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

|                                                                                                                                 |                                                                                                                                                                                                              |
|---------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 10 Don ADDINGTON, <i>et al.</i> ,<br>11 Plaintiffs,<br>12 vs.<br>13 US AIRLINE PILOTS ASSN., <i>et al.</i> ,<br>14 Defendants.  | CASE NO. 2:08-CV-1633-PHX-NVW<br>(Consolidated)<br><b>MOTION IN LIMINE #5:<br/>TO EXCLUDE EVIDENCE &amp;<br/>ARGUMENT THAT WOULD BE USED<br/>TO EXCUSE USAPA FOR<br/>COMPLYING WITH ITS<br/>CONSTITUTION</b> |
| 15 Don ADDINGTON, <i>et al.</i> ,<br>16 Plaintiffs,<br>17 vs.<br>18 Steven H. BRADFORD, <i>et al.</i> ,<br>19 Defendants.<br>20 | Case No. 2:08-CV-1728-PHX-NVW                                                                                                                                                                                |

21 The Court should exclude evidence and argument that USAPA intends  
22 to make that it is excused from DFR liability, or has a valid defense, because  
23 it is only following the Constitution adopted by the majority of its members.  
24 USAPA's Constitution does not control where it conflicts with the duty of  
25 fair representation. Such evidence is, therefore, neither relevant nor  
26 admissible on the DFR issues to be decided by the jury. This Motion is  
27 supported by a separately filed Memorandum that supports all of Plaintiffs'  
28

1 motions *in limine* and by the Memorandum of Points and Authorities that  
2 follows.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. Compliance with USAPA’s Constitution is not a defense.**

5 A union constitution is merely a contract between the union and its  
6 members. *Korzen v. Loc. Union 705, Intl. Bhd. of Teamsters*, 75 F.3d 285,  
7 288 (7th Cir. 1996). As a general principal, a contract cannot modify a  
8 statutory duty unless the statute expressly provides otherwise. *See*  
9 *Davidowitz v. Delta Dental Plan of California, Inc.*, 946 F.2d 1476, 1481 (9th  
10 Cir. 1991) (“[A]n ERISA fiduciary cannot avoid liability for breach of duty by  
11 claiming to be acting under a plan provision.”). A similar rule applies to a  
12 union under the Railway Labor Act. *See Steele v. Louisville & N.R. Co.*, 323  
13 U.S. 192, 203-04 (1944) (union is not “entitled to take the benefit of a  
14 contract which the bargaining representative is prohibited by the statute  
15 from making”). The RLA does not provide otherwise. It is, therefore, of no  
16 consequence here that USAPA’s Constitution requires a date-of-hire  
17 seniority integration. USAPA did not change its duty of fair representation  
18 by requiring in its Constitution that it disregard minority views.

19 **II. USAPA plans to argue that its Constitution’s date-of-hire provision  
20 excused disregarding the Nicolau Award.**

21 USAPA is poised to argue that it should be excused for disregarding the  
22 Nicolau Award because its Constitution requires date-of-hire seniority  
23 integration. USAPA lists its Constitution and bylaws as Exhibit 1006. In  
24 its proposed pretrial order, USAPA contends that it “has a Constitutional  
25 objective to ‘maintain uniform principles of seniority based on date of hire  
26 and the perpetuation thereof.’” (USAPA Proposed Pretrial Order, 11:16-18  
27 (Mar 31, 2009).) None of this constitutes an affirmative defense. Whether  
28 USAPA’s self-authored Constitution or its contractual promises to its

1 members requires integration by date-of-hire or not has no relevance to  
2 whether USAPA improperly disregarded the Nicolau Award.

3 **III. Conclusion**

4 Plaintiffs ask the Court to order, *in limine*, that USAPA not present  
5 Exhibit 1006 or any similar evidence or make arguments that its  
6 Constitution creates a defense to unfair representation or in any way  
7 lessens its duty of fair representation.

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

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17 **CERTIFICATE OF SERVICE**

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

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

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

28  
s/ **KATIE V. BROWN**  
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