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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 REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO THE US AIRLINE PILOTS ASSOCIATION'S MOTION TO DISMISS**

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I. SUMMARY

In order to avoid dismissal of its action on jurisdictional grounds, the Plaintiffs must both satisfactorily allege a DFR violation related to the alleged contractual violations and, in addition, establish that submitting their contractual dispute to a System Board is excused by the narrowly interpreted futility doctrine. Plaintiffs' DFR claim is based on the unsustainable theory that USAPA has a legal obligation to conform to the internal seniority integration policies of a decertified predecessor union. The law does not support such a thesis. Federal case law is clear that seniority is not permanent even *after* it has been implemented – let alone where, as here, a decertified predecessor union declined to pursue implementation of its own proposal.[1] USAPA's policy goal – to honor the concept of date-of-hire seniority – has been deemed a core value of the labor movement and an equitable basis for seniority integration.

Even if the Plaintiffs are found to have properly alleged a DFR violation by USAPA, they fail to satisfy the futility doctrine established by the Ninth Circuit in *Bautista v. Pan Am. World Airlines, Inc.*, 828 F.2d 546, 552 (9th Cir. 1987), which holds that futility cannot be based on a mere disagreement over contractual interpretation between a union and the members it represents, but rather must be based on invidious discrimination or unjustified

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[1] Plaintiffs attempt to present the Court with a red herring by portraying the former East and West pilot groups as distinct legal entities that "agreed" to "final and binding" arbitration on the issue of seniority integration. (Dkt. No. 44, 1:17). However, the former East and West pilot groups had no choice of whether or not to submit the issue to arbitration, because at that time, they were both bound by the internal merger policy of the now decertified union that represented them. Under this same flawed legal reasoning, Plaintiffs argue that the Transition Agreement was an "ordinary commercial contract" between the pilots. (Dkt. No. 44, 3:22). The East and West pilots are not, as collective groups, distinct legal entities that could enter into any such commercial contract, but assuming they could, it is well settled that the applicable collective bargaining agreements would supersede any such contract. *Melanson v. United Air Lines*, 931 F.2d 558, 561 (9th Cir. 1991); *Delapp v. Cont'l Can Co.*, 868 F.2d 1073, 1076 (9th Cir. 1989); *Wien Air Alaska v. Bachner*, 865 F.2d 1106, 1110 (9th Cir. 1989); *Musicians Union of Las Vegas, Local No. 369 v. Del E. Webb Corp.*, 1984 U.S. App. LEXIS 18509, *6 (9th Cir. Sept. 18, 1984); *Hendriks v. Air Line Pilots Ass'n*, 696 F.2d 673 (9th Cir. 1983).

hostility. To allow the Plaintiffs to circumvent the System Board's jurisdiction would defeat the policy underlying the Railway Labor Act and open the federal courts' floodgates.

II. ARGUMENT

1. The Court May Consider the Evidence Submitted by USAPA and May Dismiss the Case With Prejudice

Plaintiffs incorrectly argue that the Court may not consider the Declarations submitted by USAPA. As the moving party, USAPA brought a factual attack on subject matter jurisdiction based on the Brennan and Cleary Declarations. As such, this court "may review evidence beyond the complaint . . ." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *Vartanian v. AMFA Local 9*, 2008 U.S. App. LEXIS 14645 (9th Cir. July 8, 2008). Additionally, contrary to Plaintiffs' contention, USAPA never argued that its motion was to be *automatically* converted into a motion for summary judgment. Rather, USAPA moved in the *alternative* for summary judgment, and such a disposition is warranted under proper circumstances. *Rosales v. United States*, 824 F.2d 799, 802-803 (9th Cir. 1987).[2]

Plaintiffs also argue that because USAPA moved to dismiss on jurisdictional grounds, dismissal with prejudice would be "improper." (Dkt No. 45, 3:18-19). Plaintiffs go so far as to declare that "*[u]nder no circumstances* . . . should this Court dismiss this action with prejudice." (*Id*. at 3:26-27) (emphasis supplied). However, USAPA also moved to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), pursuant to which dismissal with prejudice may be entered.[3]

2. Plaintiffs' Three Asserted Bases for Finding a DFR Violation Fail to State a Claim

Plaintiffs' Opposition serves to dramatically narrow the DFR issues before the Court. Plaintiffs do not "challenge" USAPA's actions or policy, but only its "motives":

> Plaintiffs allege hostile discrimination without challenging either the merits of USAPA's seniority polices or whether USAPA can properly revisit seniority. ... Rather, Plaintiffs allege that USAPA **improperly** revisited seniority. *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).

