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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**

10 DON ADDINGTON, *et al.*,

11 Plaintiffs,

12 vs.

13 US AIRLINE PILOTS ASSOCIATION,
14 and US AIRWAYS, INC.,

15 Defendants.

CASE NO. 2:08-CV-1633-NVW

**PLAINTIFFS MOTION FOR LEAVE TO
FILE DISPOSITIVE MOTION**

16 Plaintiffs, pursuant to the Court's Order of February 20, 2009, hereby
17 request leave of the Court to file a motion for partial summary judgment,
18 pursuant to Rule 56(d)¹, that USAPA has been and is in violation of the duty
19 of fair representation because its "constituted purpose [i]s to impose a date-of-
20 hire scheme on the minority membership in disregard of an arbitrated
21 compromise both sides agreed to and deemed fair in advance" and because it
22 has "followed through on that aim without any corresponding benefit to the
23 pilots as a whole." (Order, 11:13-17 (Nov. 20, 2008) (doc. 84).) "By granting
24 summary judgment [on] ... liability ... and leaving the remedies by way of
25 injunction ... and the like to be determined later, [the Court will] ...
26 crystallize and reduce the issues." *Harms, Inc. v. Tops Music Enterprises,*
27 *Inc., of Cal.*, 160 F. Supp. 77, 87 (D.C. Cal. 1958).

28 ¹ All citations to "Rules" are to the Federal Rules of Civil Procedure.

1 If granted leave to file this motion, Plaintiffs will demonstrate as a matter
2 of law that, prior to the April 2008 NMB election, USAPA “adopted and
3 announced a bargaining policy on seniority merger [a date-of-hire seniority
4 policy] motivated only by a desire to win the votes of a majority of the
5 employees.” *Truck Drivers & Helpers, Local Union 568 v. NLRB*, 379 F.2d
6 137, 145 (D.C. Cir. 1967). Plaintiffs will show that announcement of this
7 policy and other actions effectively made the NMB election a popular
8 referendum on the Nicolau Award such that USAPA improperly delegated its
9 decision-making function to a referendum of employees “with the
10 understanding that their actions will be motivated solely by their own
11 personal considerations.” *Branch 6000, Nat’l Ass’n of Letter Carriers v.*
12 *NLRB*, 595 F.2d 808, 812 (D.C. Cir. 1979).

13 After it became the certified bargaining agent, USAPA improperly cast off
14 a brokered arrangement that the pilots it represented, through its
15 predecessor, had agreed to treat as final and binding. USAPA thereby
16 effectively “renounced any good faith effort to reconcile the interests” of both
17 pilot groups. *Truck Drivers*, 379 F.2d at 142-43. 142-43. USAPA continues to
18 target the Nicolau Award in a way that gives scant consideration to the West
19 Pilots’ interest.

20 Plaintiffs are entitled to partial summary judgment because “an attempt
21 by a majority of the employees in a collective bargaining unit to gang up
22 against a minority of employees in the fashion” as outlined above is “a
23 violation of the duty of fair representation by the union that the majority used
24 as its tool.” *Air Wisconsin Pilots Protection Committee v. Sanderson*, 909 F.2d
25 213, 217 (7th Cir. 1990).

26 Finally, Plaintiffs will demonstrate that USAPA cannot defeat their notion by
27 arguing the merits of their proposed date-of-hire seniority scheme. That issue might be
28 relevant to a claim akin to the one brought in *Air Line Pilots Assn., Intl. v. O’Neill*, 499

1 U.S. 65 (1991), but is not relevant here because Plaintiffs' "legal objection to USAPA's
2 date-of-hire seniority policy is not directly substantive, but rather procedural." (Order at
3 9:20-21).

4 The alleged breach of the duty stems from the bad faith manner of USAPA's
5 determined attempts to evade the Award. Irrespective of whether seniority
6 rights "vest" in a proprietary sense, a union may not arbitrarily abridge those
rights after a merger solely for the sake of political expediency.

7 (Id. at 9:22-26). See also *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1533 (7th
8 Cir. 1992); *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 800 (7th Cir. 1976).

9 In sum, Plaintiffs respectfully ask the Court to grant them leave to file a Rule
10 56(d) motion for partial summary judgment that USAPA has been, and still is, in
11 violation of the duty of fair representation.

12 Dated this 27th day of February, 2009.

13 **POLSINELLI SHUGHART, PC**

14
15
16 By /s/ Andrew S. Jacob

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20 I hereby certify that on this 27th day
21 of February 2009, I electronically
22 transmitted the foregoing document to
23 the U.S. District Court Clerk's
24 Office by using the ECF System for
filing and transmittal.

25 By /s/ Andrew S. Jacob