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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 ASSN., *et al.*,

14 Defendants.

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

(Consolidated)

**MOTION IN LIMINE #4:  
TO EXCLUDE EVIDENCE &  
ARGUMENT SHOWING THAT USAPA  
ACTED RATIONALLY AFTER IT  
DETERMINED IT WOULD DISREGARD  
THE NICOLAU AWARD.**

15 Don ADDINGTON, *et al.*,

16 Plaintiffs,

17 vs.

18 Steven H. BRADFORD, *et al.*,

19 Defendants.

Case No. 2:08-CV-1728-PHX-NVW

21 The Court should preclude USAPA from introducing testimony or  
22 evidence that USAPA's merger committee acted rationally in formulating a  
23 seniority policy that did not consider the Nicolau Award in any way, shape  
24 or form. Whether USAPA acted arbitrarily after it committed the DFR is of  
25 no relevance to the factual issues the jury will decide, and cannot establish  
26 an affirmative defense. This Motion is supported by a separately filed  
27 Memorandum that supports all of Plaintiffs' motion *in limine* and by the  
28 Memorandum of Points and Authorities that follows.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Whether the results of USAPA's actions are rational is not at**  
3 **issue.**

4 Unfair representation can be established with proof that "a union's  
5 conduct towards a member of the collective bargaining unit is arbitrary,  
6 discriminatory or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)  
7 (emphasis added). "[E]ach of these requirements represents a distinct and  
8 separate obligation." *Simo v. Union of Needletrades, Indus. & Textile*  
9 *Employees, Southwest Dist. Council*, 322 F.3d 602, 617 (9th Cir. 2003)  
10 Evidence that disproves only one of these requirements of fair  
11 representation is of no consequence to the claim that one of the other  
12 requirements was violated because each "requires a **separate analysis.**" *Id.*  
13 (emphasis added). Hence, disproving one component does not disprove  
14 another.

15 Although the Supreme Court may have raised the bar for proving  
16 arbitrariness in *O'Neill*, it reaffirmed the doctrine that a violation of any one  
17 of these "three components of the duty" is unfair representation. *Air Line*  
18 *Pilots Assn. Intl. v. O'Neill*, 499 U.S. 65, 77 (1991). Hence, whether or not  
19 USAPA acted arbitrarily, its "powers are 'subject always to complete good  
20 faith and honesty of purpose in the exercise of its discretion.'" *Humphrey v.*  
21 *Moore*, 375 U.S. 335, 343 (1964).

22 The Court has recognized that Plaintiffs are not making a claim based  
23 in the *O'Neill* arbitrariness component of the duty of fair representation.  
24 Plaintiffs' "legal objection to USAPA's date-of-hire seniority policy is not  
25 directly substantive, but rather procedural." *Addington v. US Airline Pilots*  
26 *Assn.*, 588 F.Supp.2d 1051, 1060 (D. Ariz. 2008). Hence, it is of no import  
27 here whether the end-result of USAPA's actions appears "to be irrational."  
28 *O'Neill*, 499 U.S. at 67.

1 **II. USAPA Plans to Introduce Evidence That Its Seniority Proposal is**  
2 **Rational.**

3 USAPA intends to introduce testimony, evidence, and argument to the  
4 effect that it did not violate the *O'Neill* arbitrariness component of the duty  
5 of fair representation. USAPA proposes, for example, that the jury should  
6 decide whether it “advance[ed] a lawful and traditional goal of promoting  
7 date of hire seniority.” (*USAPA Draft Proposed Pretrial Order*, 12:22-23  
8 (Mar 31, 2009)). Whether USAPA’s date-of hire is or is not a traditional  
9 means of seniority integration is of no consequence to Plaintiffs’ claims for  
10 DFR liability, or to any contested issue of fact the jury will be called on to  
11 decide. Whether USAPA has proposed a plan for seniority integration that  
12 has some rational basis is neither relevant nor admissible under the  
13 undisputed facts in this case.

14 Yet USAPA proposed, as an undisputed fact, a lengthy description of its  
15 seniority proposal. (*Id.* at 10, ¶ 58.) In addition, USAPA has identified  
16 numerous exhibits that would show only the substance of its seniority  
17 proposal and its efforts to negotiate a collective bargaining agreement.  
18 These include: Exhibit 1012 (Status of Contract Negotiations 11.08.08), 1013  
19 (Negotiating dates), 1098 (US Airways Seniority Integration/Date of Hire  
20 Conditions and Restrictions), and 1181-1249, which are various proposals  
21 and related documents from negotiations between USAPA and the Airline.  
22 In addition, USAPA has identified numerous exhibits and CDs that clearly  
23 have been created since USAPA was formed and since the presentation of  
24 USAPA’s seniority proposal to the Company in September 2008. These  
25 exhibits show analyses of USAPA’s seniority proposal and compare that  
26 proposal to the Nicolau Award.

27 Evidence of USAPA conduct that occurred after the events upon which  
28 Plaintiffs base their DFR claims is of no consequence. USAPA’s actions

1 after-the-fact are of no consequence to deciding why USAPA was  
2 constituted, how USAPA acted during its election campaign, or whether  
3 USAPA gave due consideration to the Nicolau Award when it formulated its  
4 seniority plans. Such evidence, therefore, is not relevant and not  
5 admissible.

6 **III. Conclusion**

7 Plaintiffs, therefore, ask the Court to order, *in limine*, that USAPA may  
8 not present evidence and may not make arguments in regard to any exhibits  
9 identified in the attached Exhibit A and any other exhibits that only reflect  
10 actions taken by USAPA after it determined that it would disregard the  
11 Nicolau Award.

12 Dated this 7<sup>th</sup> day of April, 2009.

13 POLSINELLI SHUGHART PC

14  
15 **KATIE V. BROWN**

16 By: \_\_\_\_\_

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21 **CERTIFICATE OF SERVICE**

22 I hereby certify that on April 7, 2009, I electronically transmitted the  
23 foregoing document to the U.S. District Court Clerk's Office by using the  
24 CM/ECF System for filing and transmittal of a Notice of Electronic Filing to  
25 the following CM/ECF registrant(s).

26 I further certify that on April 7, 2009, I served a paper copy of the  
27 foregoing document by electronic delivery on those who are registered  
28 participant(s) of the CM/ECF System:

I further certify that on April 7, 2009, I delivered a paper courtesy  
copy of the foregoing document and the Notice of Electronic Filing to the  
assigned Judge:

s/ **KATIE V. BROWN**

**EXHIBIT A**

**Exclude Evidence & Argument Showing that USAPA  
Acted Rationally After It Determined It Would  
Disregard the Nicolau Award**

**Exhibit No.**

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