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)
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

JURY INSTRUCTIONS
JOINT SUBMISSION OF THE PARTIES

[pursuant to
Guidelines For Jury Instructions In Civil Cases
Judge Neil V. Wake]

I. NINTH CIRUCIT MODEL CIVIL INSTRUCTIONS USED BY ALL ARIZONA JUDGES.

Instructions for this section follow, each starting on their own page in accordance with the "Guidelines For Jury Instructions In Civil Cases, Judge Neil V. Wake" p. 2, line 5:

INSTRUCTIONS ON THE TRIAL PROCESS [follow on next page]:

ST § 1.0A Duty of Jury (Court reads and provides written instructions).

Ladies and gentlemen: You are now the jury in this case. It is my duty to instruct you on the law.

These instructions are preliminary instructions to help you understand the principles that apply to civil trials and to help you understand the evidence as you listen to it. You will be allowed to keep this set throughout the trial to which to refer. This set of instructions is not to be taken home and must remain in the jury room when you leave in the evenings. At the end of the trial, I will give you a final set of instructions. It is the final set of instructions, which will govern your deliberations.

You must not infer from these instructions or from anything I may say or do as indicating that I have an opinion regarding the evidence or what your verdict should be.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all important.

ST § 1.2 Claims and Defenses.

To help you follow the evidence, I will give you a brief summary of the positions of the parties:

The plaintiff claims that they were not fairly represented by their union, defendant USAPA. The plaintiff has the burden of proving these claims.

The defendant denies those claims.

ST § 1.3 Burden of Proof – Preponderance of the Evidence

When a party has the burden of proof on any claim [or affirmative defense] by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

[*See*, 9th Cir. Civ. Jury Instr. 13.1 comment (2007) applying "preponderance" on DFR claim]

ST § 1.6 What Is Evidence.

The evidence you are to consider in deciding what the facts are consists of:

1. the sworn testimony of any witness;

2. the exhibits which are received into evidence; and

3. any facts to which the lawyers have agreed.

ST § 1.7 What Is Not Evidence.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, [will say in their] closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

(2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

(3) Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition sometimes testimony and exhibits are received only for a limited purpose; when I [give] [have given] a limiting instruction, you must follow it.

(4) Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

ST § 1.8 Evidence for Limited Purpose.

Some evidence may be admitted for a limited purpose only.

When I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and for no other.

[The testimony [you are about to hear] [you have just heard] may be considered only for the limited purpose of [*describe purpose*] and for no other purpose.]

ST § 1.9 Direct and Circumstantial Evidence.

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

ST § 1.10 Ruling on Objections.

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer might have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider the evidence that I told you to disregard.

ST § 1.11 Credibility of Witnesses.

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. Proof of a fact does not necessarily depend on the number of witnesses who testify about it.

In considering the testimony of any witness, you may take into account:

(1) the opportunity and ability of the witness to see or hear or know the things testified to;

(2) the witness's memory;

(3) the witness's manner while testifying;

(4) the witness's interest in the outcome of the case and any bias or prejudice;

(5) whether other evidence contradicted the witness's testimony;

(6) the reasonableness of the witness's testimony in light of all the evidence; and

(7) any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it.

ST § 1.12 Conduct of the Jury.

I will now say a few words about your conduct as jurors.

First, you are not to discuss this case with anyone, including members of your family, people involved in the trial, or anyone else; this includes discussing the case in internet chat rooms or through internet "blogs," internet bulletin boards or e-mails. Nor are you allowed to permit others to discuss the case with you. If anyone approaches you and tries to talk to you about the case, please let me know about it immediately;

Second, do not read or listen to any news stories, articles, radio, television, or online reports about the case or about anyone who has anything to do with it;

Third, do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials, and do not make any investigation about the case on your own;

Fourth, if you need to communicate with me simply give a signed note to the [bailiff] [clerk] [law clerk] to give to me; and

Fifth, do not make up your mind about what the verdict should be until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence. Keep an open mind until then.

