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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 RESPONSES TO PLAINTIFFS' MOTIONS IN LIMINE (Doc. # 309-315, 317-319)**
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

1) USAPA Response To Plaintiffs' Motion In Limine No. 1 (Doc. # 309).

USAPA's Position:

Oppose the relief as requested because it is overly broad; however there is no objection to exclusion of evidence offered for *no purpose other than* to relitigate the Nicolau arbitration. USAPA is entitled to demonstrate that there were non-arbitrary reasons to objecting to the results of the Nicolau arbitration.

USAPA's Argument:

First, that the subject evidence is of "no consequence to *plaintiff's* case in chief" is not the test under the rules of evidence. Rather, relevant evidence is anything "having any tendency to make the existence of any fact that is of consequence to the determination of *the action* probable or less probable ..." FRE 401 (emphasis added). The action means issues raised by the pleadings, and USAPA not only denies all of Plaintiffs' claims, it has pled twelve separate affirmative defenses (Doc. # 8, ¶¶ 124-136). Plaintiffs' argument is thus flawed in its premise.[1]

Second, Plaintiffs' motion goes too far. It excludes evidence that could be offered to relitigate Nicolau, but also is relevant to show whether USAPA acted without good faith and within reason when it did not pursue Nicolau but rather its constitutional objective in its consideration of the interests of the *entire* bargaining unit. This gets to the heart of the case. But excluding all evidence necessary to explain

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[1] Plaintiffs' contention that USAPA has no affirmative defenses inexplicably misstates the record.

USAPA's actions would only present the jury with a misleading picture. The ultimate issue that the jury will be presented with is: In the context of post-April 18, 2008 negotiations, did USAPA's pursuit of its constitutional seniority integration policy, in lieu of the arbitrated seniority list that its de-certified predecessor was unable to implement under the terms of its own policy, result in arbitrary, discriminatory or bad faith disregard for the rights of the minority class? The issue is not, as Plaintiffs insist, whether Nicolau was the only possible resolution open to USAPA. Consequently, the jury needs to hear and see evidence that explains the full context for USAPA's actions:

> To ask a jury to determine whether a union official acted contrary to its duty by presenting a proposal for negotiation *without reference to the origins of the proposal* puts unnecessary and misleading blinders on the jury.

Alvey v. General Electric, 622 F.2d 1279, 1290 (7th Cir. 1980) (emphasis added).

Third, Plaintiffs are wrong that the "pilots on both sides" ever agreed to anything. Rather it is undisputed that the parties to the Nicolau arbitration were not the pilots themselves, but rather the respective Merger Representatives: "The parties to this arbitration are the US Airways Pilot Merger Representatives and the America West Pilot Merger Representatives." ("Ground Rules For The US Airways America West Pilots Seniority Integration Arbitration" in Exhibit D to Plaintiffs' original Complaint, at p. 1). This is a fact that Plaintiffs: i) submitted as part of their Complaint (Ex. D); and ii) subsequently *stipulated* to (Doc. # 77, ¶¶ 24-26). Nor can it be fairly said that even these Merger Representatives "agreed" to anything since, as ALPA members,

they were under compulsion to follow the ALPA Merger Policy process *irrespective* of their own preferences.

This Court has already dismissed, as federally preempted, Plaintiffs' state claims aimed at individual pilots, which claimed that individual pilots had breached some sort of a contract. (Doc. # 118, p. 6:1 – "Although the West Pilots' aim their present action at individual union members rather than the union as a whole, the injunctive relief they seek is identical in function to the relief sought in their companion action against the union."). Nevertheless, to the extent that the Plaintiffs now re-characterize their case as being based on the "East pilots'" disregard of the Nicolau award, it is highly relevant as to whether there were non-arbitrary and/or principled reasons for disregarding the award. *Barton Brands, Ltd. v. National Labor Relations Board*, 529 F.2d 793, 800 (7th Cir. 1976) (*citing Associated Transport, Inc.*, 185 N.L.R.B. 631 (1970)). Neither a labor union nor its members are bound in perpetuity to adhering to an arbitration award that was based on politically manipulated criteria, disregarded fundamental labor union values, or, in the view of the arbitration's dissenting opinion, fundamentally misinterpreted the applicable criteria.[2]

Fourth, Plaintiffs are wrong to claim that this Court has 'recognized' the final and binding nature of the Nicolau award; the reference Plaintiffs cite does not support that. This claim is simply Counts I and II repackaged. There is no dispute, however,

[2] The issue as to whether the Nicolau arbitration violated ALPA Merger Policy was never fully resolved since a court action to determine this issue was discontinued on the grounds of mootness due to ALPA's termination of the East and West MEC's.

that this Court dismissed Counts I and II as outside the Court's jurisdiction. (Doc. # 84 at 1:13). And, any other comments by the Court on the 'duty' to implement Nicolau were not findings but rather made whilst assuming the truth of Plaintiffs' claims in order to assess a motion to dismiss. Even if this were not the case, all liability issues are reserved for the jury to determine. (Doc. # 202). In any event, the overwhelming evidence supports the conclusion that, *even under ALPA Merger Policy*, the arbitration award was not final and binding. Indeed, ALPA's conduct from the date of the Nicolau award's issuance to through the certification of USAPA confirms that the award was not final and binding on the MEC's or the pilot groups themselves. (*See* Doc. # 200).

Fifth, Plaintiffs' motion should be rejected as, at best too vague and at worst frivolous, because on close reading, Plaintiffs' motion allows for the *same* evidence Plaintiffs' seek to preclude to come back in "as needed to give the jury a basic background on the subject matter" – in other words, whenever Plaintiffs want. This is a loophole big enough to make the exclusion unworkable because the only definition of "background" is a subjective one. And unless there is a relevant purpose, "background" per se is not needed. (Feb. 20. 09 TR. 36:21 – THE COURT "But it also seems that we don't have to have a courtroom trial to establish any of the background facts which are, really, the breadth of this case."). Moreover, Plaintiffs have reported that they plan to offer a 're-do' of the same expert testimony already submitted in the Nicolau hearings. (Granath Decl. Ex. 1). Such evidence would violate the very order

Plaintiffs now urge.

