a contract was signed: "Causes of action based on entry into collective bargaining agreements accrue … when the contract is signed." *Id*. at 1273. The court recognized both injuries as valid bases for accrual of a DFR claim.

The other cases cited by USAPA also support ripeness. *Dolan v. Assn. of Flight Attendants*, 1996 WL 131729 (N.D.Ill. 1996), explained that "the duty of fair representation … is not intended to protect minority employees from an adverse

bargaining position alone that may or may not lead to adverse terms and conditions of employment." *Id*. at 4. While it is true that an adverse position itself is not cognizable injury, a claim is stated where, as here, adverse consequences result from the adverse bargaining position. Plaintiffs have an actual injury, and therefore a ripe claim, because they allege that USAPA's adverse bargaining position caused adverse consequences—furloughs and missed promotions.

Nor does the case of *Marquez v. Screen Actors Guild, Inc.*, 124 F.3d 1034 (9th Cir. 1997), control because it addressed a different claim than what Plaintiffs alleged in their Complaint. In *Marquez*, the claim was that the union "breached its duty of fair representation by negotiating and entering into a CBA with two unlawful terms." *Id.* at 1037. *Marquez* only stands for the self-evident propositions that a contract cannot cause direct harm until it has been executed, and that a claim on such contract is not ripe until that happens. The present matter is distinguishable because it alleges direct harm that occurred from a failure to make a contract.[4] It is undisputed that furloughs and missed promotions have occurred, and that more damages are certain and imminent. Plaintiffs have stated a ripe claim for relief.

4. The Norris-LaGuardia Act Does Not Apply

"Norris-LaGuardia does not prevent courts from issuing injunctions to **enforce positive duties** imposed by other federal labor statutes." *Camping Const. Co. v. District Council of Iron Workers*, 915 F.2d 1333, 1344 (9th Cir. 1990). *Id*. at 1344 (emphasis added); *see also Lukens Steel Co. v. United Steelworkers of Am. (AFL-CIO)*, 989 F.2d 668, 678 (3d Cir. 1993) (noting that an exception is made "to reconcile the [Norris-LaGuardia Act] with other federal statutes"). The duty of fair representation is a positive duty imposed by other federal labor statutes. *See Camping*, 915 F.2d at 1344. Hence, *Bernard v. Air Line Pilots Assn., Intl.*, 873 F.2d 213 (9th Cir. 1989), approved an order

[4] Plaintiffs do not address *Rugemer v. American Natl. Can Co.* Cir. R. 36-3(c).

quite analogous to that sought here in Count Two. *Id*. at 215. The details of the order in *Bernard* are quoted below to demonstrate for the Court that there is nothing unusual in the relief sought here by Plaintiffs.

> By way of remedy, the district court: (1) directed ALPA to apply its current merger policy providing for negotiation, mediation and arbitration in order to resolve merger and seniority integration disputes between the two groups of pilots; (2) directed ALPA to treat the former Jet America pilots as a separate ALPA-represented group for purposes of implementing this policy and to appoint three Jet America pilot merger representatives; (3) vacated and set aside the October 6, 1987, seniority integration agreement between ALPA and Alaska Airlines; and (4) 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.

Id.[5]

Finally, hybrid claims are closely identified with *Glover v. St. Louis-S.F. Ry. Co.*, 393 U.S. 324 (1969), which itself is an example of a court providing injunctive relief that might otherwise have violated Norris-LaGuardia. In the context of a hybrid claim, *Glover* approved "an injunction to cause the defendants to cease and desist from their discrimination against petitioners and their class and 'for any further, or different relief as may be meet and proper." *Id.* at 326. In effect, Plaintiffs ask for nothing more.

The Norris-LaGuardia Act does not impair this Court's jurisdiction.

5. Plaintiffs Do Not Challenge The NMB's Certification Of USAPA.

Plaintiffs do not challenge USAPA's NMB certification. *Contra.* USAPA, *Mot.* at 15:19-22. USAPA does not cite cases that equate a hybrid claim with challenging the exclusive jurisdiction of the NMB. *McNamara-Blad* does not do this. Rather, it merely referred to NMB certification to define the point at which a union's DFR is triggered.