(Dkt. No. 45, 5:12-14, 9:21-25) (emphasis supplied).

[2] As the Court advised the parties: "the briefing is going to walk and talk like a motion for summary judgment. . ." (Dkt. No. 41, 9:2-3).
[3] *See Steckman v. Hart Brewing, Inc*., 143 F.3d 1293, 1298 (9th Cir. 1998).

Plaintiffs' abandonment of any challenge to the substance of USAPA's seniority policies or its right to revisit seniority is compelled by law. As already briefed by USAPA, date-of-hire seniority integration is a standard union policy that courts have recognized as well within a union's wide range of reasonableness, and the right to revisit previously implemented seniority arrangements is also well established. (Dkt. No. 36, 7:4-9:8). The Plaintiffs allege three bases to their "motive"-based DFR claim: (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. (Dkt. No. 45, 10:1).

a. <u>Formation of Seniority Policy</u>

The Plaintiffs find fault with USAPA's formation of its seniority integration policy in that it did not give "due consideration" to the interests of a "minority." As a threshold matter, USAPA contends that there is no acceptable means of evaluating what Plaintiffs contend is USAPA policy until that policy finds its expression in an agreement with US Airways. However, even assuming that USAPA adopted and implemented a pure date-of-hire seniority integration policy based on the determination of a democratic majority:

> A rational person could conclude that **dovetailing** seniority lists in a merger … **serves the interests of labor as a whole**. … The propriety of dovetailing, treating the two groups identically, follows directly. If the union's leaders took account of the fact that workers at the larger firm preferred this outcome, so what? **Majority rule is the norm**. Equal treatment does not become forbidden because the majority prefers equality, even if formal equality bears more harshly on the minority.

Rakestraw v. United Airlines, Inc., 981 F.2d 1524, 1533 (7th Cir. 1992) (emphasis supplied).

The case at bar, however, does not involve a majority's adoption of a pure date-of-hire seniority integration policy. Rather, the only official embodiment of USAPA policy – the USAPA Constitution – balances the date-of-hire objective with "reasonable conditions and restrictions to preserve each pilot's un-merged career expectations." (Dkt. No. 36, 4:1). Thus, USAPA, as a matter of constitutional mandate, does in fact consider the "minority" interests of West pilots.

Plaintiffs cite a single case in support of their "due consideration" argument, *Barton Brands, Ltd. V. NLRB*, 529 F.2d 793, 798-99 (7th Cir. 1976). Not only are *Barton Brands*' facts entirely distinguishable, but both the decision's own discussion of then-existing

precedent, and the Seventh Circuit's subsequent treatment of *Barton Brands*, support USAPA's course of conduct.

In *Barton Brands*, the union had *negotiated* and obtained membership ratification of a seniority integration that dovetailed the employees working at two plants referred to as Barton and Glencoe. *Id*. at 795. When the employer subsequently closed one of the two plants, the *same* union re-negotiated the contractual integration in order to *endtail* the employees at the smaller Glencoe plant, thereby shifting the burden of layoffs *exclusively* to the smaller group. *Id*. at 796. The Seventh Circuit upheld the NLRB's finding of a DFR violation based on its determination that the union had rejected a previously negotiated, and implemented, date-of-hire seniority integration in favor of endtailing the Glencoe employees, for no apparent reason other than political expediency. *Id*. at 800.

USAPA is not attempting to reverse a seniority arrangement that it had previously negotiated, ratified, and implemented in favor of the endtailing of a disfavored minority. As held in the Seventh Circuit's subsequent *Rakestraw* decision, USAPA's policy of seeking pilot integration on a date-of-hire basis cannot be deemed arbitrary and capricious since dovetailing "serves the interests of labor as a whole." *Rakestraw*, 981 F.2d at 1533.