Sixth, despite Plaintiffs' objection to hearing it, evidence of the pre-merger financial strength of the two airlines is relevant to USAPA's consideration of what was in the interests of both the entire bargaining unit as a whole and the respective pilot groups – and that goes to good faith and reasonableness. *Herring v. Delta Air Lines*, 894 F.2d 1020, 1023 (9th Cir. 1989) (*citing Bautista v. Pan American World Airways*, 828 F.2d 546, 549 (9th Cir. 1987) ("The courts allow a union a 'wide range of reasonableness' in the conduct of its representation of its members. It must be able to focus on the needs of the whole membership without undue fear of law suits from individual members"). This shows not only the rationale basis for proceeding pursuant to USAPA's constitutional objective, rather than with Nicolau, but also the absence of bad faith. "The integration of a seniority list is a difficult undertaking ... in these circumstances, a union does not breach its duty of fair representation to others as long as it proceeds on some reasoned basis." *Clayton v. Republic Airlines*, 716 F.2d 729 (9th Cir. 1983). *See also Ford Motor Co. v. Huffman*, 345 U.S. 330, 349 (1953) (analyzing the 'wide range of reasonableness' allowed a statutory bargaining representative in negotiation by "good faith and honesty of purpose"); *Rakestraw v. United Airlines, Inc*., 981 F.2d 1524, 1535 (7th Cir. 1992), *cert. denied sub nom. Hammond v. Air Line Pilots*, 510 U.S. 861 (1993); *Ratkosky v. Transp. Union*, 843 F.2d 869, 878-79 (6th Cir. 1988); *Jackson v. Trans World Airlines*, 457 F.2d 202, 203 (2d Cir. 1972). That such evidence was also evidence in the Nicolau arbitration is

incidental.

Seventh, Plaintiffs are wrong to argue that the "East Pilots... took their best shot" in the Nicolau arbitration. This is not material to the issue in the case twice over. First, under law, USAPA had no duty until April 18 2008, the date it was certified by the National Mediation Board.[3] Plaintiffs have no claim against individual pilots, only the union; it is USAPA that is on trial for whether it breached its duty of fair representation. Second, there is no duty to implement Nicolau anymore than there is a duty to implement any disappointed minority or faction's desiderata:

> As all of society is an assembly of minorities, the losers can point to some respect in which they are a minority and insist that the distinction must have been part of a 'bad faith' plot ... Taken to its limits, the approach prevents the union from resolving differences internally and representing the interests of workers as a group. Yet one of the premises of the Railway Labor Act ... is that unions act democratically to reach a collective decision – the majority is entitled to prevail.

Rakestraw v. United Airlines, Inc., 981 F.2d 1524, 1531 (7th Cir. 1992).

USAPA's Requested Relief:

Deny Plaintiffs' motion in limine No. 1, or, in the alternative order that, "evidence offered for no purpose other than to relitigate the Nicolau arbitration shall be excluded." Also, the Court should grant USAPA motion in limine No. 30 (Doc. # 316 at 39-42) ("Counsel shall be prohibited from stating in opening statement that this court

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[3] *See Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944); *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944); *Dycus v. NLRB*, 615 F.2d 820, 826 (9th Cir. 1980); *Bensel v. Air Line Pilots Ass'n*, 387 f.3d 298, 312 (3d Cir. 2004); *Cooper v. TWA Airlines, LLC*, 349 F. Supp. 2d 495, 507 (E.D.N.Y. 2004).

has ruled that the Nicolau award is contractually enforceable on USAPA ").

2) <u>USAPA Response To Plaintiffs' Motion In Limine No. 2 (Doc. # 310).</u>

USAPA's Position:

Oppose the motion.

USAPA's Argument:

Plaintiffs' Second Motion in Limine (Doc. # 310) asks this Court to preclude USAPA from offering any evidence and argument intended to demonstrate how other unionized workgroups on the property integrated seniority after the merger between US Airways and America West.

One of the most familiar judicial definitions of the concept of the duty of fair representation is whether a union's conduct is "so far outside a wide range of reasonableness that it is wholly irrational or arbitrary." *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 78 (1991) (citations omitted). The question of whether USAPA's seniority policy is within this "wide range of reasonableness" cannot be analyzed in a vacuum. In order to determine what the "wide range of reasonableness" consists of in this case and what standard governs any alleged breach of the duty of fair representation, it is necessary to examine the common practice in the industry. *Sears v. Automobile Carriers*, 711 F.2d 1059 (6th Cir. 1983) ("This court has held that a union's reliance on past industry practice is an explanation sufficient to avoid liability."). *See also Connally v. Transcon Line*, 583 F.2d 199, 202 (5th Cir. 1978); *Robertson v. Burlington Northern and Santa Fe Railway*, 2007 U.S. App. LEXIS 2418, at **6 (10th Cir. 2007);

Ferrara v. Pacific Intermountain Express Company, 301 F. Supp. 1240, 1245 (N.D. Ill. 1969).

Therefore, in this case, it is clearly relevant that every other unionized workgroup on the property integrated their seniority on a date-of-hire basis. To exclude such evidence would deny the jury the ability to properly determine what standard USAPA had to meet in order to be acting within a "wide range of reasonableness."

Moreover, Plaintiffs have alleged that USAPA violated its duty of fair representation because it "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). The evidence USAPA intends to introduce relating to the seniority policies and integrations of the other unionized workgroups on the property will show that the Association of Flight Attendants ("AFA"), and the International Association of Machinists & Aerospace Workers ("IAM") did not have any sort of hearing or procedure that afforded opportunity to present arguments and evidence relating to formulation of their respective seniority integration policies.[4] Similarly, there was no "hearing or procedure" when ALPA originally formulated or subsequently amended its seniority

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[4] This is especially relevant in the context of the mechanics. At the time of the merger, the West mechanics were represented by the International Brotherhood of Teamsters and the East Mechanics were represented by the IAM. The IAM proceeded to represent all of the combined carrier's mechanics and seniority was integrated based on date of hire without any opportunity for either side to present arguments and evidence in favor of their interests.

integration policy in a manner that was intended to be harmful to the US Airways pilots.

