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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, US AIRWAYS, INC., Defendants,	Case No. 2:08-cv-1633-PHX-NVW (Consolidated) **DEFENDANT USAPA'S COMBINED MOTIONS IN LIMINE WITH POINTS AND AUTHORITY**
Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, Plaintiffs, vs. Steven H. BRADFORD, Paul J. DIORIO, Robert A. FREAR, Mark. W. KING, Douglas L. MOWERY, and John A. STEPHAN, Defendants.	Case No. 2:08-cv-1728-PHX-NVW

TO: PLAINTIFFS' COUNSEL, PLAINTIFFS AND ALL COUNSEL OF RECORD, TAKE NOTICE OF THE FOLLOWING MOTIONS:

I. INTRODUCTION.

Defendant USAPA submits this Combined Motion In Limine in conformance with the Court's pretrial orders. In its "Order Setting Final Pretrial Conference" (Doc. # 251, ¶ 7), the Court instructed as follows:

> The parties shall file and serve all motions in limine no later than April 7, 2009. Responses to motions in limine shall be filed on or before April 14, 2009. No replies will be permitted. Each motion in limine shall include proposed language for the order in limine being sought from the Court, and the proposed language shall state with precision the evidence that is subject to the proposed order and the limitation or exclusion placed on the evidence. Counsel shall be prepared to argue the merits of such motions at the Final Pretrial Conference.

In addition, the Court has advised the parties that proper in limine motions serve an "evidentiary function" (on the record, March 6, 2009; Tr. 11:24). Mindful of the Court's instructions, and for its convenience, all in limine motions are combined into one document and provided herein below.

II. MOTIONS, POINTS, AUTHORITIES AND PROPOSED LANGUAGE.

1) Motion To Exclude Evidence Offered To Show Any Challenge To The Election Of USAPA, Or Its Certification By The NMB.

Proposed Language For Order Sought:

"Evidence of any kind challenging the legitimacy or lawfulness of the US Airways pilots' election of USAPA, or the legitimacy or lawfulness of USAPA's certification by the National Mediation Board, shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because such evidence is not relevant and its admission risks confusing the jury or unfairly prejudicing Defendant. (FRE 402, 403):

First, there can be no dispute over the legality of USAPA's election or the NMB's certification of USAPA. No challenge with the NMB was ever lodged nor does the Complaint allege otherwise. Plaintiffs have never challenged the election or certification in the instant case; in fact they have represented they make no representational claim whatsoever (Doc. # 45 at 15:5 – "Plaintiffs Do Not Challenge The NMB's Certification Of USAPA"). Moreover, this Court has already and correctly determined that the instant suit raises no representational issues:

> Nor is this claim an improper attempt to challenge USAPA's certification, as USAPA suggests. There is no representational dispute in this case, nor does the dispute depend only upon conduct occurring prior to the certification of USAPA. (Doc. # 84[1] at 13:22).

Second, the legitimacy or lawfulness of the US Airways pilots' election of USAPA, or the legitimacy or lawfulness of USAPA's certification by the National Mediation Board, is within the exclusive jurisdiction of the NMB. *McNamara-Blad v. Ass'n of Prof'l Flight Attendants*, 275 F.3d 1165, 1170 n. 1 (9th Cir. 2002). Any challenges to pre-certification election conduct should have been submitted to the NMB in a timely manner in accordance with the NMB Representation Manual. The

[1] Reported at 588 F. Supp. 2d 1051 (November 20, 2008); 2008 U.S. Dist. LEXIS 95214.

appropriate remedy for any allegedly improper election conduct would have been limited to a re-run election. *Truck Drivers & Helpers, Local Union 568 v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967). Finally, admission of such evidence would be unfairly prejudicial to Defendant, or risk confusing the jury, because of its similarity to Plaintiffs' claim that USAPA "promised to follow its improperly derived seniority policy if elected." (Doc. # 86, ¶ 117).

2) <u>Motion To Exclude Evidence Offered To Show Implementation Of The Nicolau List Was Possible *Prior To* Negotiation Of A Single CBA.</u>

Proposed Language For Order Sought:

"Evidence offered to prove that implementation of the Nicolau List was possible *prior* to negotiation of a single collective bargaining agreement shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language. Evidence suggesting that the Nicolau Award could be implemented *prior* to negotiation or ratification of a single CBA should be excluded as unfairly prejudicial, confusing and irrelevant (FRE 402, 403) because:

First, in considering the Transition Agreement ("TA") in the context of motions to dismiss, this Court already – and correctly – found that the TA is crystal clear that there can be no seniority integration list implemented unless and until it is part of a newly negotiated and ratified CBA:

- Doc. # 84 at 4:8 – "Separate operations under separate seniority lists would continue until two events took place: the completion of an integrated seniority

list and the negotiation of a single collective bargaining agreement.";

- Doc. # 84 at 6:2 – "US Airways has maintained separate East and West Operations under separate seniority lists, as the Transition Agreement expressly entitles it to do until operations are consolidated and a merged seniority list effectuated."

Second, any question about whether or not the Nicolau Award could be implemented before a single CBA is ratified was already dismissed, and correctly so, as *outside this Court's jurisdiction*. Consequently, it was relegated to the exclusive jurisdiction of the System Board of Adjustment. Currently pending before that Board are the claims contained in Counts I and II of Plaintiffs' Complaint. Count II expressly pled that, "according to the West CBA terms found in the Transition Agreement, after Defendant US Airways accepted the Nicolau List, it was obligated to negotiate with USAPA in good faith to institute Integrated Operations by adopting a single collective bargaining agreement that would implement the Nicolau List." (Doc. # 86, ¶ 100; same at Doc. # 1, ¶ 90). In Count II, Plaintiffs also alleged that the Company was in "breach of the West CBA terms found in the Transition Agreement" precisely because it had "not been negotiating with USAPA in good faith" to "implement the Nicolau List." (Doc. # 86, ¶ 101; same at Doc. # 1, ¶ 91).

But, after nearly a full day of hearing and after briefing, this Court squarely held that the alleged failure to negotiate implementation of the Nicolau List as pled was outside of the Court's jurisdiction under the Railway Labor Act:

> Both of the claims [counts I and II] against the airline arise under the operative terms of the Transition Agreement: the first alleges a violation of its substantive terms, and the second alleges a violation of the

> obligation imposed by that agreement to exert every reasonable effort in negotiations. These disputes are deemed "minor" in the Railway Labor Act parlance because they involve the 'interpretation or application of collective bargaining agreements.' *Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Aloha Airlines, Inc.*, 776 F.2d 812, 815 (9th Cir. 1985). In minor disputes, the Board of Adjustment provides the exclusive remedy. (Doc. # 84 at 14:13).

Therefore, to expose the jury to evidence offered to prove a claim over which this Court has no jurisdiction risks admission of irrelevant evidence, unfair prejudice to Defendant, and confusion of the jury.