Significantly, even in the *Barton Brands* case, the Seventh Circuit recognized, and distinguished its own holding from existing NLRB precedent permitting a union to negotiate the revocation of a seniority integration instituted pursuant to a "final and binding" arbitration process where the union considered the arbitration decision to be objectionable. 529 F.2d at 799-800 (*citing Associated Transport, Inc.,* 185 N.L.R.B. 631 (1970)).

b. Alleged Misuse of Authority

For this argument, Plaintiffs rely primarily on dicta contained within the Seventh Circuit's decision in *Air Wisconsin Pilots Prot. Comm. v. Sanderson*, 909 F.2d 213 (7th Cir. 1990). However, the *Air Wisconsin* dicta, which questioned the propriety of re-visiting an implemented seniority integration, was clearly rejected by the Seventh Circuit's subsequent decision in *Rakestraw*, 981 F.2d 1524 (7th Cir. 1992).

Rakestraw is particularly instructive with respect to the application of DFR principles to seniority because it addresses both the impermanency of determinations related to contractual seniority as well as the right of a democratic majority to insist on dovetailing.

The *Rakestraw* decision consolidated disputes at two different carriers: the first involving the TWA/Ozark merger and the second the modification of a "permanent" seniority agreement between United Airlines ("United") and ALPA in the aftermath of the 1985 strike.

In the TWA case, the court, however, found nothing wrong with ALPA's acquiescence to the majority's preference for a date-of-hire integration despite allegations that ALPA had improperly disregarded its own Merger Policy. *Id*. at 1533.

The United portion of the *Rakestraw* case concerned ALPA's negotiation of a reversal of the relative position of two distinct pilot groups despite an express contractual promise "never" to do so. *Id*. at 1528-29. The Seventh Circuit reversed the district court's decision, which was based on the contractually guaranteed permanency of the prior seniority arrangement, holding:

> "Forever" in labor relations means "until the next collective bargaining agreement." Excepting vested rights, a promise lasts only until renegotiation or the expiration of the agreement. *Litton Financial Printing Division v. NLRB*, 115 L. Ed. 2d 177, 111 S. Ct. 2215, 2226 (1991).

Id. at 1536.

Unlike ALPA in the United portion of the *Rakestraw* decision, USAPA does *not* seek to re-negotiate a *previously implemented* seniority arrangement that it had *agreed to* as a *permanent* settlement of a seniority dispute. Unlike ALPA with respect to the TWA/Ozark pilot integration, USAPA is not disregarding its own Merger Policy, but rather abiding by its own constitutional mandate in pursuing date-of-hire integration.

c. Alleged Promise to Disregard Minority Interests

Plaintiffs rely on one case, *Truck Drivers & Helpers Local Union 568 v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967), to support this argument. In *Truck Drivers*, however, the union violated its DFR by promising to evade the equitable concept of date-of-hire seniority integration. *Id*. at 139. The promise made in *Truck Drivers* bears no resemblance to USAPA's constitutional seniority integration policy of date-of-hire plus preservation of each pilot's un-merged career expectations.[4] In fact, the D.C. Circuit in *Truck Drivers* described straight date-of-hire seniority integration as "equitable and feasible." *Id*. at 143 n.10. By

[4] *See* discussion infra, p. 3; *see also* Dkt. No. 36 at 4:1-4.

adopting the additional consideration of "un-merged career expectations" into its policy, USAPA has committed itself to a greater consideration of "minority" interests than the *Truck Drivers* court, and the federal judiciary in general, have required.

Finally, Plaintiffs' "promise"-based argument is simply not ripe. USAPA's policy "promise" is embodied in its constitution, a document that incorporates both date-of-hire and career expectation considerations. Accordingly, until there is a final agreement with US Airways concerning seniority integration, there can be no means of determining whether USAPA has either violated its balanced constitutional principles or violated DFR standards by adopting a final agreement that is 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).

3. Plaintiffs' DFR Claims are Time Barred and Not Ripe

According to Plaintiffs, USAPA "incongruously" argues that Plaintiffs' claims are both too early and too late. (Dkt No. 45, 10:9). However, Plaintiffs' claims fall into two distinct temporal categories: 1) that the Nicolau decision should "*already*" have been implemented, and 2) that USAPA's *future* negotiations must be constrained by the Nicolau decision. The first claim is barred by the six-month DFR limitations period. The second claim is not ripe.

In arguing that its action is "ripe," Plaintiffs contend that the non-implementation of the Nicolau list "has already caused missed-promotion injuries." (Dkt. No. 45, 13:7). In terms of accrual, Plaintiffs' contention begs the question: when was union action first taken to prevent the implementation of the Nicolau list in violation of Plaintiffs' asserted DFR rights?