Significantly, when a third union on the property – the Transportation Workers Union ("TWU") – conducted a seniority integration arbitration under the industry standard process know as Allegheny-Mohawk, the result was a date-of-hire seniority integration. The TWU arbitration award is strong evidence that politically-inspired criteria contained in ALPA Merger Policy skewed the result of the Nicolau arbitration. Not only was the Nicolau award not fair and equitable, it was never *intended* to be fair and equitable. The approach of all three unions highlights the inequities of the Nicolau award and the principled and non-arbitrary basis for declining to implement the award's seniority list.

Plaintiffs seek to have the jury determine that USAPA has breached its duty by not holding any sort of hearing or procedure so that West Pilots could present argument and evidence in favor of their interests as it related to USAPA's seniority policy. However, Plaintiffs are now seeking to exclude evidence that will show that hearings or procedures of this type are not common practice in formulating union seniority integration policy. Plaintiffs seek to hold USAPA to a standard that does not exist, but they realize that the only way they can prove this standard to the jury is to exclude USAPA from presenting evidence that will demonstrate that there is no such standard. Plaintiffs refer to USAPA's right to defend itself in this instance as "time-wasting mischief," but the reality is that this is just another attempt by Plaintiffs to handcuff USAPA in its ability to defend itself.

Finally, evidence demonstrating how every other unionized workgroup on the property integrated seniority lists is relevant as it relates to the *inherent sense of fairness* shared by the employees of US Airways surrounding seniority integration following the merger with America West. Employees from the workgroups on the property interact with each other on a daily basis – especially the pilots and flight attendants who share a thin aluminum tube for an office, and these individuals are well aware that the pilots are the only workgroup on the property who were not afforded, in Plaintiffs' words, the time-honored and revered principle of labor law that is date-of-hire. It is easy to see *why* Plaintiffs would not want a jury to analyze this evidence, but there is simply no evidentiary justification for restricting the jury from deciding this case based on the entire picture as opposed only to Plaintiffs' snapshot.

USAPA's Requested Relief:

Deny Plaintiffs' motion in limine No. 2.

3) <u>USAPA Response To Plaintiffs' Motion In Limine No. 3 (Doc. # 311).</u>

USAPA's Position:

Oppose the motion.

USAPA's Argument:

Plaintiffs have asked the Court to "exclude evidence and argument about ALPA's conduct in administering the transition agreement, ALPA merger policy, or the supervision, review and approval of the Nicolau Award." (Doc. # 311 at 1). Plaintiffs claim that "ALPA and ALPA Merger Policy are not on trial." (*Id.*). However, ALPA

Merger Policy *was attached as an exhibit to Plaintiffs' Complaint* and Plaintiffs devoted numerous paragraphs in their complaint to describing ALPA's Policy. (Doc. # 86, ¶¶ 45-50).

Plaintiffs now claim that they have narrowed their case to three issues (Doc. # 315). The three issues identified by Plaintiffs are each centered on the Nicolau Award. As stated by the America West Pilot Merger Representatives' attorney at the time of the merger, the Nicolau Award was "the proposed pilot seniority list developed through ALPA's Merger Policy," that ALPA adopted as its "bargaining position," and which ALPA was required, under the terms of its Merger Policy to "use all reasonable means at its disposal to compel the company to accept and implement." (Doc. # 38, Ex. B). Plaintiffs have built their case around the Nicolau Award and now seek to isolate it from the union and union policy that created it and failed to implement it. To adopt this approach would deny USAPA the right to present all of the relevant facts that gave rise to the current dispute. This would be tantamount to allowing the jury to hear only Plaintiffs' side of the story.

The Plaintiffs' entire case presupposes that the Nicolau Award created a vested right under ALPA Merger Policy. Nevertheless, it is undisputed that the democratic checks contained in ALPA Merger Policy itself created a logjam of indefinite duration that both ALPA and Company fully recognized. (Doc. # 200 at ¶¶16-17). The Court has already recognized that evidence will be required regarding this logjam:

> The Nicolau Award may have created such a "logjam" prior to the formation of USAPA, but it is still likely possible to infer that USAPA did

> not break any logjam in the interest of all US Airways pilots. *This question and other like it will require evidence.*

(Doc. # 253 at 2) (emphasis added). One relevant part of the Court-referenced analysis is clearly the nature of ALPA's own failed efforts to break the logjam by proposing modifications to the Nicolau Award as well as ALPA's assessment of the prejudice being suffered by the entire pilot group because of the indefinite nature of the logjam.

Plaintiffs' motion in limine however asks this Court to allow only *their* evidence on this topic. Plaintiffs rely heavily upon ALPA Merger Policy and what they describe as the "final and binding" and "fair and equitable" nature of the seniority list that it generated, but at the same time they ask this Court to foreclose USAPA from offering any evidence related to the same Policy and the failure of that policy, which rendered the Nicolau "award" illusory.[5]

Contrary to Plaintiffs, USAPA does not intend to offer evidence on "whether ALPA breached its duty of fair representation." (Doc. # 311 at 2). Instead, the evidence offered by USAPA will show that a stalemate had been created by the contours of ALPA policy; that USAPA had to depart from those failed policies; and that this was to secure a single collective bargaining agreement that would afford increases in pay,

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[5] The term "fair and equitable" as it pertains to the Nicolau Award must be taken in context and not simply defined in a general sense. Fair and equitable as it relates to the Nicolau Award was always defined as fair and equitable in accordance *with the terms of ALPA Merger Policy*. In order to put "fair and equitable" into proper context and understand what that term truly means in this case, an examination of ALPA Merger Policy and how that Policy has evolved is directly relevant to this litigation as Plaintiffs' have framed it.

benefits and working conditions to *all of the pilots* that it represents.