3) <u>Motion To Exclude Evidence Offered To Prove Count I .</u>

Proposed Language For Order Sought:

"Evidence offered to prove Count I, including breach of those West CBA terms found in the Transition Agreement requiring furlough of all pilots on the New Hire Seniority list, i.e. furlough out of order, shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because such evidence is not relevant (FRE 402) and admission would risk unfair prejudice or confusion of the jury (FRE 403):

First, the Court dismissed Count I as outside of the Court's jurisdiction and within the exclusive jurisdiction the System Board of Adjustment. (Doc. # 84 at 14:13).

Second, because this Court correctly dismissed Count I, Plaintiffs have now conceded that, "No jury would be able to decide, therefore, whether the Company breached the CBA." (Doc. # 161 at 2:26).

Third, admission would unfairly prejudice USAPA because a jury may tend to blame USAPA for furloughs executed by the Company that USAPA has already arbitrated in its "TA No. 9" grievance on behalf of West pilots.

Fourth, admission risks confusion of the jury because it may tend to focus on job loss by West pilots rather than on the allegations that USAPA did not fairly represent West pilots in adopting its constitutional seniority integration policy.

4) Motion To Exclude Evidence Offered To Prove Count II.

Proposed Language For Order Sought:

"Evidence offered to prove Count II, including that the Company breached the West CBA terms found in the Transition Agreement by not negotiating with USAPA in good faith to adopt a single CBA implementing the Nicolau List, i.e., failure to negotiate in good faith, shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because such evidence is not relevant (FRE 402) and admission would risk unfair prejudice or confusion of the jury (FRE 403):

First, the Court dismissed Count II as outside of the Court's jurisdiction and within the exclusive jurisdiction the System Board of Adjustment. (Doc. # 84 at 14:13).

Second, because this Court correctly dismissed Count II, Plaintiffs have now conceded that, "No jury would be able to decide, therefore, whether the Company breached the CBA." (Doc. # 161 at 2:26).

Third, admission would unfairly prejudice USAPA because a jury may tend to blame USAPA for actions for which Plaintiffs blame an absent (from trial) Company.

Fourth, admission risks confusion of the jury because Count III alleges that USAPA *caused* Count II: "Because USAPA failed to give due consideration ... it has caused ... US Airways to breach its" CBA. (Doc. # 86, ¶ 111). (*See also* Transcript Oct. 29, 08; 43:2 – "THE COURT: but see Count 2 is *inseparable* from Count 3." [emphasis added]).

5) <u>Motion To Exclude Evidence Offered To Prove Plaintiffs' May 2009 Arbitration Claims.</u>

Proposed Language For Order Sought:

"Evidence offered to prove claims that Plaintiffs have been ordered to pursue, and are now pursuing, before the System Board of Adjustment in the scheduled May 2009 arbitration hearing, shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because such evidence is not relevant (FRE 402) and admission would risk unfair prejudice or confusion of the jury (FRE 403):

First, for the same reasons that evidence offered to prove Counts I or II should be excluded, so must evidence offered to prove any claims by Plaintiffs now properly before the Adjustment Board; in substance, they are the same claims.

Second, there is particular risk of unfair prejudice or confusion with the

admission of evidence that will be, or logically could be, offered to prove Plaintiffs' arbitration claims. The risk arises from the intertwined nature of Count II, now relegated to arbitration, with Count III, which this Court has ordered submitted to a jury:

> THE COURT: But see, Count 2 is inseparable from Count 3. Whether the employer has breached a duty to negotiate in good faith is entirely dependent on whether they [Plaintiffs] make their case that the union has breached its duty of fair representation. So I don't see how you can arbitrate one and not the other. You can't decide one and not the other, whether it's an arbitrator or me. (Transcript October 29, 2008; 43:2-9).

Third, the System Board is exclusively responsible for determining whether any individual pilot has standing to assert a claim for an alleged breach of any implied good faith obligation that may be read into the terms of the Transition Agreement, or whether, consistent with Railway Labor Act precedent, any good faith bargaining obligation exists exclusively as between the labor union and the company. *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298 (3d Cir. 2004). Any consideration of evidence related to an alleged failure by either US Airways or USAPA to bargain in good faith toward a single collective bargaining agreement would impermissibly subvert the exclusive jurisdiction of the System Board.

The problem of prejudice is exacerbated because the jury will hear (on April 28) Count III before the Adjustment Board will hear (on May 27) Count II, thereby compelling the jury to decide facts without the legal framework and contractual interpretation that can only be provided by the System Board.

6) Motion To Exclude Exhibit Nos. 32, 172, 173, 174, 175, 215, 218, 320 regarding Any Evidence Offered To Show Six East Pilots Serving In The West Were Displaced Back To The East.

Proposed Language For Order Sought:

"Evidence relating to the six East pilots flying within West operations who were allowed to displace back to East operations after being furloughed from West operations, including Plaintiffs' Trial Exhibit Nos. 32, 172, 173, 174, 175, 215, 218, and 320 shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because such evidence is not relevant and admission risks confusing the jury (FRE 402, 403) because:

First, there is no dispute that the six East pilots who were flying within East operations retained their East seniority at all times and were only temporarily working within West operations.

Second, the issue of whether the six East pilots should have been allowed to displace back into East operations, or whether they should have been required to await a vacancy within East operations, concerns interpretation or application of the East collective bargaining agreement that is a minor dispute subject to the RLA. The only pilots who might have been prejudiced by the displacement would be more junior East pilots[2], and these pilots had every right and opportunity to file the appropriate grievance

[2] Hemenway Tr. at 179:1-180:6.

with the System Board.

Third, any evidence probative of an issue that is exclusively subject to the System Board of Adjustment is outside of this Court's jurisdiction. (Doc. # 84 at 14:18) (*citing Consol. Rail Corp. v. Ry. Labor Execs. Ass'n,* 491 U.S. 299, 310, 109 S. Ct. 2477, 105 L. Ed. 2d 250 (1989)).

Fourth, such evidence is not probative of any claim or defense in this case, but rather concerns only the proper exercise of seniority among East pilots within the East pilot list.

7) Motion To Exclude Exhibit Nos. 84, 86, 106, 141, 148, 266, 267, 268, 270, 271, 274, 275, 276, 277, 280, and 282 Regarding Enforcement of Section 29 of CBA.

Proposed Language For Order Sought:

"Plaintiffs' trial exhibit Nos. 84, 86, 106, 141, 148, 266, 267, 268, 270, 271, 274, 275, 276, 277, 280 and 282 regarding enforcement of Section 29 of the CBA shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because such evidence is not relevant and admission risks confusing the jury (FRE 402, 403) because:

First, the issue of USAPA policy or enforcement of Section 29 (the union security clause), which requires all US Airways pilots to pay either membership dues or agency fees to USAPA as a condition of employment, is strictly a matter of

interpretation or application of the parties' collective bargaining agreement in Section 29, that is subject to the RLA.