The answer to the accrual question is found in Plaintiffs' own briefs and pleadings. Plaintiffs allege that acts evincing "hostile motivation" began as early as July 25, 2007. (Dkt. No. 44, 10:18). These acts include the determination of an ALPA representative on July 29, 2007 that "the Nicolau Award will never see the light of day." (*Id*. at 10:23; State Complaint ¶ 91). On August 15, 2007, ALPA's US Airways Master Executive Council "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.*" (Dkt. No. 44, 10:24)(emphasis supplied). Reinforcing their position on accrual, Plaintiffs allege in their parallel state action that ALPA East MEC Chairman Jack Stephan is personally liable for breaching a contractual obligation to implement the Nicolau list in August, 2007. (State

Compl. ¶¶ 92, 123-126). Thus, if DFR liability for the non-implementation of the Nicolau list exists, it arose no later than August, 2007, due to ALPA's failure to fulfill its obligation under ALPA Merger Policy which required it to "use all reasonable means at its disposal to compel the company to accept and implement the merged seniority list." (Complaint Ex. C, p.8); *Bernard v. Air Line Pilots Ass'n,* 873 F.2d 213 (9th Cir. 1989)(ALPA DFR liability based on the breach of its own Merger Policy).

The Plaintiffs' right to pursue a DFR claim based on the Nicolau decision expired at the latest in mid-February, 2008, six months after ALPA representatives took effective action "to prevent implementation of the Nicolau list," since the loss of promotion opportunities would have followed immediately thereafter. As Plaintiffs have observed, 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.'" (Dkt. No. 45, 12:17) (*quoting Archer v. Airline Pilots Assn. Intl.,* 609 F.2d 934, 937 (9th Cir. 1979)). The Plaintiffs' sole response is that the subsequent certification of USAPA on April 18, 2008, revivified claims that had died over two months before. There is no basis for recognizing any such Lazarus-type doctrine based on the arrival of a successor union. *Cf.*, *Myers v. Southern California Gas Co*., 2000 U.S. App. LEXIS 15430 (9th Cir. June 27, 2000) (explaining limited circumstances when tolling or equitable estoppel applies to DFR statute of limitations). In any event, ALPA's failure to implement its own internal policy cannot be the basis for a claim against USAPA.

4. Plaintiffs Have Failed to Plead and Cannot Demonstrate Futility [5]

In *Bautista*, the Ninth Circuit held that, in order to gain access to the federal courts, the employee must demonstrate that resort to the Adjustment Board would be "absolutely futile." 828 F.2d at 552. The requisite futility cannot be based on a "mere disagreement" with the union concerning contractual interpretation. Rather, the employee must demonstrate "invidious discrimination or unjustified hostility." *Id.* Plaintiffs have failed to plead and cannot now show that such "invidious discrimination" or "unjustified hostility" exists in this

[5] USAPA hereby adopts and incorporates the arguments set forth by Defendant US Airways on this issue contained within its Motion to Dismiss (Dkt. No. 30) and its Memorandum in Reply to Plaintiffs' Opposition.

case. At best, what exists in this case is a "mere disagreement," which is not enough to demonstrate futility.

Plaintiffs argue that futility is demonstrated by the following 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." (Dkt. No. 45, 12:8).

a) Access to a System Board Neutral

The Plaintiffs' own submissions belie the first and second arguments above. In fact, USAPA and US Airways have already agreed to make the necessary arrangements to have the McIlvenna grievance heard before a System Board chaired by a neutral. (Second Brennan Decl. ¶ 4). Additionally, in order to eliminate the potential for financial bias on the USAPA Board members' part, USAPA has made a determination to only appoint union Board members who would not be adversely affected by the possible implementation of the Nicolau list. (*Id.*). The fact that the express terms of the Transition Agreement provide that only the "parties" to the Agreement have the right to file a grievance does not alter the fact that these same parties have agreed to modify that restriction to provide Mr. McIlvenna with the necessary access.