Finally, until this case is given to you for your deliberation and verdict, you are not to discuss the case with your fellow jurors.

ST § 1.13 No Transcript Available to Jury.

During deliberations, you will have to make your decision based on what you recall of the evidence. You will not have a transcript of the trial. I urge you to pay close attention to the testimony as it is given.

If at any time you cannot hear or see the testimony, evidence, questions or arguments, let me know so that I can correct the problem.

ST § 1.14 Taking Notes.

If you wish, you may take notes to help you remember the evidence. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. Do not let note-taking distract you. When you leave, your notes should be left in the [courtroom] [jury room] [envelope in the jury room]. No one will read your notes. They will be destroyed at the conclusion of the case.

Whether or not you take notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

ST § 1.15 Questions to Witnesses by Jurors.

You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning of each witness. You may propose questions in order to clarify the testimony, but you are not to express any opinion about the testimony or argue with a witness. If you propose any questions, remember that your role is that of a neutral fact finder, not an advocate.

Before I excuse each witness, I will offer you the opportunity to write out a question on a form provided by the court. Do not sign the question. I will review the question with the attorneys to determine if it is legally proper.

There are some proposed questions that I will not permit, or will not ask in the wording submitted by the juror. This might happen either due to the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case. If I do not ask a proposed question, or if I rephrase it, do not speculate as to the reasons. Do not give undue weight to questions you or other jurors propose. You should evaluate the answers to those questions in the same manner you evaluate all of the other evidence.

By giving you the opportunity to propose questions, I am not requesting or suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.

[*See*, Model instruction for recommended procedure]

ST § 1.18 Bench Conferences and Recesses.

From time to time during the trial, it [may become] [became] necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury [is] [was] present in the courtroom, or by calling a recess. Please understand that while you [are] [were] waiting, we [are] [were] working. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error.

Of course, we [will do] [have done] what we [can] [could] to keep the number and length of these conferences to a minimum. I [may] [did] not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

ST § 1.19 Outline of Trial.

Trials proceed in the following way: First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

The plaintiff will then present evidence, and counsel for the defendant may cross-examine. Then the defendant may present evidence, and counsel for the plaintiff may cross-examine.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments.

After that, you will go to the jury room to deliberate on your verdict.

INSTRUCTIONS ON TYPES OF EVIDENCE [follow on next page]:

ST § 2.2 Stipulations of Fact.

The parties have agreed to certain facts [to be placed in evidence as Exhibit __] [that will be read to you]. You should therefore treat these facts as having been proved.

PL § 2.3 Judicial Notice.

The court has decided to accept as proved the fact that [state fact], even though no evidence has been introduced on the subject. You must accept this fact as true.

PL § 2.4 Deposition In Lieu Of Live Testimony.

The parties have agreed to certain facts [to be placed in evidence as Exhibit __] [that will be read to you]. You should therefore treat these facts as having been proved.

ST § 2.5 Transcript of Tape Recording.

You [are about to listen/watch] [have listened/watched] to a tape recording [video] that has been received in evidence. [Please listen to it very carefully.] Each of you [has been] [was] given a transcript of the recording to help you identify speakers and as a guide to help you listen to the tape. However, bear in mind that the tape recording is the evidence, not the transcript. If you [hear] [heard] something different from what [appears] [appeared] in the transcript, what you heard is controlling. After the tape has been played, the transcript will be taken from you.

ST § 2.8 Impeachment Evidence – Witness.

The evidence that a witness [e.g., has been convicted of a crime, lied under oath on a prior occasion, etc.] may be considered, along with all other evidence, in deciding whether or not to believe the witness and how much weight to give to the testimony of the witness and for no other purpose.

ST § 2.11 Expert Opinion.

Some witnesses, because of education or experience, are permitted to state opinions and the reasons for those opinions.

Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

ST § 2.12 Charts and Summaries Not Received In Evidence.

Certain charts and summaries not received in evidence [may be] [have been] shown to you in order to help explain the contents of books, records, documents, or other evidence in the case. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

ST § 2.13 Charts and Summaries In Evidence.