Second, any evidence probative of an issue that is exclusively subject to the System Board of Adjustment is outside of this Court's jurisdiction and hence the jury's as well. (Doc. # 84 at 14:18) (*citing Consol. Rail Corp. v. Ry. Labor Execs. Ass'n,* 491 U.S. 299, 310, 109 S. Ct. 2477, 105 L. Ed. 2d 250 (1989)). Moreover, a Section 29 case has been recently submitted to a single neutral arbitrator with hearings held on April 1, 2009. Any court involvement will only serve to subvert the exclusive jurisdiction of that arbitral board.

Third, such evidence is not probative of any claim or defense in this case.

8) <u>Motion To Exclude Exhibit Nos. 92, 440, and 466, i.e. Transcript of Road Shows Or Other.</u>

Proposed Language For Order Sought:

"Plaintiffs' trial exhibit Nos. 92, 440, and 466 shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because such evidence lacks foundation, is not the original or best evidence, is not relevant, and admission will unfairly prejudice USAPA (FRE 402, 403, 901, 1001, 1002) because:

First, these documents are *incomplete* transcripts of videos with no stipulated accuracy or any possible foundation (given the limited list of trial witnesses that

Plaintiffs disclosed).

Second, the videos and recordings from which the transcripts are derived constitute the original, best and complete evidence, not transcripts manufactured by a party for litigation.

Third, admission of excerpts, even if authentic and accurate, risks prejudice to Defendant because the whole document is not offered, only excerpts taken out of context and selectively picked, and thus highly misleading.

Fourth, transcripts are not evidence, the recordings are. The transcript is merely an illustration or aid, for example, the recording controls over the transcript. *See United States v Delgado*, 357 F.3d 1061, 1070 (9th Cir. 2004) (court instructed jury that transcripts were only aids to understanding that the recordings themselves were evidence).

Fifth, the jury will be confused by admission because the Ninth Circuit Model Jury Instruction 2.5 advises, and correctly so, that "bear in mind that the tape recording is the evidence, not the transcript ..." *See also United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998) (the recording itself is the evidence to be considered; the transcript is merely an aid).

9) <u>Motion To Exclude Exhibit Nos. 209, 210, 223, 240, 242, 304, 305, 306, 307, 309, and 311, Regarding Unrelated, Various Individual Grievances.</u>

Proposed Language For Order Sought:

"Plaintiffs' trial exhibit Nos. 209, 210, 223, 240, 242, 304, 305, 307, 309, and

311 shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because such evidence lacks foundation, is not the original or best evidence, is not relevant, and admission will unfairly prejudice USAPA (FRE 402, 403, 901, 1001, 1002) because:

First, all subject documents concern contract grievances.

Second, these grievances have nothing to do with any claim or defense or trial issue in this case.

Third, contract grievances are outside the jurisdiction of this court. (Doc. # 84 at 14:18) (*citing Consol. Rail Corp. v. Ry. Labor Execs. Ass'n,* 491 U.S. 299, 310, 109 S. Ct. 2477, 105 L. Ed. 2d 250 (1989)).

Fourth, admission risks confusion or prejudice because these contract disputes are not relevant, yet the jury might assume that Defendant is not properly processing such grievances and assign blame.

10) <u>Motion To Exclude Exhibit Nos. 227, 235, and 237 Regarding Letters of Agreement.</u>

Proposed Language For Order Sought:

"Plaintiffs' trial exhibit Nos. 227, 235, and 237 shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because such evidence lacks foundation, is not the original or best evidence, is not

relevant, and admission will unfairly prejudice USAPA (FRE 402, 403, 901, 1001, 1002) because:

First, these documents concern Letters of Agreement or proposed Letters of Agreement that amend the collective bargaining agreement.

Second, such Letters of Agreement or proposed Letters of Agreement have nothing to do with any claim or defense or trial issue in this case.

Third, the Court has no jurisdiction over collective bargaining, which is generally reserved to the National Mediation Board. 45 USC § 155; *See America West Airlines, Inc. v. National Mediation Bd.*, 119 F.3d 772 (9th Cir. 1997), *rehearing denied, cert. denied* 118 S. Ct. 1301.

Fourth, admission risks confusion because the jury may assume that such agreements are somehow relevant.

11) <u>Motion To Exclude Exhibit Nos. 246, 247, 248, 249, and 250, Transcripts of Court Hearings.</u>

Proposed Language For Order Sought:

"Plaintiffs' trial exhibit Nos. 246, 247, 248, 249, and 250 shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because such evidence lacks foundation, is not the original or best evidence, is not relevant, and admission will unfairly prejudice USAPA (FRE 402, 403, 901, 1001, 1002) because:

First, these documents are transcripts of court hearings with this Court.

Second, such transcripts are not evidence that the jury can consider. Arguments of counsel, comments or questions by the Court, statements made outside the trial are generally per se inadmissible.

Third, the jury will be confused by such evidence. Ninth Circuit Model Rule 1.6 tells jurors what evidence is, while 1.7 tells them what it is not. Jurors are told that: "Arguments and statements by lawyers are not evidence ... Questions and objections by lawyers are not evidence ... the court's ruling on it ... Anything you may have seen or heard when the court was not in session is not evidence ..."

Fourth, even if some statement in the transcript were otherwise admissible, the transcripts themselves are not evidence and their wholesale introduction is inadmissible. *See United States v Delgado*, 357 F.3d 1061, 1070 (9th Cir. 2004); *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998).

12) Motion To Exclude Exhibit No. 312 Regarding The Empire Shuttle Issue.

Proposed Language For Order Sought:

"Plaintiffs' trial exhibit No. 312 shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because such evidence is not relevant, and admission risks confusion (FRE 402, 403) because:

First, this document concerns an issue that springs from complaints that are

historical to USAPA and have nothing to do with the present claims, defenses or trial issues.

Second, this document concerns the proper interpretation of USAPA's Constitution 1) which requires deference to the union's interpretation and exhaustion of USAPA's internal remedies; 2) is irrelevant to this case, which finds fault with the adoption of the Constitution per se irrespective of its interpretation; and 3) the issue presented in the document concerns retroactive application to integrated lists that were implemented 7 and 20 years ago.

Third, as such, admission will only risk confusion and waste of time.

13) Motion To Exclude Evidence Offered To Prove Pre-Certification DFR Liability By USAPA.