In another twist, Plaintiffs assert that it would be "futile" for them to submit their case to a System Board in which USAPA representatives and US Airways representatives sit as panelists. (Dkt. No. 44, 6:13). However, courts have held that, even in the context of hotly contested seniority disputes, employees seeking to circumvent the jurisdiction of the System Board may not do so based on conclusory allegations concerning the supposed bias of company or union panelists. *United Farm Workers v. Arizona Agric. Employment Relations Bd.*, 727 F.2d 1475, 1478 (9th Cir. 1984) (rejecting claim of inherent bias because of failure to allege any instance of actual bias or financial interest); *Del Casal v. Eastern Airlines, Inc.*, 634 F.2d 295 (5th Cir. 1981) (refusing to set aside System Board decision because grievant could not show partiality or bias of **individual** members of the Board); *Wells v. Southern Airways, Inc.*, 517 F.2d 132, 134-35 (5th Cir. 1975) (same); *Wells v. Southern Airways, Inc.*, 616 F.2d 107, 111 (5th Cir. 1980) (same); *Stumo v. United Air Lines, Inc.*, 382 F.2d 780, 787

(7th Cir. 1967), *cert. denied*, 389 U.S. 1042 (1968) (rejecting plaintiff's claim that she could not receive a fair hearing based on the composition of the System Board); *Arnold v. United Air Lines, Inc*., 296 F.2d 191 (7th Cir. 1961) (rejecting pilots' claims of bias and prejudice predicated upon the composition of the System Board); *Edwards v. United Parcel Service Inc*., 974 F. Supp. 1043 (W.D. Ky. 1997), *remanded on other grounds*, 181 F.3d 100 (6th Cir. 1999) (stating that "we cannot be so cavalier about predicting how four members will react to days of testimony and evidence"); *McFarland v. Allied Pilots Ass'n*, Case No. 3:03-cv-00984 (N.D. Texas Sept. 22, 2005) (rejecting grievants' request to have their grievance heard by a single neutral arbitrator because of lack of showing of partiality or bias on the part of **individual** members).

Of particular note are the *Arnold* and *McFarland* decisions, which involved grievances in the context of seniority disputes. In *Arnold*, a group of United pilots, who were formerly flight engineers, brought grievances asserting that the system seniority list failed to recognize the period each was employed as a flight engineer prior to being employed as a pilot. Despite the presence of a conflict between two discrete employee groups – pilots and former flight engineers – the court declined to hold that the two union pilot-members of the Board were "hostile" to the grievants. *Arnold*, 296 F.2d at 195. In *McFarland*, former TWA pilots, who were subjected to disadvantageous seniority integration by the dominant American pilot group, sought access to a neutral-only System Board in order to challenge the seniority-based furlough of former TWA pilots. The court held that the former TWA pilots were not entitled to have their case decided solely by the neutral appointed to that Board, in the absence of a showing of partiality or bias on the part of the individual American-pilot and/or Company Board members.

b) Plaintiffs Have not Demonstrated Invidious Discrimination or Unjustified Hostility

Plaintiffs' only basis for alleging "improper hostility" is that USAPA is hostile "to the interests that Plaintiffs seek to vindicate." (Dkt. No. 44, 10:7). However, Plaintiffs' claim in this respect falls markedly short of satisfying the Ninth Circuit's futility standard.

Along with such airline unions as the Association of Flight Attendants, the Transport Workers Union, the International Association of Machinists, and others, USAPA has as an

objective, a seniority integration based on date-of-hire principles with appropriate protections based on pre-merger career expectations. The federal courts have held that dovetailing is a fair and equitable approach that advances the interests of the labor movement – hardly the basis for the necessary finding of "invidious discrimination or unjustified hostility." Moreover, USAPA's actions in no way demonstrate unjustified hostility to the West pilots. To the contrary, USAPA is actively working to vindicate the contractual rights and seniority interests of the West pilots, even at the expense of East pilots.

First, USAPA is currently processing a grievance that covers the Plaintiffs' entire first cause of action. (Dkt. No. 36, 4:23-5:1). The remedy which USAPA seeks would have the effect of placing new-hire East pilots on furlough and allowing pre-merger West pilots to take their places. USAPA's position is dictated by its good faith interpretation of the Transition Agreement and its *non-discriminatory* adherence to seniority principles, even when these seniority principles have an adverse impact on East pilots.