Certain charts and summaries [may be] [have been] received into evidence to illustrate information brought out in the trial. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserve

ST § 2.14 Evidence in Electronic Format.

Those exhibits capable of being displayed electronically will be provided to you in that form, and you will be able to view them in the jury room. A computer, projector, printer and accessory equipment will be available to you in the jury room.

A court technician will show you how to operate the computer and other equipment; how to locate and view the exhibits on the computer; and how to print the exhibits. You will also be provided with a paper list of all exhibits received in evidence. (Alternatively, you may request a paper copy of an exhibit received in evidence by sending a note through the [clerk] [bailiff].) If you need additional equipment or supplies, you may make a request by sending a note.

In the event of any technical problem, or if you have questions about how to operate the computer or other equipment, you may send a note to the [clerk] [bailiff], signed by your foreperson or by one or more members of the jury. Be as brief as possible in describing the problem and do not refer to or discuss any exhibit you were attempting to view.

If a technical problem or question requires hands-on maintenance or instruction, a court technician may enter the jury room [with [the clerk] [the bailiff] [me] present for the sole purpose of assuring that the only matter that is discussed is the technical problem.] When the court technician or any non-juror is in the jury room, the jury shall not deliberate. No juror may say anything to the court technician or any non-juror other than to describe the technical problem or to seek information about operation of

equipment. Do not discuss any exhibit or any aspect of the case.

The sole purpose of providing the computer in the jury room is to enable jurors to view the exhibits received in evidence in this case. You may not use the computer for any other purpose. At my direction, technicians have taken steps to make sure that the computer does not permit access to the Internet or to any "outside" website, database, directory, game, or other material. Do not attempt to alter the computer to obtain access to such materials. If you discover that the computer provides or allows access to such materials, you must inform me immediately and refrain from viewing such materials.

Do not remove the computer or any electronic data [disk] from the jury room, and do not copy any such data.

INSTRUCTIONS CONCERNING DELIBERATIONS [follow on next page]:

ST § 3.1 Duty To Deliberate.

When you begin your deliberations, you should elect one member of the jury as your presiding juror. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not hesitate to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

ST § 3.2 Communication With Court.

If it becomes necessary during your deliberations to communicate with me, you may send a note through the [marshal] [bailiff], signed by your presiding juror or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing; I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court. If you send out a question, I will consult with the parties before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including me—how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not disclose any vote count in any note to the court.

ST § 3.3 Return of Verdict.

A verdict form has been prepared for you. [*Any explanation of the verdict form may be given at this time.*] After you have reached unanimous agreement on a verdict, your presiding juror will fill in the form that has been given to you, sign and date it, and advise the court that you are ready to return to the courtroom.

ST § 3.4 Additional Instructions of Law .

At this point I will give you a further instruction. By giving a further instruction at this time, I do not mean to emphasize this instruction over any other instruction.

You are not to attach undue importance to the fact that this was read separately to you. You shall consider this instruction together with all of the other instructions that were given to you.

[*Insert text of new instruction.*]

You will now retire to the jury room and continue your deliberations.

ST § 3.5 Deadlocked Jury [as needed].

Members of the jury, you have advised that you have been unable to agree upon a verdict in this case. I have decided to suggest a few thoughts to you.

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict if each of you can do so without violating your individual judgment and conscience. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become persuaded that it is wrong. However, you should not change an honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors or for the mere purpose of returning a verdict.

All of you are equally honest and conscientious jurors who have heard the same evidence. All of you share an equal desire to arrive at a verdict. Each of you should ask yourself whether you should question the correctness of your present position.

I remind you that in your deliberations you are to consider the instructions I have given you as a whole. You should not single out any part of any instruction, including this one, and ignore others. They are all equally important.

You may now retire and continue your deliberations.

DAMAGES INSTRUCTIONS [follow on next page]:

{ for the legal remedy stage, if needed }

DF § 5.1 Damages – Proof.