Proposed Language For Order Sought:

"Evidence offered to prove that Defendant is *liable* for failure to fairly represent Plaintiffs, or the class, at any time *prior* to certification by the National Mediation Board on April 18, 2008, shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because such evidence is not relevant and admission risks unfair prejudice, confusion or waste of time (FRE 402, 403) because:

First, as a matter of law, the duty of fair representation is generally co-terminus with a union's status as representative of the bargaining unit. *Steele v. Louisville &*

Nashville Railroad Co., 323 U.S. 192 (1944); *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944) ("by its selection as the bargaining representative, it has become the agent of the employees"); *Dycus v. NLRB*, 615 F.2d 820, 826 (9th Cir. 1980) (a union may avoid duty to bargain by "disclaiming further interest in representing the unit"); *Bensel v. Air Line Pilots Ass'n*, 387 F.3d 298, 312 (3d Cir. 2004) ("The scope of the duty of fair representation is commensurate with the scope of the union's statutory authority as the exclusive bargaining agent"). "Thus, a union does not owe a duty of fair representation to those it does not represent." *Cooper v. TWA Airlines, LLC*, 349 F. Supp. 2d 495, 507 (E.D.N.Y. 2004) (*citing McNamara-Blad v. Ass'n of Prof'l Flight Attendants*, 275 F.3d 1165, 1169-70 (9th Cir. 2002)).

Second, this Court has already impliedly recognized that any alleged violation occurred, if at all, only in the six months prior to September 2008 when the Complaint was filed. (Doc. # 84:9-12 – "... and in the six months before filing [lawsuit], USAPA allegedly violated its duty by its continued attempts to obstruct use of the Nicolau Award").

Third, there is no dispute that USAPA's duty to fairly represent did not start until its certification on April 18, 2008, because Plaintiffs have already conceded this point:

> 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. (Doc. # 45 at 14:17-21).

Fourth, because Defendant cannot be liable as a matter of law for any conduct prior to April 18, 2008, and Plaintiffs have admitted the same, no evidence *offered for that purpose* could ever be relevant to the DFR claim in Count III.

Fifth, admission of such evidence risks unfair prejudice to Defendant or confusion of the jury because such evidence inherently suggests that Defendant is on trial for actions prior to certification. It is not.

14) Motion To Instruct Jury On Limitation On Evidence Of Pre-Certification Conduct By USAPA Not Offered To Show Pre-Certification Liability.

Proposed Language For Order Sought:

"Evidence of USAPA's pre-certification conduct that is offered for any purpose (other than to show pre-certification liability) shall be limited by curative instruction to the jury, i.e. that it cannot consider such evidence to find USAPA liable for any conduct occurring prior to April 18, 2008."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because such evidence risks unfair prejudice, confusion or waste of the jury's time (FRE 403) because:

First, as stated above herein, Defendant owed no duty of fair representation that preceded certification by the NMB on April 18, 2008. Therefore, evidence offered to prove liability for conduct occurring prior to April 18, 2008 should be excluded.

Second, any such evidence offered for any purpose *other than* showing pre-

certification liability, and which the Court finds relevant, nevertheless *still risks* unfairly prejudicing Defendant or confusing the jury and so it too should be accompanied by curative instruction to the jury. The risk arises because the same evidence that may be relevant for one purpose but not for the other creates the possibility that the jury may not be able to distinguish the purpose without a curative instruction. The jury should be instructed that such evidence cannot be taken to *impose liability* on USAPA for *conduct* that occurred *prior* to certification.

15) Motion To Limit Evidence Of Post-Certification Conduct By USAPA.

Proposed Language For Order Sought:

"Evidence of conduct by USAPA occurring after its certification by the NMB on April 18, 2008, shall be *limited* to evidence of, or concerning, USAPA's constitutional seniority policy or consideration of USAPA's current seniority integration bargaining proposal where such evidence is offered to illustrate USAPA's constitutional objective concerning seniority."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because unlimited evidence of post-certification conduct is not relevant (FRE 402) because:

First, the Plaintiffs' trial theory is that USAPA was bound by what Plaintiffs consider to be a "final and binding" arbitration decision.

Second, there is no dispute that the arbitration decision which Plaintiffs claim

binds USAPA in perpetuity is the Nicolau Award. There is no dispute that the Nicolau Award occurred before USAPA was formed or certified. (The Nicolau Award was issued on May 3, 2007; USAPA was certified on April 18, 2008).

Third, there is no dispute that USAPA did not, and does not, consider the Nicolau Award to be final and binding on it, or contractually enforceable against USAPA.

Fourth, logically, any post-certification conduct by USAPA cannot be relevant if USAPA was *already bound* by a pre-certification arbitration ruling. This follows because Plaintiffs' case is that USAPA unlawfully (because of bad faith) created a constitutional objective to seek a seniority integration that varied from the Nicolau Award and then unlawfully appealed to the majoritarian interests of the East pilots to obtain certification. In short, if USAPA was *stained at birth,* then logically the manner in which USAPA complied with its supposedly unlawful constitutional objective is immaterial. Under Plaintiffs' theory, what happened after certification does not matter. If the Plaintiffs contend that the manner in which USAPA seeks to implement its constitutional objective is material, then this case is clearly not ripe since USAPA is engaged in an ongoing negotiating process that may evolve based on the Company's posture or changes in USAPA's bargaining strategy or political structure.

16) Motion To Exclude Evidence Of Drafts Of USAPA's Seniority Integration Proposal.

Proposed Language For Order Sought:

"Evidence of drafts, or any non-final iterations of USAPA's seniority proposal to the Company, shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because such evidence is not relevant (FRE 402) because:

First, Plaintiffs brought suit before USAPA had made *any* seniority proposal – ever. The action was commenced in this Court, and in state court, on September 4 and 5, 2008. USAPA's seniority proposal was submitted to US Airways "on September 30, 2008 ..." (Doc. # 84 at 5:27). In reality, Plaintiffs sued over the mere adoption of a constitutional "objective."

Second, there is no claim or allegation pled that USAPA failed to fairly represent Plaintiffs or the class because it *changed* its September 30th proposal from one draft to another.

Third, Plaintiffs' Count III – as pled – breaks down into three fact assertions, none of which implicates any non-final iteration of USAPA's 'policy' or its proposal:

1) Whether "USAPA decided its seniority policy without holding any sort of hearing or procedure that afforded Plaintiffs and other West Pilots an opportunity to present arguments and evidence in favor of their interests"? (Doc. # 86, ¶ 109).

2) Whether USAPA "has a seniority policy that caused" US Airways to "breach its collective bargaining agreement with West Pilots"? (Doc. # 86, ¶ 111).

3) Did USAPA "promise to follow" an "improperly derived seniority policy if

elected"? (Doc. # 86, ¶ 117).

Again, none of these allegations concerning a "seniority policy" can possibly pertain to anything other than USAPA's constitutional objective because USAPA's seniority integration proposal did not exist at the time of the complaint and the seniority integration proposal that exists today has not been implemented and is subject to change.