Plaintiffs also argue that USAPA should be foreclosed from offering evidence that "the real reason that USAPA was formed was because of decades of unhappiness with ALPA's handling of negotiations, giving away too much in prior negotiations, costing too much, and doing nothing to protect the pilots." (Doc. # 311 at 3). Plaintiffs are correct that there were a number of reasons for the formation of USAPA. The first issue that Plaintiffs claim they will now attempt to prove is that "USAPA was created so that the East Pilots could use their majority power to disregard the Nicolau Award." (Doc. # 315 at 4). It is unfair to allow Plaintiffs to offer evidence that USAPA was created based solely on dissatisfaction with the Nicolau Award and at the same time foreclose USAPA from presenting evidence demonstrating the many different reasons that underscored the creation of USAPA and the pilots' subsequent support of the Association. Again, Plaintiffs ask this Court to allow only their side of the story to be presented to the jury.

In framing their first issue, Plaintiffs rely on the Seventh Circuit's decision in *Air Wisconsin Pilots Protection Committee v. Sanderson*, 909 F.2d 213 (7th Cir. 1990). That case was decided based upon a pre-1991 version of ALPA Merger Policy that was determined by the Seventh Circuit to be "fair." 909 F.2d at 216. If *Air Wisconsin* is considered as a basis for determining USAPA's liability in this matter, then the substantive changes made to ALPA Merger Policy following that decision are directly related to the merits of this dispute, and USAPA should not be foreclosed from

introducing such relevant evidence.

Plaintiffs would like to present evidence as it relates to ALPA Merger Policy, the Nicolau Award and the formation of USAPA in order to support their case, but seek to deny USAPA the right to defend itself by asking this Court to preclude USAPA from presenting its evidence relating to these exact topics. Plaintiffs cannot have their proverbial cake and eat it too.

USAPA's Requested Relief:

Deny Plaintiffs' motion in limine No. 3 (Doc. No. 311).

4) <u>USAPA Response To Plaintiffs' Motion In Limine No. 4 (Doc. # 312).</u>

USAPA's Position:

Oppose the motion.

USAPA's Argument:

The Plaintiffs request that USAPA not be permitted to present evidence and exhibits that "only reflect action taken by USAPA after it determined that it would disregard the Nicolau Award." (Doc. # 312 at 4). At the same time, however, Plaintiffs argue that USAPA's determination to disregard the Nicolau award coincided with its creation in mid-2007. This legal theory is clearly problematic.

USAPA owed Plaintiffs no duty prior to April 18, 2008 as a matter of law.[6] Prior to April 18, 2008, USAPA had merely formulated a constitutional objective of "seniority based on date of hire and the perpetuation thereof, with reasonable conditions

and restrictions to preserve each pilots un-merged career expectations." The Plaintiffs' argument, therefore, assumes the premise that nothing within these broad constitutional parameters could satisfy USAPA's duty of fair representation.

Second, Plaintiffs' motion No. 4 confuses the duty at issue with a 'duty' that the law does not recognize. USAPA is on trial over whether it violated a duty of fair representation after its duty arose on April 18, 2008. But USAPA cannot be on trial over whether it violated a duty to implement the Nicolau list, at any time. There is no such duty to implement the Nicolau list at law; there is only a duty of fair representation. And, all contract 'duties' are a matter for the exclusive jurisdiction of the System Board of Adjustment.

Furthermore, in the context of collective bargaining, the law is clear what a union's duty is, and reasonableness and good faith are intertwined at the heart of the duty. A union is permitted a "wide range of reasonableness" in bargaining. *O'Neill*, 499 U.S. 65, 78 (1991). *See also Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1531 (7th Cir. 1992*), cert. denied sub nom., Hammond v. Air Line Pilots*, 510 U.S. 861 (1993); *Herring v. Delta Air Lines*, 894 F.2d 1020, 1023 (9th Cir. 1989) (*citing Clayton v. Republic Airlines*, 716 F.2d 729 (9th Cir. 1983) (the integration of a seniority list is a difficult undertaking ... in these circumstances, a union does not breach its duty of fair representation to others as long as it proceeds on *some* reasoned basis."). Therefore, Plaintiffs' DFR claim necessarily requires admission of any evidence of consequence to

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[6] *See infra* footnote No. 3.

whether USAPA acted reasonably in considering the interests of Plaintiffs in bargaining.

Third, Plaintiffs' attempt to isolate the good/bad faith element from reasonableness is grossly misplaced under the law. Plaintiffs are free to abandon the arbitrary and discriminatory prongs as they appear to have done but while bad faith might be said never to be reasonable – reasonableness is relevant to showing good faith. Especially in a merger context. This principle is deeply embedded in the law of the duty of fair representation as illustrated by cases that have analyzed the union's duty in the context of negotiations. "We do not read this passage [in *Huffman*, suggesting that no review of substantive terms is permitted] to limit review of the union's actions to "good faith and honesty of purpose," but rather to recognize that the union's conduct must also be within "a wide range of reasonableness." *O'Neill*, 499 U.S. 65, 76 (1991). A "bad motive" alone does not spoil a collective bargaining agreement that rationally serves the interests of workers as a whole. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953); *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1535, (7th Cir. 1992*), cert. denied sub nom.*, *Hammond v. Air Line Pilots*, 510 U.S. 861 (1993); *Ratkosky v. Transp. Union*, 843 F.2d 869, 878-79 (6th Cir. 1988); *Jackson v. Trans World Airlines*, 457 F.2d 202, 203 (2nd Cir. 1972). Thus, USAPA should be allowed to offer evidence that it has proposed to treat Plaintiffs *exactly* like it treats the majority: by seniority – except where it has proposed special treatment in favor the West pilots.[7] A union can

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follow the dictates of the majority if they conclude in good faith that the decision reflected a proper resolution of conflicting, but legitimate, interests. *Alvey v. General Elec. Co*., 622 F.2d 1279, 1289-90 (7th Cir: 1980); *Augspurger v. Locomotive Eng'rs*, 510 F.2d 853, 859 (8th Cir. 1975) (no violation where union conducted "advisory" vote of membership even though union selected option chosen by majority).

Fourth, Plaintiffs should not be permitted, in the guise of a motion in limine, to argue for an order effectively granting them a finding or a conclusion that the *only* conceivable interest that Plaintiffs or the West pilots had – that USAPA could ever consider – was the Nicolau list. Such a claim amounts to a request that this Court dictate the terms of a collective bargaining agreement (and preempt the jury's function). Plaintiffs are free to make their case that their interests were not considered, or to try to prove bad faith towards them, but there is no cognizable action at law that entitles them to a finding or conclusion that the *only* consideration open to USAPA was the Nicolau list.