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiff [on the plaintiff's ____ claim], you must determine the plaintiff's damages. The plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendant. You should consider the following:

[*Here insert types of damages. See Instruction 5.2 (Measures of Types of Damages)*]

It is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

Plaintiffs' Objection to *Model Instruction* § 5.1

This instruction is misleading because there will be no evidence presented on damages. Indeed, there is "no need" to present any such evidence at a trial that is limited to liability. *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 457 (7th Cir. 1982). The Court, therefore, should not use *Model Instruction* § 5.1.

DF § 5.2 Measure of Types of Damages.

In determining the measure of damages, you should consider:

[The reasonable value of [wages] [earnings] [earning capacity] [salaries] [employment] [business opportunities] [employment opportunities] lost to the present time;]

Plaintiffs' Objection to *Model Instruction* § 5.2

This instruction is misleading because there will be no evidence presented on damages. Indeed, there is "no need" to present any such evidence at a trial that is limited to liability. *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 457 (7th Cir. 1982). The Court, therefore, should not use *Model Instruction* § 5.2.

DF § 5.3 Damages – Mitigation.

The plaintiff has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

The defendant has the burden of proving by a preponderance of the evidence:

1. That the plaintiff failed to use reasonable efforts to mitigate damages; and

2. The amount by which damages would have been mitigated.

Plaintiffs' Objection to *Model Instruction* § 5.3.

This instruction is misleading because there will be no evidence presented on damages. Indeed, there is "no need" to present any such evidence at a trial that is limited to liability. *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 457 (7th Cir. 1982). The Court, therefore, should not use *Model Instruction* § 5.3.

II. NON-MODEL INSRUCTIONS TO WHICH THE PARTIES HAVE STIPULATED.

Instructions for this section follow, each starting on their own page in accordance with the "Guidelines For Jury Instructions In Civil Cases, Judge Neil V. Wake" p. 2, line 5:

None.

III. PLAINTIFFS' NON-MODEL INSTRUCTIONS (with any objections or alternative instruction).

Instructions for this section follow, each starting on their own page in accordance with the "Guidelines For Jury Instructions In Civil Cases, Judge Neil V. Wake" p. 2, line 5:

Plaintiffs' Proposed Non-Model Instruction No. 1

A union has a duty to represent all workers represented by the union, including workers who are not members of the union. This duty of fair representation (or DFR) includes the responsibility to represent the interest of all workers fairly and impartially.

Source:
Wallace Corp. v. NLRB, 323 U.S. 248, 255 (1944).

Defendant's Objection, Authority and/or Alternative Instruction:

Objection:
Incomplete; misleading; inaccurate. It is more accurate to say that the duty extends to employees in the bargaining unit, regardless of whether they have joined the union or not. The word "impartially" is not the modern standard and dates from *Wallace*. The *Wallace* case, however, did not involve a direct challenge by disaffected employees against their union. *Wallace* arose under the National Labor Relations Act (NLRA), and at the time, in 1944 (*Steele* issued the same day as *Wallace*, and *Steele* arose under the RLA) the NLRA did not identify unfair labor practices that could be committed by unions and there was no clear basis for federal court action against unions. The modern standard was articulated in *Vaca* and reaffirmed in *O'Neill*, that a breach of the duty occurs "only when a union's conduct toward a member ... is arbitrary, discriminatory, or in bad faith." Departing from this standard invites error.

Authority:
Vaca v. Sipes, 386 U.S. 171, 190 (1967); *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 55, 67, 77 (1991).

Alternative Instruction:
Defendant's Instruction § IV, No. 13 herein below.

Plaintiffs' Proposed Non-Model Instruction No. 2

The union is responsible to, and owes complete loyalty to, the interests of all workers it represents. The union is always obligated to exercise its authority and discretion in complete good faith and honesty of purpose.

Source:
Ford Motor Co. v. Huffman, 345 U.S. 330, 337-338 (1953); *Humphrey v. Moore*, 375 U.S. 335, 343 (1964).