17) <u>Motion To Exclude Evidence That USAPA Allegedly Deliberately Delayed Negotiations Of A Single CBA.</u>

Proposed Language For Order Sought:

"Evidence that USAPA deliberately delayed negotiations of a single CBA, for any purpose, shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because such evidence would be unfairly prejudicial to USAPA and a needless waste of the jury's time (FRE 403) because:

First, all named class representatives have, under oath, disavowed this particular allegation in their deposition testimony. (Addington 97:21 - 98:15; Bostic 107:4-10; Burman 47:14-20; Iranpour 67:7-12; Wargocki 159:3-10; Velez 47:20 - 48:7).

Second, class counsel has also conceded the point: "While USAPA seeks to delay this litigation, *it is working hard to finalize negotiation and approval of a date-of-hire single collective bargaining agreement* with the company." (Doc. # 239 at 7:23)

[emphasis added].)

Third, this Court, too, has recognized that USAPA is not delaying bargaining but rather is currently negotiating:

> Similarly, Plaintiffs are not deficient for acknowledging in depositions that USAPA is not delaying negotiations (as previously asserted) *but is currently negotiating toward a single CBA* on terms inconsistent with the Nicolau Award. (Doc. # 248 at 10:14) [emphasis added].

Fourth, because the point is no longer in dispute, it would unfairly prejudice USAPA to allow evidence suggesting that USAPA did, or is, delaying negotiation of a single CBA. It is not. The only delay has been caused by Plaintiffs' suit. Plaintiffs may certainly argue that USAPA did not take steps to propose the Nicolau list. This is not a fact in dispute. But Plaintiffs are not free to present evidence suggesting that USAPA has delayed negotiations aimed at achieving a single CBA.

Fifth, the Company's Vice President of Labor Relations testified that he does not "see any evidence that USAPA is not working hard to make an agreement." (Hemenway Tr. 173:19-20).

18) <u>Motion To Exclude Evidence Offered To Prove Disgorgement Of Dues Or Fees.</u>

Proposed Language For Order Sought:

"Evidence offered to prove any claim, or remedy, that seeks refund of union membership dues or agency fees, shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language

because such evidence is not relevant (FRE 402) because:

First, Plaintiffs sought, but did not plead or seek leave to plead, class-wide relief in the form of a refund of union agency fees and membership dues, as well as a vacatur of such fees and dues obligations. (Doc. # 210).

Second, this Court granted Defendant's motion for judgment on the pleadings (Doc. # 272), ruling that, "Plaintiffs' claims for monetary and injunctive relief relating to past and future payments of union dues and fees are dismissed with prejudice" (Doc. # 287).

19) <u>Motion To Exclude Evidence Offered To Show That West Pilots Were Denied Opportunity To Present Their Interests For Consideration By USAPA.</u>

Proposed Language For Order Sought:

"Evidence offered to show that West Pilots were denied an opportunity to present their interests for consideration by USAPA, shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because such evidence would be unfairly prejudicial to USAPA (FRE 403) because:

First, USAPA sought to depose 17 or more named defendants in *US Airline Pilots Association v. AWAPPA, et al*, (W.D.N.C., Case No. 3:08-cv-00246) ("RICO case") in order to obtain evidence in support of relevant facts concerning the deliberate self-exclusion of West pilots from participation in USAPA's political framework, including:

i) Evidence of a concerted and highly successful effort by West pilots to refrain from paying dues, joining USAPA as members, or otherwise participating within USAPA;

ii) The preference of West pilot leaders to participate in tortious and criminal actions designed to destroy USAPA, rather than to engage in a process of constructive dialogue;

iii) That there was an organized effort to intimidate any West pilot who attempted to participate in, become a member of, or support or pay dues or fees to, USAPA.

Second, after Plaintiffs objected and sought a protective order (Doc. # 254), this Court granted a protective order (Doc. # 258) effectively denying USAPA discovery of the above-referenced evidence.

Third, this Court denied (Doc. # 279) Defendant's motion for reconsideration. (Doc. # 273).

Fourth, it would constitute patent unfair prejudice to allow Plaintiffs to introduce evidence that any West pilots were excluded *by USAPA* from participation or consideration when it "decided its seniority policy" (Doc. # 86, ¶ 109) when USAPA was denied discovery into the most promising sources of the above-referenced evidence. While it is freely conceded that USAPA still had a duty to represent these defendants, *their hostility made USAPA's efforts to include them futile*. Consequently, West pilots who desired to protect their interest by having a direct hand in shaping USAPA's

seniority integration proposal were forcibly shut out by intimidation by the same faction that represented a 'no compromise' position and planned to litigate if necessary. For the Court to now allow the jury to hear one side of this sad story but not the other will unfairly prejudice USAPA to the point of abuse of discretion. Significantly, the evidence that USAPA was prevented from developing included specific references to the fact that the campaign of self-exclusion through voluntary and coercive means was deliberately designed to influence this Court's decision-making process.

20) Motion To Exclude Evidence Or Argument That The Fact That The USAPA Negotiating Committee Was Composed Entirely Of East Pilots Is Probative Of Liability.

Proposed Language For Order Sought:

"Evidence offered to show, reference to, or argument that, the fact that (at one time) USAPA's negotiating committee was composed entirely of East pilots is probative in any way of the alleged breach of duty of fair representation, shall be prohibited."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because such evidence would be unfairly prejudicial to USAPA (FRE 403) both because of the reasons stated in Motion # 19 above and because Plaintiffs have stipulated and represented to this Court, on the record, that no such evidence would be offered:

> THE COURT: [continued] Mr. Stevens, do you intend to argue at trial that the fact that all 12 of the pilots on the committee were East Pilots is relevant and probative of the violation of the duty of fair representation?

MR. STEVENS: Excuse me, Your Honor. Just a second. I'm trying to think of the way that Your Honor has posed the question. Could the Court repeat that?
THE COURT: Yes. Do you intend to suggest at the trial that the fact that the committee was composed entirely of East Pilots is probative in any way of the alleged breach of duty of fair representation?
MR. STEVENS: Not -- no. Not the way you phrased the question.
THE COURT: Are you going to offer it into evidence for any purpose at all?
MR. STEVENS: No.

21) <u>Motion To Exclude Exhibit No. 14, Bradford Letter Wrongfully Posted On Web Board.</u>

Proposed Language For Order Sought:

"Plaintiffs' Trial Exhibit No. 14 shall be excluded from trial, and no reference of, or argument from, shall be made."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because the document in question is protected by attorney-client privilege. (FRE 403, 502):

First, the document in question is a report of a meeting with USAPA President Bradford, and other union representatives, with a law firm that was then being interviewed for possible retention by USAPA and was then providing legal advice.[3]

Second, the subject document was posted on a web board *without* the knowledge or permission of Bradford, the union, the law firms, or any union representative who

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[3] Because this document contains privileged information, it will be produced *in camera* on request.

was authorized to waive the privilege.