Under the wide range of reasonableness standard and the requirement that the union consider the whole of the bargaining unit, USAPA was not required to consider the Nicolau list as an 'either or' proposition. Indeed, to accede to the dictates of a minority would itself risk a DFR violation. Rather, the law is settled that a union is free, even in the circumstances of merging seniority lists, to treat groups differently and that

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[7] Indeed, consideration of USAPA's proposal reflects their good faith objective of giving greater consideration to the West pilots' particular interests than any other labor union on the property has given to their West counterparts.

to do so is not a *per se* violation of the duty. *Rakestraw*, 981 F.2d 1524, 1532-35, (7th Cir. 1992), *cert. denied sub nom., Hammond v. Air Line Pilots*, 510 U.S. 861(1993)[8]; *Aqua-Chem, Inc. v. NLRB*, 910 F.2d 1487 (7th Cir. 1990), *reh'g denied,* 922 F.2d 403, *cert. denied,* 501 U.S. 1238 (1991); *Leveld Wholesale, Inc.,* 218 N.L.R.B. 1344, 1350 (1975); *Plumbers Local 66*, 287 N.L.R.B. 583 (1987); *Teamsters Local 955,* 325 N.L.R.B. 605, (1998); *Burchfield v. Steelworkers*, 577 F.2d 1018, 1020 (5th Cir. 1978); *Shamblin v. General Motors Corp*., 743 F.2d 436, 438-39 (6th Cir. 1984); *Johnson v. Air Line Pilots*, 650 F.2d 133, 136-37 (8th Cir. 1981); *Hiatt v. New York Cent. RR Co*., 444 F.2d 1397 (2d Cir. 1971); *Griffin v. Air Line Pilots*, 32 F.3d 1079, 1083-84 (7th Cir. 1994). Everything relevant to why USAPA 'treated' the conflict in merging seniority lists the way it did is relevant to its defense against Count III.

Fifth, seniority integration based on date-of-hire seniority or dovetailing has been accepted as the gold standard by which all other seniority integration processes are judged. *Laturner v. Burlington Northern, Inc*., 501 F.2d 593, 599 (9th Cir. 1974); *Truck Drivers & Helpers, Local Union 568 v. National Labor Relations Board*, 379 F.2d 137, 143 n. 10 (D.C. Cir. 1967). No union has *ever* been held to violate its duty of fair representation by negotiating seniority integration on this basis. *Humphrey v. Moore*, 375 U.S. 335 (1964); *Winston v. Teamsters Local 89*, 93 F.3d 251 (6th Cir. 1996);

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[8] Indeed, *Rakestraw* holds that a union is permitted to re-visit "permanent" seniority agreements, even where the seniority agreement has been *implemented* – which is not the situation in this case – where the union has acted within a wide range of reasonableness.

Rakestraw, 981 F.2d 1524, 1533 (7th Cir. 1992), *cert. denied sub nom.*, *Hammond v. Air Line Pilots*, 510 U.S. 861 (1993); *Borowiec v. Boilermakers Local 1570*, 889 F.2d 23 (1st Cir. 1989), *aff'g* 626 F. Supp. 296, 303 (D. Mass. 1986); *Ratkosky v. United Transp. Union*, 843 F.2d 869 (6th Cir. 1988*); Teamsters Local 42* v. N.L.R.B., 825 F.2d 608, 611-14 (1st Cir. 1987), *enforcing* 281 N.L.R.B. 974 (1986); *Baker v. Newspaper & Graphic Comm. Local 6*, 628 F.2d 156, 166-67 (D.C. Cir. 1980), *aff'g* 461 F. Supp.109 (D.D.C. 1978); *King v. Space Carriers, Inc.,* 608 F.2d 283 (8th Cir. 1979); *Ekas v. Carling Nat'l Breweries, Inc.,* 602 F.2d 664, 668 (4th Cir. 1979), *cert. denied,* 444 U.S. 1017 (l980); *Bell V. IML Freight, Inc*., 589 F.2d 502 (10th Cir. 1979); *Walters v. Roadway Express, Inc*., 557 F.2d 521, 525 (5th Cir. 1977); *Morris v. Werner Continental, Inc*., 466 F.2d 1185, 1190 (6th Cir. 1972); *Price v. Teamsters*, 457 F.2d 605 (3d Cir. 1972); *Fuller v. Teamsters Local 107*, 428 F.2d 503 (3d Cir 1970); *Teamsters Local 568 v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967); *In re ABF Freight Sys., Inc.,* 988 F. Supp. 556 (D. Md. 1997), *aff'd per curiam sub nom. Gorge v. Carey*, 166 F.3d 1209 (4th Cir. 1998).

USAPA's Requested Relief:

Deny Plaintiffs' motion in limine No. 4 (Doc. # 312).

5) <u>USAPA Response To Plaintiffs' Motion In Limine No. 5 (Doc. # 313).</u>

USAPA's Position:

Oppose the motion.

USAPA's Argument:

Plaintiffs' Fifth Motion in Limine (Doc. # 313) asks this Court to exclude evidence and argument related to USAPA's Constitution. Plaintiffs ask this Court to specifically exclude the USAPA Constitution in its entirety and argue that whether USAPA's "Constitution or its contractual promises to its members requires integration by date-of-hire or not has no relevance to whether USAPA improperly disregarded the Nicolau Award." (*Id*. at 3). First, Plaintiffs are wrong that USAPA is not legally obligated follow its own Constitution. Second, Plaintiffs have misinterpreted their own case and missed the target as to why the USAPA Constitution is relevant.

Contrary to Plaintiffs' strained legal reasoning, a "union *is* legally required to follow the procedures proscribed in its constitution for making collective agreement. . ." *Teamsters Local Union No. 515 v. National Labor Relations Board*, 906 F.2d 719, 726 n.7 (D.C. Cir. 1990) (emphasis added). USAPA is legally required to follow its constitution, including the objective to "maintain uniform principles of seniority based on date of hire and the perpetuation thereof, with reasonable conditions and restrictions to preserve each pilot's un-merged career expectations." (Doc. # 38, Ex. D, p. 5).