Defendant's Objection, Authority and/or Alternative Instruction:

Objection:
Out of context; incomplete; misleading. The language taken form *Huffman* omits the following which comes two sentences later and is necessary to understand the duty: "The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. Compromises on a temporary basis, with a view to long-range advantages, are natural incidents of negotiation." The *Humphrey* citation appears inaccurate.

Authority:
Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953) (for cite above).

Alternative Instruction:
Defendant's Instruction § IV, Nos. 13, 20 herein below.

Plaintiffs' Proposed Non-Model Instruction No. 3

A union violates the duty of fair representation when it acts in bad faith toward a worker or group of workers.

Source:
Vaca v. Sipes, 386 U.S. 171, 190 (1967).

Defendant's Objection, Authority and/or Alternative Instruction:

Objection:
Incomplete; misleading. First, the complete statement referenced in *Vaca* at 386 U.S. 190 is: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." To omit the complete sentence is unnecessarily suggestive because it omits "only." Second, "a 'bad' motive does not spoil a collective bargaining agreement that rationally serves the interests of workers as a whole …" *Rakestraw v. United Airlines, Inc*., 981 F.2d 1524, 1535 (7th Cir. 1992).

Authority:
Vaca v. Sipes, 386 U.S. 171, 190 (1967); *Rakestraw v. United Airlines, Inc*., 981 F.2d 1524, 1535 (7th Cir. 1992).

Alternative Instruction:
Defendant's Instruction No. 13 herein below.

Plaintiffs' Proposed Non-Model Instruction No. 4

A union violates the duty of fair representation if it abandons an existing seniority award without any corresponding benefit to the workers as a whole.

Source:
Addington v. US Airline Pilots Assn., 588 F. Supp.2d 1051, 1061 (D. Ariz. 2008); *see, generally, Steele v. Louisville & N.R. Co*., 323 U.S. 192, 198-99 (1944).

Defendant's Objection, Authority and/or Alternative Instruction:

Objection:
Inaccurate; incomplete; unsupported; contentious. First, "existing seniority award" assumes a fact and legal determination not yet made by this Court, i.e. whether USAPA is bound by the internal ALPA arbitration because of any CBA it inherited (as the Court noted, it was obligated to assume the facts pled, Doc. # 84 p. 2:13 – "For purposes of a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the court accepts as true the allegations in the complaint."); and also whether ALPA Merger Policy itself precluded implementation of the Nicolau Award, in which case there was nothing to "abandon." Second, the issue is beyond the jurisdiction of this Court because resolution requires interpretation of agreements made pursuant to the RLA that are within the exclusive jurisdiction of the System Board of Adjustment (as this Court has already held, Doc. # 84, p. 14). Third, *Steele* does not stand for the proposition that Plaintiffs' cite it for. *Steele* dealt with an existing contract, not an arbitration, not a proposal, not a mere intent to propose. Fourth, seniority rights are creatures of contract that do no vest and unions are free to revisit seniority terms.

Authority:
Doc. # 84 p. 2:13; *Steele* at 194 ("On February 18, 1941, the railroads and the Brotherhood, as representative of the craft, *entered into a new agreement* which provided that not more than 50% of the firemen in each class of service in each seniority district of a carrier should be Negroes; that until such" [emphasis added]); Seniority rights not vested: *See Hass v. Darigold Dairy Prod. Co.,* 751 F.2d 1096, 1099 (9th Cir. 1985); *Wightman v. Springfield Terminal Railway Co*., 100 F.3d 228, 232 (1st Cir. 1996); *Rakestraw v. United Airlines, Inc*., 981 F.2d 1524, 1535 (7th Cir. 1992); *United Food & Commercial Workers Int'l Union v. Gold Star Sausage Co*., 897 F.2d 1022, 1026 (10th Cir. 1990); *Shamblin v. General Motors Corp*., 743 F.2d 436, 438-39 (6th Cir. 1984); *Johnson v. Air Line Pilots Ass'n*, 650 F.2d 133, 136-37 (8th Cir. 1981); *Burchfield v. Steelworkers*, 577 F.2d 1018, 1020 (5th Cir. 1978); *Hiatt v. New York Cent. RR Co*., 444 F.2d 1397 (2d Cir. 1971).