Third, there was no waiver of the privilege because the individual who posted the document acted without the knowledge of, or the permission of, the *organization* seeking the representation – USAPA. *See Milroy v. Hanson*, 875 F. Supp. 646, 648 (D. Neb. 1995) (*citing Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985) ("since the majority decision of the board of directors of a Nebraska corporation "controls" the corporation under Nebraska law, it follows that an individual director is bound by the majority decision and cannot unilaterally waive or otherwise frustrate the corporation's attorney")); *Stuffleben v. Cowden*, 2003 Ohio App. LEXIS 5676 at *P34 (Ohio Ct. App., Cuyahoga County Nov. 26, 2003) ("The attorney – client privilege attaches to a corporation by way of its corporate representatives seeking legal advice on behalf of the corporation ..."); *State v. Today's Bookstore*, 86 Ohio App. 3d 810, 818 (Ohio Ct. App., Montgomery County 1993) ("The mere fact that a memorandum subject to the attorney – client privilege comes into the hands of an opposing party does not necessitate a finding that the client has waived the privilege"); *Estes v. Health Ventures*, 2006 U.S. Dist. LEXIS 80719 at *7 (S.D. Ill. Nov. 3, 2006) (*citing Commodities Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985) (because the CFO was no longer employed by the company, he had no authority to waive the attorney – client privilege)).

Fourth, there was also no waiver because, even if Bradford had waived, there was no *joint* waiver from all of those in the group then seeking legal representation. *See*

In re Auclair, 961 F.2d 65, 70 (5th Cir. 1992) (reversing district court's conclusion that one of the jointly interviewed prospective clients could waive the attorney – client privilege for all the participants); *In re Grand Jury Subpoena Duces Tecum etc.*, 406 F. Supp. 381, 386 (S.D.N.Y. 1975) ("where there is consultation among several clients and their jointly retained counsel, allied in a common legal cause, it may be reasonably inferred that resultant disclosures are intended to be insulated from exposure from beyond the confines of the group...").

22) Motion To Exclude Testimony Or Declaration By Kevin Horner.

Proposed Language For Order Sought:

"Evidence in the form of testimony or written Declaration by Kevin Horner shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because, by stipulation during discovery, the parties agreed that Defendant would not depose Mr. Horner in exchange for Plaintiffs' not calling him at trial by testimony or offer of Declaration. (*Ref.*, e-mail by Granath to Stevens, 7 Mar. 09; reply e-mail Stevens to Granath, 7 Mar. 09).

23) Motion To Exclude Evidence Of 36,000 E-mails.

Proposed Language For Order Sought:

"Evidence in the form of any of the '36,000 e-mails' shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because admission would be unfair prejudice to Defendant (FRE 403) because:

First, Defendant sought these e-mails in discovery.

Second, after Plaintiffs objected on burden grounds, the Court denied Defendant this evidence. (Doc. # 207; Transcript 20 Feb. '08, 23:19).

Third, nevertheless, Plaintiffs specifically cited this evidence in support of their motion for class certification. (Doc. No. 214, p. 5, n. 3).

Fourth, the Court granted Plaintiffs' motion for certification and denied Defendant's request for an evidentiary hearing in part to challenge the evidence.

Fifth, Defendant made an interlocutory appeal under Rule 23(f) citing the absence of this evidence. (Petition, p. 18, n 2).

Sixth, under these circumstances it is unfair to allow Plaintiffs to use evidence against Defendant in trial that was denied in discovery and it is prejudicial as well because Defendant cannot examine evidence withheld by Court order.

24) <u>Motion To Exclude Any Evidence Obtained By Subpoena For Production Of Documents Or Things On Non-Parties Not First Served On Defendant.</u>

Proposed Language For Order Sought:

"Evidence of documents or things (e.g. videos) obtained by Plaintiffs by subpoena for production of documents or things that was directed to non-parties, shall be excluded where the subpoena was not first served on Defendant as required by Rule

45."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because admission would be unfair prejudice (FRE 403):

First, Rule 45(b)(1) provides that "if the subpoena commands the production of documents ... then *before it is served*, a notice must be served on each party." [emphasis added]. *See*, Fed. R. Civ. P. 45 committee note, 1991 amendments. *See also, Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimanec*, 529 F.3d 371, 386 (7th Cir. 2008); *Butler v. Biocore Medical Technologies Inc*., 348 F.3d 1163, 1173 (10th Cir. 2003).

Second, Plaintiffs failed to serve Defendant with a subpoena on ALPA (*Ref.*, Granath letter to Flood, 12 Jan. 09 objecting; Stevens to Granath, 14 Jan. 09; acknowledging). Later, Plaintiffs indicated they were going to serve a "video production company" but Defendant was never served. It would be unfair prejudice to allow evidence obtained in violation of the Rule 45, especially after Plaintiffs were put on notice by USAPA's objection.

25) <u>Motion To Exclude Testimony Of, Or References To, Lee Seham.</u>

Proposed Language For Order Sought:

"Testimony of, or reference to, the absence of testimony by Defendant's attorney Lee Seham, shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because such testimony or reference is not relevant (FRE 402) because:

First, Plaintiffs sought to make USAPA counsel Lee Seham's privileged advice to USAPA an object of discovery. To that end, Plaintiffs subpoenaed the records of Seham, Seham, Meltz & Petersen, LLP.

Second, on Plaintiffs' motion to compel (Doc. # 106), this Court denied Plaintiffs' attempt to breach USAPA's attorney-client privilege (Doc. # 185).

Third, Plaintiffs' attempt caused USAPA to direct Seham to prepare to withdraw as lead trial counsel out of concern that he would be forced to be a witness or that he or his firm could be disqualified. All this was disclosed to the Court on the record on December 15, 2008 (Tr. 44:10 – 45:15), as well as the fact that Plaintiffs' Rule 26 Initial Disclosures actually listed Seham as a witness (Plaintiffs' Disclosures, December 2, 2008 at p. 17, ¶ 36). Despite these prior threats, the Plaintiffs' pre-trial order does not reference Seham.

Fourth, Seham has no relevant testimony and does not plan to testify. His advice to the Defendant is privileged. It should be excluded, except to the extent that it was published on the USAPA website pursuant to the direction of an authorized USAPA officer. Moreover, Plaintiffs should also be prohibited from referencing to Seham testifying – or not testifying – in order to avoid the possibility that such reference would require testimony from Seham, or unfair prejudice to USAPA.

26) <u>Motion To Exclude Witnesses To Be Called From The Courtroom Prior To Their Testifying.</u>

Proposed Language For Order Sought:

"Witnesses to be called shall be excluded from the Courtroom prior to their testifying; sequestration shall not apply, however, to: 1) the named plaintiffs; 2) designated officers or employees of USAPA (Steve Bradford, Mike Cleary, Robert Davison, Paul Diorio, Mark King, Doug Mowery, Randy Mowrey, Tracy Parrella, David Ciabattoni or Rob Streble); 3) any testifying or non-testifying expert."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above language to generally sequester witnesses so that they cannot hear the testimony of other witnesses (FRE 615) because:

First, FRE 615 requires sequestration if requested.