Second, there is no basis for the allegation that USAPA is hostile to the interests of the Plaintiffs, because the USAPA Constitution mandates that USAPA is required to protect the interests of the Plaintiffs by implementing "reasonable conditions and restrictions to preserve each pilot's un-merged career expectations." (Dkt. No. 36, 4:1). USAPA's creation of a constitutional policy mandating consideration of the West pilots' "minority" interests precludes any finding of invidious discrimination or unjustified hostility.

Finally, even if USAPA had chosen to adhere to a straight date-of-hire seniority integration method, this could not be characterized as "invidious discrimination" or "unjustified hostility" because federal courts have consistently construed this seniority integration method to be inherently non-discriminatory and well within a union's wide range of reasonableness. (Dkt. No. 36, 7:4-9:8).

5. Plaintiffs Lack Standing Under the RLA to Bring Their Failure to Negotiate Claim and an Arbitrator Would Have Jurisdiction to Enforce any Contractual Obligation to Negotiate in Good Faith

In an effort to side-step their lack of standing under the RLA, Plaintiffs argue that their Count II failure to negotiate in good faith claim is based on an implied contractual right under the Transition Agreement rather than an RLA statutory right. (Dkt. No. 45, 17:14-17). The Plaintiffs then proceed to argue that the System Board is precluded from providing a

remedy for the violation of a contractual bargaining obligation and that, therefore, the federal court must assert jurisdiction. (Dkt. No. 44, 11:16). However, arbitrators do in fact have the right to fashion remedies in the event of the violation of a contractual obligation to negotiate.[6] Therefore, there is no rationale for disregarding the RLA's mandate that contractual disputes fall within the exclusive jurisdiction of the System Board.

6. The Norris-LaGuardia Act Does Apply

Plaintiffs argue that the Norris-LaGuardia Act is not applicable because it does not prevent the court from enjoining a breach of the duty of fair representation. (Dkt. No. 45, 14:17). However, Plaintiffs' own pleadings show that they do not seek to simply enjoin the alleged breach of the DFR. Rather, Plaintiffs seek to enjoin the Company from furloughing West pilots before it has furloughed East pilots who were either on furlough or not yet hired at the time of the merger, and Plaintiffs also state that "*ultimately*" they "seek an order directing the Company and USAPA to negotiate a CBA that would implement the arbitration integrated seniority list." (Dkt. No. 44, 2:15). This is the kind of injunctive relief to which the NLGA applies. *Int'l Ass'n of Machinists and Aerospace Workers v. Tenn. Valley Auth.*, 976 F. Supp. 1114 (M.D. Tenn. 1997) (holding that NLGA § 104(f) restricts the issuance of injunctions aimed at interfering with collective bargaining negotiations).[7]

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[6] Frank Elkouri & Edna Asper Elkouri, How Arbitration Works, at 754-55 (6th ed. 2003) (*citing Milprint, Inc*., 51 LA 748 (Somers, 1968) (ordering cancellation of subcontract based on company's failure to comply with contractual obligation to negotiate over subcontracting); *Philip A. Hunt Chemical Corp*., 70 LA 1182 (Malkin, 1978) (awarding damages for company's failure to comply with contractual obligation to negotiate over subcontracting); *Rock Island Refining Corp*., 70 LA 322 (High, 1978) (same); *Kaiser Foundation Hospitals*, 61 LA 1008 (Jacobs, 1973) (same); *U.S. Steel Corp*., 54 LA 1207 (Duff, 1970) (same); *Milprint, Inc*., 46 LA 724 (Graff, 1966) (same)).

[7] *Bernard*, 873 F.2d 213 (9th Cir. 1989), cited by the Plaintiffs, is distinguishable, because in that case, the court found that ALPA had breached its DFR by ignoring its own Merger Policy in reaching an integrated seniority agreement that discriminated against the Jet America pilots. The court issued an order to set the tainted agreement aside. Here, there has been no DFR finding, and plaintiffs do not seek to set aside any agreement, but rather seek to enjoin furloughs and dictate collective bargaining.

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Respectfully Submitted,

Dated: October 17, 2008 By:

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CERTIFICATE OF SERVICE

This is to certify that on the date indicated herein below a true and accurate copy of the foregoing pleading, *to wit*,

- Memorandum Of Points And Authorities In Reply To Plaintiffs' Response In Opposition To The US Airline Pilots Association's Motion To Dismiss;
- Attachments to Memorandum;
- Certificate of Service

were electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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And further that paper hard copies were provided to The Honorable Neil V. Wake, District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.

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