Alternative Instruction:
None.

Plaintiffs' Proposed Non-Model Instruction No. 5

A union violates the duty of fair representation if, in order to win the votes of the majority of employees, it makes election campaign promises that it will adopt and promote a seniority list favored by that majority.

Source:
Truck Drivers and Helpers, Local Union 568 v. NLRB, 379 F.2d 137, 143 (C.A.D.C. 1967).

Defendant's Objection, Authority and/or Alternative Instruction:

Objection:
Inaccurate; incomplete; misleading. First, *Truck Drivers* concerned an *election* challenge and remedy, affirming an order to re-run an election ("we think the Board could conclude that this campaign activity by UTE inevitably introduced improper influences into the election process tantamount to the restraint or coercion contemplated by section 7" 379 F.2d at 145). But in the case at bar, it is undisputed that Plaintiffs made no election or certification challenge to the National Mediation Board ("NMB"). Were they to, that would be subject to the exclusive jurisdiction of the NBM. Second, in *Truck Drivers*, 379 F.2d at 143, the operative language was not "the votes of the majority" but rather "other than the purely political motive of winning an election by a promise of preferential representation to the numerically larger number of voters." A union is always free to consider the majority: "If the union's leaders took account of the fact that the workers at the larger firm preferred this outcome, so what? Majority rule is the norm." (*Rakestraw* at 1533). Third, in *Truck Drivers* the Court held that date of hire is the gold standard: " the Board may legitimately measure other proposals for handling the problems occasioned by merging the seniority rosters by a dovetailing standard, as experience has demonstrated it generally to be an equitable and feasible solution and others with situations" *Id*. at 143, (*citing Humphrey* at 347). Fourth, considerations of majoritarian interests are only improper where political expediency, without any other rational justification, is the sole consideration and DFR standards are otherwise violated. *Alvey v. General Electric Co*., 622 F.2d 1279, 1287 (7th Cir. 1980).

Authority:
Truck Drivers and Helpers, Local Union 568 v. NLRB, 379 F.2d 137, 143 (D.C. Cir. 1967); *Rakestraw v. United Airlines, Inc*., 981 F.2d 1524, 1533 (7th Cir. 1992); *Alvey v. General Electric Co*., 622 F.2d 1279, 1287 (7th Cir. 1980); *Humphrey v. Moore*, 375 U.S. 335, 347 (1964).

Alternative Instruction:
Defendant's Instruction Nos. 15, 15, 17, 18 herein below.

Plaintiffs' Proposed Non-Model Instruction No. 6

A union violates the duty of fair representation if it fails to make a good faith effort to fairly and impartially reconcile the competing interests of two different groups of workers.

Source:
Truck Drivers and Helpers, Local Union 568 v. NLRB, 379 F.2d 137, 143 (C.A.D.C. 1967).

Defendant's Objection, Authority and/or Alternative Instruction:

Objection:
Inaccurate; incomplete; misleading. *Truck Drivers* does not stand for the proposition cited. Rather, the Court upheld an unfair labor practice under the NLRA and affirmed the re-running of an election: "In any event, a campaign pledge by a union seeking the favor of two groups of employees that it will, deliberately and without any pretense to rational justification in fact or theory, discriminate against one in the exercise of the exclusive bargaining rights conferred by section 9 of the Act is not compatible with the free election promise of Section 7 [of the NLRA]" *Id*. at 146

Authority:
Truck Drivers and Helpers, Local Union 568 v. NLRB, 379 F.2d 137, 143 (D.C. Cir. 1967).

Alternative Instruction:
Defendant's Instruction Nos. 15, 15, 17, 18 herein below.

Plaintiffs' Proposed Non-Model Instruction No. 7

A union violates the duty of fair representation if it allows itself to be used by the majority of workers to avoid the implementation of a properly arbitrated seniority award.

Source:
Air Wisconsin Pilots Protection Committee v. Sanderson, 909 F.2d 213, 217 (7th Cir. 1990).