Second, the exceptions in the proposed language are consistent with the exceptions in FRE 615, which does not authorize the exclusion of: 1) "a party who is a natural person" 2) "an officer or employee of a party which is not a natural person designated by its representative by its attorney" 3) "a person whose presence is shown by a party to be essential to the presentation of the party's cause."

Third, the following persons are, were at the time this action was commenced, or have recently been elected, officers of USAPA: Steve Bradford, Mike Cleary, Robert Davison, Paul Diorio, Mark King, Doug Mowery, Randy Mowrey, Tracy Parrella, David Ciabattoni, Rob Streble.

27) Motion To Exclude All Evidence Of Damages In Bifurcated Liability Trial.

Proposed Language For Order Sought:

"Any and all evidence, references to evidence, testimony, or argument relating to the named Plaintiffs' damages or class damages during the liability phase of this bifurcated trial shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because such evidence or information is not relevant (FRE 402) because:

First, this Court has ordered trial bifurcated as follows:

> As previously ordered, a bifurcated trial by jury will commence April 28, 2009. This trial will be limited to the disputed liability facts relating to USAPA's alleged breach of its duty of fair representation. This trial will exclude quantification and proof of individual causation regarding monetary recovery for lost wages, lost benefits, lost working conditions, and repayment of already-paid union dues and fees for individual Plaintiffs or class members, assuming the jury finds liability. These issues will be deferred for further bench or jury proceedings as appropriate. (Doc. # 252 at 2:2).

Second, such order is necessary to avoid introduction of irrelevant and prejudicial evidence or argument.

28) Motion To Exclude Reference To Witnesses Not Called.

Proposed Language For Order Sought:

"Evidence of, reference to, or testimony or argument, relating to any decision not to call any witnesses to testify at trial shall be prohibited."

Motion, Points And Authority:

Defendant hereby moves that this Court order the above proposed language because mention of witnesses not called is not relevant and such mention risks unfair prejudice to Defendant. (FRE 402, 403) because:

First, such evidence is speculative and irrelevant.

Second, such evidence risks unfair prejudice because it suggests fault for failure to call witnesses equally available to both parties, and risks shifting the burden that Plaintiffs properly bear.

29) Motion To Exclude Any Exhibit That Was Not Exchanged With Defendant By April 1.

Proposed Language For Order Sought:

"Any trial exhibit for which a copy was not exchanged in paper form with Defendant by April 1, in accordance with this Court's Order Setting Final Pretrial Conference (Doc. # 251), that was then in possession of Plaintiffs, shall be excluded."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because such evidence risks unfair prejudice (FRE 402, 403) because:

First, pursuant to Fed. R. Civ. P. 37(c), this Court ordered that

> The parties shall (a) meet in person and exchange copies of all exhibits to be used at trial no later that April 1, 2009, for the Proposed Final Pretrial Orders (any exhibit not exchanged at this meeting shall be precluded at trial; and (b) eliminate any duplicative exhibits while meeting to exchange exhibits. (Doc. # 251, ¶ 6).

Second, Plaintiffs failed to comply with the Court's order by failing to provide Defendant with "copies of all exhibits to be used at trial no later that April 1, 2009." Defendant made paper copies of all of its exhibits and physically transported them (in several boxes) to Plaintiffs' counsel's office for a prearranged meeting on April 1. Previously, Defendant had suggested meeting the day before so that the parties could use two days to review exchanged exhibits given that it then appeared both sides would offer approximately 1000 exhibits. Plaintiffs declined. Upon arriving, Defendant learned that Plaintiffs had no paper copies to exchange and had no digital copies. At Defendant's insistence, late in the afternoon and near the conclusion of the meeting, Plaintiffs produced a DVD ROM with their exhibits in PDF form. Despite the lack of Plaintiff documents to review, Defendant remained to discuss proposed fact stipulations. A review of documents never occurred. The failure of Plaintiffs to comply with the Court's order prevented the timely opportunity to compare exhibits and eliminate duplicates by the deadline.

Third, the Court's Order Setting Final Pretrial Conference (Doc. # 251, ¶ 4) warned both parties that "the Court will not allow the parties to offer any exhibit, witness, or other evidence that was not disclosed in accordance with the provisions of this Order ... except to prevent manifest injustice." The Court's subsequent Scheduling Order also warned that "the Deadlines are real. The parties are advised that the Court intends to enforce the deadlines set forth in this order ... [t]he parties are warned that failure to meet any of the deadlines in this order ... without substantial justification may

result in sanctions, including dismissal of the action ..." (Doc # 251, p. 2, ¶¶ 4, 5). And the "Proposed Final Pretrial Order For Jury Trial" requires the parties to certify that "each exhibit listed herein ... has been disclosed and shown to opposing counsel" (¶ S 3) and that "the parties have complied in all respects with the mandates of the Court's Rule 16 Scheduling Order and Order Setting Final Pretrial Conference" (¶ S 4).

Fourth, the Plaintiffs' failure is not justified. In the meeting, the only excuse offered was that a paralegal had a family emergency. This Court already made clear that mere inconvenience of attorneys is not a factor to delay trial. (Record, April 2, 2009, Tr. 8:7 - "And while I understand your situation, the exigencies of this case do not allow it to be delayed to suit the convenience of counsel's trial calendar."). A single paralegal's absence from work is less a reason than was already rejected by the Court. Indeed, at the present date, the Plaintiffs have yet to provide the Defendant with paper copies of their proposed exhibits. And while it is true that Plaintiffs did provide their exhibits in digital form as PDF files on a DVD ROM, albeit after Defendant insisted and later in the day, PDF files are not what the Court ordered to be exchanged. The Court's order was simple: "exchange copies of all exhibits to be used at trial no later that April 1, 2009." Not "PDF's," not even "document" but rather "copies of all exhibits to be used at trial." The same Order instructed that the parties meet in "person" and eliminate "duplicates while meeting." A natural reading of the Court's order is that the exercise of exchange reasonably required looking at paper or hard copy form of exhibits just as the jury would see them.

Sixth, it is unfair to allow Plaintiffs to profit from their neglect. They have the burden, both in the case and for this meeting, and they were ordered to initiate communications. (Doc. # 251 at ¶ 5). And, to date, Plaintiffs have insisted on an expedited trial schedule and opposed every attempt that Defendant has made to secure sufficient time to satisfy due process, even as Plaintiffs have pursued discovery of claims that this Court found lacked any legal merit, such as their disgorgement remedy (*e.g.* Doc. # 287). Plaintiffs should be accountable under Orders that are applied equally and fairly to both parties.[4]

30) <u>Motion To Exclude Improper Argument In Opening Statement Regarding Nicolau Award.</u>

Proposed Language For Order Sought:

"Counsel shall be prohibited from stating in Opening Statement that this Court has ruled that the Nicolau Award is *contractually* enforceable on USAPA."