Plaintiffs have boiled their case down to whether USAPA was created to disregard, whether it promised to disregard, and whether it has disregarded, the Nicolau Award. (Doc. # 315). There is no dispute that the seniority objective contained within USAPA's constitution requires USAPA to bargain for seniority integration that varies from the list embodied in the Nicolau award. Therefore, Plaintiffs' case is actually that USAPA unlawfully created a constitutional objective to seek a seniority integration that

varied from the Nicolau award, and then unlawfully appealed to the majoritarian interest of the East Pilots to obtain certification and validate that constitution. Consequently, under this theory, USAPA was *tainted at birth*, and anything that occurred after certification by the NMB on April 18, 2008, is irrelevant because everything that USAPA did following that date was in accordance with the mandate of its constitution.

It is ironic that Plaintiffs now seek to exclude USAPA's Constitution because their entire case is built upon the alleged unlawfulness of the seniority objective contained within that document. This is demonstrated by the fact that Plaintiffs filed suit against USAPA before a seniority proposal was *even proposed* to the Company. Therefore, Plaintiffs' were suing based on USAPA's intention to bargain over seniority in accordance with its Constitution.

USAPA would propose, given Plaintiffs' identification of the issues to be presented in their case (Doc. # 315), that any post-certification issues be limited to the following: 1) whether USAPA has deliberately delayed the negotiation process as it relates to ripeness; and 2) an analysis of the existing seniority proposal that USAPA has on the table for consideration by US Airways, for illustrative purposes to demonstrate how the constitutional seniority objective was memorialized in a collective bargaining proposal.[9] Plaintiffs would then have to live with the consequence that they are

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[9] It is important to note that this proposal could be substantially altered during the ongoing negotiation process, and this is precisely why the case law is clear that it is only the *final product* of the bargaining process that can result in a breach of the duty of fair representation.

precluded from presenting any alleged "bad acts" or exclusion of West pilot political participation that post-dates April 18.

USAPA's Requested Relief:

Deny Plaintiffs motion in limine No. 5 (Doc. # 313).

6) <u>USAPA Response To Plaintiffs' Motion In Limine No. 6 (Doc. # 314).</u>

USAPA's Position:

Oppose the motion.

USAPA's Argument:

First, in order to spare the Court extra reading in this brief, Defendant hereby incorporates in its response to Plaintiffs' motion in limine No. 6, Defendant USAPA's Motion For Reconsideration Of Order Granting Protective Order (Doc. # 273), and all supporting submissions and related on-the-record argument.

Second, Plaintiffs misconstrue the relevant purpose for this evidence they seek to exclude. There is no dispute that 'bad acts' or misconduct, or hostility, or anything that members of the bargaining unit – including non-members of the union – do can allow for, or excuse, a violation of the duty of fair representation. The point is not that there is a limit on the scope of the duty; that was never an argument advanced by USAPA. Rather, the relevance has always been to the *application* of the duty to the facts in this case. The evidence would be offered to show that the attempt by USAPA to fulfill its duty was prevented or frustrated, to the extent it was, by the intentional wrongdoing, tortious and criminal, of a faction that planned to commence litigation in order to

exploit the very thing their acts prevented or frustrated.

This is specifically relevant to defending against what the Plaintiffs have explicitly pled: "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." (Amended Complaint, Doc. # 86, ¶ 109). *Logically*, Defendant is entitled to present evidence that this did not occur, and to the extent that it did, it was because of the intentional misconduct of West pilot leaders who intended, and with signal success, to intimidate members of the class from participating or presenting arguments and evidence in favor of their interests. Further, Defendant is entitled to present evidence that this misconduct was part of a campaign anticipating this very litigation, and was specifically and cynically designed to influence this Court.

Third, legally, Plaintiffs' motion is unsupported. They cite no case for the proposition that they wish this Court to adopt, at the risk of abuse of discretion, namely that a union is liable for failure to represent when such failure was not the fault of the union's culpable hostility, arbitrariness, or discrimination but rather directly attributable to the intentional acts of those who acted in order that they can complain they were not afforded the duty. This is not the law: "You can't complain that you were 'excluded' from an election you boycotted." *Rakestraw v. Unite Airlines, Inc*., 981 F.2d 1524, 1534 (7th Cir. 1992), *see also Duerr v. Minnesota Mining and Manufacturing Company*, 101 F. Supp. 2d 1057, 1065 (N.D.Ill. 2000) ("plaintiff prevents the Union

from being his exclusive representative by skirting the entire grievance process. In short, Plaintiff seeks to sue on the 'contract' as a third-party beneficiary while simultaneously his conduct speaks repudiation of the same contract."); *Erie v. White*, 966 P.2d 342, 345 (Wash. Ct. App. 1998) ("did the plaintiff consent, before the accident or injury, to the negation of a duty that the defendant would otherwise have owed to the plaintiff? If the answer is yes, the defendant does not have the duty, there can be no breach and hence no negligence.").

Fourth, such evidence is relevant both to disprove Plaintiff's "failure to give due consideration" pleading but also USAPA's affirmative defense of estoppels. (Doc. # 88, ¶ 135). In sum, a fair trial requires that the jury should hear the whole story, not just the scripted second-half.

USAPA's Requested Relief:

Deny Plaintiffs motion in limine No. 6 (Doc. # 314).

7) <u>USAPA Response To Plaintiffs' Motion In Limine No. 7 (Doc. # 318).</u>

USAPA's Position:

Oppose the motion.

USAPA's Argument:

Plaintiffs' motion No. 7 unjustifiably seeks to exclude or strike what Plaintiffs refer to as "late disclosed experts." (Doc. # 318). Plaintiffs' argument that the "time for listing experts has passed" (*id*. at 5), is at best odd considering that the Court, in its March 16 Scheduling Order, did not order an expert disclosure deadline. The Court left

it to the parties to confer and decide upon a deadline for expert disclosure, and the parties have not yet set that deadline.

> The Court defers setting the deadline for expert disclosures as required by Rule 26(a)(2)(A)-(C) of the Federal Rules of Civil Procedure pending further discussion of counsel and prompt presentation to the Court of any dispute relating to this issue.