Defendant's Objection, Authority and/or Alternative Instruction:

Objection:
Inaccurate; incomplete; misleading. First, the phrase "a properly arbitrated seniority award" assumes too much, and ALPA Merger Policy has been altered dramatically since the *Air Wisconsin* decision. Second, the "gang up" language in *Air Wisconsin* was dicta, not the holding. Third, the "gang up" language, even if 'good dicta' is not applicable in light of the subsequent holding in *Rakestraw* that clarifies that considering the preferences of the majority *per se* is not a violation even where ALPA Merger Policy was allegedly circumvented by the TWA-pilot majority. Fourth, the *Air Wisconsin* case involved factual circumstances in which the democratic check provided for under ALPA Merger Policy had already been exhausted.

Authority:
Rakestraw v. United Airlines, Inc., 981 F.2d 1524, 1535, 1533 (7th Cir. *1992), cert. denied sub nom. Hammond v. Air Line Pilots Ass'n*, 510 U.S. 861 (1993) ("If the union's leaders took account of the fact that the workers at the large firm preferred this outcome, so what? Majority rule is the norm").

Alternative Instruction:
None.

Plaintiffs' Proposed Non-Model Instruction No. 8

A union violates the duty of fair representation if its constituted purpose is to impose a date of hire seniority list on the minority employees in disregard of an arbitrated seniority award established by a process that both sides agreed to and deemed fair in advance.

Source:
Addington v. US Airline Pilots Assn., 588 F. Supp.2d 1051, 1061 (D. Ariz. 2008); *see, generally, Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198-99 (1944).

Defendant's Objection, Authority and/or Alternative Instruction:

Objection:
Inaccurate; incomplete; misleading. First, neither cited authority supports the instruction. Second, "both sides" did not agree either to the arbitration process or to the finality of "an arbitrated award." Third, date of hire seniority is a legitimate union goal in of itself. Fourth, the instruction assumes facts that have not been established, for example that USAPA was "constituted" to disregard anyone's rights. Fifth, seniority rights do not vest and a union is free to negotiate them. Sixth, misstates the standard for a DFR. Seventh, it disregards case law permitting labor unions to re-visit arbitrated seniority decisions, even where they agreed that they be final and binding, where the union has a principle objection to the arbitration result. *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 800 (7th Cir. 1976) (*citing Associated Transport, Inc.*, 185 N.L.R.B. 631 (1970)).

Authority:
Vaca v. Sipes, 386 U.S. 171, 190 (1967); *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 55, 67, 77 (1991); Seniority rights not vested: *See Hass v. Darigold Dairy Prod. Co.,* 751 F.2d 1096, 1099 (9th Cir. 1985); *Wightman v. Springfield Terminal Railway Co.*, 100 F.3d 228, 232 (1st Cir. 1996); *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1535 (7th Cir. 1992); *United Food & Commercial Workers Int'l Union v. Gold Star Sausage Co.*, 897 F.2d 1022, 1026 (10th Cir. 1990); *Shamblin v. General Motors Corp.*, 743 F.2d 436, 438-39 (6th Cir. 1984); *Johnson v. Air Line Pilots Ass'n*, 650 F.2d 133, 136-37 (8th Cir. 1981); *Burchfield v. Steelworkers*, 577 F.2d 1018, 1020 (5th Cir. 1978); *Hiatt v. New York Cent. RR Co.*, 444 F.2d 1397 (2d Cir. 1971); *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 800 (7th Cir. 1976) (*citing Associated Transport, Inc.*, 185 N.L.R.B. 631 (1970))

Alternative Instruction:
None.

Plaintiffs' Proposed Non-Model Instruction No. 9

The terms of the collective bargaining agreements and the Transition Agreement are binding on the individual employees and upon the union, and any successor union, as the bargaining agent for those employees.