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[5] *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 a CBA negotiated between the post-merger carrier and ALPA, was "tainted by the duty of fair representation violation." *Id.* at 218. *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. That is exactly the relief Plaintiffs seek in Count Two.

See id. at 1170, n.1. Although the *McNamara-Blad* court declined to entertain the hybrid claim, it did so because the DFR claim was based *solely* on conduct that preceded that certification. *Id.* at 1170 ("the union was not the exclusive bargaining agent for the Reno flight attendants when it negotiated the seniority agreement with American"). Such is not the case here.

The plaintiffs in *Landry v. Air Line Pilots Assn., Intl.*, 901 F.2d 404 (5th Cir. 1990), tried to avoid the *DelCostello* hybrid claim six-month limitations by characterizing the carrier's misconduct "as an improper attempt to decertify ALPA as the bargaining agent for the pilots." *Id*. at 414. The court avoided this argument by noting that the plaintiffs "do not explain why they believe this characterization makes *DelCostello* inapplicable, nor do they state which statute of limitations then becomes applicable or why." *Id*. at 414, n.24. It merely held that, if plaintiffs were making a claim other than a hybrid claim, it would be under the exclusive jurisdiction of the NMB. *Id*. The court never found that plaintiffs were challenging NMB certification. *Id.*

Finally, *Indep. Fedn. of Flight Attendants v. Cooper*, 141 F.3d 900 (8th Cir. 1998), works directly against USAPA's argument. *Cooper* held that "causes of action arising out of representation disputes" conflict with the NMB's jurisdiction only where any remedy that could be fashioned "would be the functional equivalent of resolving the representation dispute." *Id.* at 903. *Cooper* is distinguishable for three reasons. First, it had an overt representational dispute. *Id.* at 901 ("This case is the latest in a series of cases spawned by a dispute between two unions over the right to represent the flight attendants that Trans World Airlines (TWA) employs.").

Second, the NMB had previously addressed the issue that was being raised in the hybrid claim. *Id*. at 903 ("The Mediation Board has already determined that IAM did not engage in unlawful conduct when it utilized Cooper during the organizing campaign."). Finally, the remedy sought would have been inconsistent with action already taken by the NMB. *Id*. Because none of these circumstances are found here, *Cooper* does not apply.

Plaintiffs are not asking the Court to violate the NMB's exclusive jurisdiction and it is not necessary to do so to resolve the basic issue of whether USAPA has committed one or more DFR violations.

6. Plaintiffs' Right To Demand Good Faith Negotiations Arises Under Contract, Not The RLA.

Benzel v. Allied Pilots Assn., 387 F.3d 298 (3d Cir. 2004), addressed individual employees seeking to use 45 U.S.C. § 152, Second & Ninth, which require a carrier to negotiate with the "representative" of its employees, to compel a carrier to negotiate with them as individuals. *Id*. at 319. *Benzel* merely holds that these provisions of the RLA do not provide a basis to compel a carrier to negotiate with individual employees. Plaintiffs do not make the *Benzel* claim. Rather, they seek to compel US Airways to negotiate with USAPA (not them), and they rely on contract, not statute, to establish their right to bring this action. *Compl.* at ¶ 113(B).

The pertinent contract provision was US Airways' agreement "to negotiate (in good faith) amendments to the [America]West CBA and to the East [US Airways] CBA necessary to allow Integrated Operations … using a single integrated seniority list and a single CBA." *Compl.* at ¶ 34(j). US Airways agreed to follow the final and binding decision of the Nicolau Award. Plaintiffs have the right to enforce this provision because US Airways agreed that Transition Agreement provisions would be enforceable by all beneficiaries. *Id.* at ¶ 33. Plaintiffs raise an entirely different claim than was raised in *Benzel*. Plaintiffs, therefore, have standing to demand that US Airways negotiate in good faith with USAPA.

IV. CONCLUSION

For all the reasons set out above and incorporated by reference to Plaintiffs' *Response to US Airways' Motion To Dismiss* (doc.30), Plaintiffs respectfully ask this Court to deny Defendant USAPA's Motion to Dismiss Counts Two and Three.

Dated this 10th day of October, 2008.

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/s/ Andrew S. Jacob

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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*

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