(Doc. # 252 at 2).

Given the accelerated trial deadline, USAPA did make a request of Plaintiffs that the parties agree to waive the Rule 26 requirement relating to disclosure of formal expert reports. Plaintiffs denied this request. The parties then engaged in only preliminary discussions regarding the possibility of disclosing names and a summary of testimony on a certain date, but nothing was ever agreed to.

Plaintiffs' counsel Marty Harper, during depositions taken the week of March 23, indicated to USAPA counsel Jim Brengle that Plaintiffs did not intend to call any experts as part of their case in chief. In an attempt to confirm this statement, by e-mail dated March 24, 2009 to Mr. Harper and Mr. Stevens, counsel for USAPA, Nicholas Granath, requested the following:

> I am requesting that Plaintiffs voluntarily disclose today, or tomorrow, at the very latest, the name(s) and subject matter of any experts (e.g. statistics) you have now retained or expect to retain to testify at trial. This is urgently needed so that Defendant can retain its experts including rebuttal.

(Granath Decl. Ex. 2). Contrary to Mr. Harper's statements earlier in the week, Plaintiffs' counsel Don Stevens sent an e-mail entitled "Experts" on Friday, March 27, 2009 at 3:11 PM stating the following:

> It is our present intention to call Bob Mann and Dan Akins as part of our case in chief to testify in accordance with the testimony by them at the Nicolau proceedings. We expect to have rebuttal experts depending on who you disclose as experts.

(Granath Decl. ¶ Ex. 1). This was the first time that Plaintiffs had even mentioned the names of these two proposed experts, and the e-mail was not accompanied by any formal expert reports and no reports have, to date, been received. Given that the parties had not yet agreed on a date for formal expert witness disclosures, USAPA did not even consider filing a motion in limine to exclude Plaintiffs' proposed experts based on failure to meet a non-existent deadline. It was USAPA's understanding that the parties would agree on a date and format for expert disclosures in the near future and then proceed with expedited depositions, if necessary, prior to trial.[10]

Plaintiffs now allege that USAPA is engaged in "trial by ambush" by concocting a "deliberate plan to sabotage both the Plaintiffs and the trial date by identifying four expert witnesses twenty-seven days before trial" without a report and without a "stipulation to waive the requirement that an expert report provide a report." (Doc. # 318 at 2, 5). But as late as March 31, Plaintiffs' freely acknowledged that "We have not yet agreed on expert disclosures and reports, so let's not forget about that." (Granath Decl. ¶ Ex. 3). And, if this is truly Plaintiffs' position, it is hypocritical in the extreme given that Plaintiffs provided only the names of their experts, without reports and

[10] In accordance with paragraph six of the Court's March 16 Order Setting Final Pretrial Conference, USAPA listed the names of these potential experts on April 1 so that it would not be foreclosed from calling these potential witnesses at trial. This was not however intended as the formal expert witness disclosure.

without stipulation to forego reports a mere four days before USAPA listed the names of their potential experts on April 1.[11]

As stated on the record during the March 6 teleconference with the Court by USAPA counsel Jim Brengle, USAPA as the Defendant, had to wait, in part, for the disclosure of Plaintiffs' experts in order to analyze the need for its own expert witnesses. (March 6 Tr. at 27:2-4). Upon receiving Plaintiffs' March 27 e-mail naming Dan Akins and Bob Mann as experts, USAPA was forced to determine, prior to April 1, what experts it needed and intended to call. Daniel Kasper was listed in response to Plaintiffs' disclosure of two economic/statistic experts, but will not be able to testify on USAPA's behalf due to conflicts. James Harris was also listed in response to Plaintiffs' disclosure of its two economic/statistic experts, and USAPA is in the process of determining what testimony, if any, he will provide. If USAPA decides to present Mr. Harris as an expert witness, it fully intends to produce a report to Plaintiffs and afford them the opportunity to depose the witness prior to trial.

Professor of Labor Studies, Richard Hurd, was not retained by USAPA until March 26, 2009. If USAPA decides to present Professor Hurd as an expert witness, it fully intends to produce a report to Plaintiffs and afford them the opportunity to depose the witness prior to trial.

Plaintiffs recognize that they have been aware for some time that Mr. Salamat

[11] Plaintiffs also accuse USAPA of not disclosing the names of these experts in their initial disclosures. So what? Neither did Plaintiffs disclose experts Akins and Mann in their Initial Rule 26 Disclosures. Nor is this required under any rule or order.

has been working with USAPA in matters not directly related to this litigation. Despite this knowledge, Plaintiffs never requested or even expressed an interest in deposing Mr. Salamat. If USAPA decides to retain the services of Mr. Salamat to testify as an expert in this matter, it fully intends to produce a report to Plaintiffs and afford them the opportunity to depose the witness prior to trial.[12]

The parties were first informed, during the March 3 teleconference, that the Court intended to proceed, in an accelerated fashion, to trial in this matter beginning April 28. (March 3 Tr. at 21:12). Plaintiffs agreed without objection to the expedited trial deadline. (*Id*. at 23:4). USAPA on the other hand strenuously objected to the accelerated trial date during the March 3 teleconference (*id*. at 23-24), and later filed a written motion for reconsideration. (Doc. # 231). Plaintiffs' opposed USAPA's motion for reconsideration of the trial date (Doc. # 239), and it was later denied by the Court. (Doc. # 266).

USAPA has objected to this schedule due, in part, to the lack of time to adequately complete discovery, including expert discovery, by the start of trial. USAPA contends that it has already been prejudiced by the rush to trial, and Plaintiffs cannot now use the expedited trial schedule, to which they agreed, as a means to further prejudice USAPA by striking all of its potential expert witnesses.

USAPA's requested relief:

[12] For purposes of Microsoft Excel, macros automate some processes in a spreadsheet. Plaintiffs complain that the "macros have been disabled." (Doc. # 318 at 3). But the files contained Macros when sent. So any disabling of macros most likely occurred on

Deny Plaintiffs' motion in limine No. 7 (Doc. # 318).