Motion, Points And Authority:

Defendant hereby moves that the Court order the above proposed language because such statements would unfairly prejudice Defendant (FRE 403) because:

First, this Court has not, nor has any court – nor has any System Board of Adjustment – to date held that the Nicolau Award is legally enforceable against USAPA *on the basis of contract*. This Court has only made limited findings "for the purposes of

[4] At a minimum, any extra time that it will take to try this case resulting from Plaintiffs' failure to exchange copies of all exhibits to be used at trial no later that April 1, 2009 should be allocated to Defendant.

jurisdiction[al]" analysis (Doc. # 84 at 2:22). These were on USAPA's motion to dismiss (Doc. # 25, 36), the Company's motion to dismiss (Doc. # 30), and Plaintiffs' preliminary injunction motion (Doc. # 12). In this limited context, this Court has found only that:

- The West CBA and the TA "provided that ... the parties were to adopt a single integrated seniority list 'in accordance with ALPA Merger Policy'" (Doc. 84 # at 3:27).
- But that "separate operations would continue until two events took place: the completion of an integrated seniority list and the negotiation of a single collective bargaining agreement" (Doc. # 84 at 4: 8).
- That while US Airways "accepted this [Nicolau] seniority list" (Doc. # 84 at 5:2), "a single collective bargaining agreement has not been reached." (Doc. # 84 at 6:1).

Moreover, these findings were made in response to USAPA's motion to dismiss for failure to state a claim. As the Court acknowledged at the time (Doc. # 84 at 2:13), the Court was then *required* to accept as true the allegations in the Complaint. That these findings were not dispositive of the merits is further reflected in the Court's subsequent comments:

- In Doc. # 202 at 7:28, on February 18: "the issue of USAPA's liability *vel non* in law and equity must be tried to a jury."
- On the record, on February 20, discussing possible dispositive motions in response to: MR. STEVENS: The -- whether or not -- or the legal obligations of USAPA to submit and defend the Nicolau award would be the primary one. THE COURT: Well, that's the whole ball game." (Tr. 35:5).
- In Doc. # 253 at 2:15-24, on March 13: "This topic runs to the heart of Plaintiffs' claims: Is it permissible for USAPA to cast aside the Nicolau Award? .... This

question and others like it will require evidence."[5]

Second, the issue of whether USAPA is obligated to apply the Nicolau Award *because of the West CBA* as modified by the Transition Agreement is a question over which this Court does not have primary subject matter jurisdiction. Only the System Board of Adjustment currently convened to hear Plaintiffs' pending May 27, 2009 arbitration dispute has exclusive jurisdiction over this issue because the issue requires interpretation and application of contract provisions under the RLA. To allow consideration of contract issues is to at once exceed this Court's subject matter jurisdiction and to invade the province of the Board. What the Court has no jurisdiction over, neither can the jury.

Third, this Court has determined that Plaintiffs' claim is not substantive but rather merely procedural.

> The problem is, though the benefit of the Nicolau Award is surely what motivates the West Pilots, their legal objection to USAPA's date-of-hire seniority policy is not directly substantive, but rather procedural. The alleged breach of the duty stems from the bad faith manner of USAPA's determined attempts to evade the Award. Irrespective of whether seniority rights "vest" in a proprietary sense, a union may not arbitrarily abridge those rights after a merger solely for the sake of political expediency. (Doc. # 84 at 9:19).

Fourth, Plaintiffs' trial theory is a breach of the duty to fairly represent on the basis of bad faith, not breach of contract.

Fifth, USAPA would surely be unfairly prejudiced by the assertion that the Court

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[5] Plaintiffs, too, in their subsequently abandoned motion for leave for summary judgment (Dkt. No. 218) sought a ruling on the enforceability of the Nicolau Award, but

had determined that USAPA was *contractually* bound to implement Nicolau. This follows because a jury would naturally assume that it must regard USAPA's failure to implement Nicolau if required by contract as automatically a failure to comply with law, and hence to fairly *represent*. Yet USAPA is on trial over whether it complied with its duty to fairly represent the West minority – *not* whether it had a contract-based duty to implement Nicolau. To equate implementation of Nicolau with the duty to fairly represent will predetermine the outcome of the case. That would convert the trial into little more than a showcase for Plaintiffs' grievance, vitiating the Defendant's rights to a fair trial.

31) Motion to Exclude Testimony Regarding Length of Contract Negotiations

Proposed Language For Order Sought:

"Lay witness testimony as to how long it should take to negotiate a collective bargaining agreement should be excluded."

Motion, Points And Authority:

Defendant hereby moves that this Court order the above proposed language because any lay witness testimony regarding the amount of time that it should take to negotiate a collective bargaining agreement would be speculative and risks unfair prejudice to Defendant.

32) Motion to Exclude Testimony Regarding Parties to Nicolau Arbitration

Proposed Language For Order Sought:

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the Court denied this as moot (Dkt. No. 253 at 3:6).

"Lay or expert witness testimony that is offered to argue that the parties to the Nicolau arbitration were the East pilots and the West pilots should be excluded."

Motion, Points And Authority:

Defendant hereby moves that this Court order the above proposed language because the Ground Rules for the Nicolau Arbitration stipulate that "[t]he parties to this arbitration are the US Airways Pilot Merger Representatives and the America West Pilot Merger Representatives." (Dkt. No. 1, Exhibit D, at 1).

33) Motion To Exclude Improper Reference In Opening Statement To Evidence Ordered Excluded.

Proposed Language For Order Sought:

"Counsel shall be prohibited from referencing or mentioning in Opening Statement any evidence that the Court has ordered excluded from trial on motion in limine."

Motion, Points And Authority:

Defendant hereby moves that this Court order the above proposed language because any mention of improper evidence during opening argument risks unfair prejudice to Defendant as well as a mistrial resulting in waste of the Court's, the jury's and the parties' resources. (FRE 403).

III. CONCLUSION.

Based on the foregoing, Defendant respectfully requests that the Court grant the foregoing motions in limine.

Respectfully Submitted,

Dated: April 7, 2009

By: ***/s/ Nicholas P. Granath, Esq.***

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CERTIFICATE OF SERVICE

This is to certify that on the date indicated herein below true and accurate copies of the foregoing documents and their attachments, *to wit*,

- Defendant USAPA's Combined Motions In Limine With Points And Authority
- Certificate of Service

were electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all admitted counsel who have registered with the ECF system, including but not limited, to:

Marty Harper MHarper@Polsinelli.com	Don Stevens DStevens@Polsinelli.com	Andrew S. Jacob AJacob@Polsinelli.com
Kelly J. Flood KFlood@Polsinelli.com	Katie Brown KVBrown@Polsinelli.com	

Further, I certify that paper hard copies shall be provided to The Honorable Neil V. Wake, District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.

On April 7 2009, by:

/s/ Nicholas Paul Granath, Esq.