8) <u>USAPA Response To Plaintiffs' Motion In Limine No. 8 (Doc. # 317).</u>

USAPA's Position:

Oppose the motion as requested but agree that evidence offered *only* to prove any claim properly before the System Board of Adjustment should be excluded.

USAPA's Argument:

First, there is no dispute that evidence offered for no purpose other than proving claims that are or should be properly submitted to the exclusive jurisdiction of the System Board of Adjustment should be excluded. Defendant has offered several motions in limine directed exactly to that point and would expect no contest from Plaintiffs given their motion in limine No. 8.

Second, this principle, however, should not exclude evidence such as contained on Plaintiffs' "Exhibit A" submitted with their motion in limine No. 8. This evidence is not offered only to prove claims before the Adjustment Board. Rather, such evidence includes documents showing that USAPA advanced the interests of West pilots by processing grievances in their interests, or related declarations by witnesses that Plaintiffs seek to introduce such as Hemenway. Evidence showing USAPA good faith is relevant to disproving Plaintiffs' claim that defendant acted in bad faith.

USAPA's Requested Relief:

Deny Plaintiffs' motion in limine No. 8, or, in the alternative order that

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computers that Plaintiffs were using – not the files that USAPA produced.

"evidence offered for no purpose other than to prove or disprove a claim properly subject to the exclusive jurisdiction of the System Board of Adjustment shall be excluded."

9) <u>USAPA Response To Plaintiffs' Motion In Limine No. 9 (Doc. # 319).</u>

USAPA's Position:

Oppose the motion.

USAPA's Argument:

Plaintiffs' Ninth Motion in Limine argues that USAPA should be "precluded from offering evidence of its current conduct with respect to current negotiations." Plaintiffs claim that evidence demonstrating "how hard USAPA has been working on all sections of the single collective bargaining agreement, including the sections completely unrelated to a pilot's seniority . . . is [neither] relevant or admissible." (Doc. # 319 at 1).

In the context of its prior motion to dismiss, USAPA has previously cited substantial case law that a union's bargaining proposal does not present a case or controversy that is ripe for adjudication until such time as the proposal is implemented and becomes a *final product* of negotiation. (Doc. # 36 at 12-13; Doc. # 47 at 6-7). The Court rejected this argument – not based on the law – but based on the finding that it "satisfies the constitutional case or controversy requirement to allege, as the Plaintiff West Pilots have, that USAPA has breached its duty by deliberately delaying the single collective bargaining agreement. . ." (Doc. # 84 at 13).

USAPA requested leave to file a summary judgment motion based in part on lack

of ripeness because each named plaintiff had disavowed any pleading that USAPA was deliberately delaying negotiation of a single CBA. (Doc. # 215). The Court denied USAPA's request for leave to file a summary judgment motion. (Doc # 253). The Court determined that the issue was not proper for summary judgment, but whether USAPA delayed negotiation of a new collective bargaining agreement would be addressed at trial:

> The extent to which USAPA has delayed negotiations or caused past, present, or future injury to Plaintiffs is deeply embedded with the liability-related fact issues proceeding to trial in April. Though ripeness may present a need for further analysis later on, a motion for summary judgment on this point is not in order.

(Doc. # 253 at 2:10-14).

The Court later reaffirmed that the trial would "address USAPA's ripeness contentions, which arise out of obvious factual disputes." (Doc. # 288 at 2:13-14). Despite the Court's repeated pronouncements that the issue of USAPA's alleged delay of negotiation of a single collective bargaining agreement as being a fact issue to be presented at trial, Plaintiffs now seek to preclude USAPA from offering evidence demonstrating that no such delay exists or has ever existed. Such evidentiary exclusion would also effectively preclude USAPA from presenting evidence that, by breaking the impasse that existed under ALPA Merger Policy, USAPA has served the interests of the *entire* bargaining unit by its pursuit of a single collective bargaining agreement that would enhance the wages, benefits, and working conditions of East *and* West pilots.

Plaintiffs contradict themselves. First, they argue that it is not their contention

that USAPA failed to negotiate "other sections of the CBA" and that they "only contend that USAPA has caused delay by allowing itself to be formed to thwart the use of the Nicolau Award . . . and by having to wait until it was certified as the bargaining agent on April 18, 2008 to commence negotiations with the Company." (Doc. # 319 at 2:1-7).[13] However, in the very next paragraph Plaintiffs revert back to arguing that USAPA has deliberately delayed negotiation and perpetrated separate operations by claiming that "USAPA has also reopened portions of the collective bargaining agreement that had been tentatively agreed to by the parties to the negotiation in July 2007." (*Id*. at 2:10-12).[14]

The time has come for Plaintiffs to fish or cut bait. At the Court-ordered April 1 face-to-face meeting, counsel were on the verge of stipulating that the parties agree that since April 18, 2008, USAPA has made every reasonable effort towards negotiation of a single CBA incorporating its seniority integration proposal while at the same time enhancing wages and benefits for the entire bargaining unit. Such a stipulation would relieve the Court of lengthy testimony from USAPA's Negotiating Advisory Committee Chairman devoted to proving that USAPA has not been delaying negotiation of a single collective bargaining agreement. Plaintiffs' motion in limine represents a step back

[13] This statement, in and of itself, is dubious considering that beginning in August 2007 ALPA did not engage in one negotiation session with the Company towards a single CBA, yet Plaintiffs blame the delay on USAPA.

[14] It is no objection that the parties have executed a protective order with the company as Plaintiffs maintain. The Court certainly has the discretion to seal the trial if need be.

from their previous disavowals of delaying allegations,[15] and at the same time seeks to foreclose USAPA from offering any evidence that would prove there has been no delay. Such a result is unfathomable.

Through this motion and Plaintiffs' other motions in limine, they seek a trial where USAPA is allowed to attend and listen to the Plaintiffs present their case to the jury, but precluded from offering any evidence in its defense.

USAPA's Requested Relief:

Deny Plaintiffs' motion in limine No. 9.

[15] Plaintiffs previously stated that "[w]hile 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).

Respectfully Submitted,

Dated: April 14, 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 Responses To Plaintiffs Motions In Limine
- 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
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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 14, 2009, by:

/s/ Nicholas Paul Granath, Esq.