Source:
Seborowski v. Pittsburgh Press, 188 F.3d 163, 168 (3rd Cir. 1999). *See also, Anderson v. AT&T Corp.*, 147 F.3d 467 (6th Cir. 1998);, *Brotherhood of Maintenance of Way Employees v. Guliford Transportation Industries, Inc*., 808 F. Supp. 46 (D.C. Maine 1992); *Order of Railway Contractors and Brakemen v. Switchmen's Union of North America*, 269 F.2d 726 (5th Cir. 1959).

Defendant's Objection, Authority and/or Alternative Instruction:

Objection:
Misleading; confusing. First, the instruction implies that individuals can be liable for the DFR claim. Second, this Court properly dismissed the State complaint aimed at individuals. Third, the Defendant in the case at bar is USAPA, not individuals. Fourth, *Seborowski* merely affirmed an order commanding individual employees to arbitrate despite the fact they claimed they were not "parties" to a CBA; it did not establish individual liability for act of the union. Fifth, while there is no quarrel with the proposition that a successor union is bound by a pre-existing contract, issues of contract interpretation and application are beyond the jurisdiction of this Court. Sixth, the instruction is misleading in that it suggests that a union is not free to re-negotiate contractual terms and that a successor union is bound by the internal policies of a de-certified predecessor merely because they are referenced in a collectively bargained agreement.

Authority:
Rakestraw v. United Airlines, Inc., 981 F.2d 1524, 1536 (7th Cir. 1992) (employees not parties to CBA only third-party beneficiaries – "it does not create contractual rights enforceable in court by the Group of [pilots] ..." and if third parties then the dispute is a "minor" one under the RLA); *see also Railway &Steamship Clerks v. Florida E. C. Ry*., 384 U.S. 238 246 (1966) (RLA prohibits a carrier from negotiating directly with employees over matters that are subject of a collective bargaining agreement); *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346 (1944)

Alternative Instruction:
Defendant's Instruction Nos. 11-15 herein below.

Plaintiffs' Proposed Non-Model Instruction No. 10

The Court has determined that USAPA is obligated to include the seniority list attached to the Nicolau Award as the integrated seniority list to be included in the single collective bargaining agreement with US Airways.

Source:
Addington v. US Airline Pilots Assn., 588 F. Supp.2d 1051, 1061 (D. Ariz. 2008); *see, generally, Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198-99 (1944).

Defendant's Objection, Authority and/or Alternative Instruction:

Objection:
Misstates the record and the law of the case; misstates the law; incomplete; misleading; violates the Seventh Amendment. This Court has made no determination of what violates any CBA and lacks the jurisdiction to do so. Regardless, any fact finding necessary to a liability determination is reserved for the jury.

Authority:
Doc. # 84 at 14. (*citing Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Aloha Airlines, Inc.*, 776 F.2d 812, 815 (9th Cir. 1985); *Consol. Rail Corp. v. Ry. Labor Execs. Ass'n*, 491 U.S. 299, 310 (1989)).

Alternative Instruction:
None.

IV. DEFENDANT'S NON-MODEL INSTRUCTIONS (with any objections or alternative instruction).

Instructions for this section follow, each starting on their own page in accordance with the "Guidelines For Jury Instructions In Civil Cases, Judge Neil V. Wake" p. 2, line 5:

INSTRUCTIONS ON THE TRIAL PROCESS [follow on next page]:

§ 1) [Communications Between Court and Jury During Jury's Deliberations.

If it becomes necessary during your deliberations to communicate with me, you may send a note by a bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me by any means other than a signed writing, and I will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open court.

You will note from the old to both be taken by the bailiffs that they too, as well as all other persons, are forbidden to communicate in any way or any manner with any member of the jury in any subject touching the merits of the case.

Bear in mind also that you are never to reveal any person – not even to me – how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.

Authority:

Federal Jury Practice, § 106.08

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 1:

Plaintiffs object to this instruction because this subject matter is adequately covered by *Model Instruction* ST § 1.12 *Conduct of the Jury*.

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 1.

§ 2) Expert Evidence.

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists for "expert witnesses." An expert witness is a person who, by education and experience has become expert in some art, science, profession, or calling. Expert witnesses may state their opinions as to matters in which they profess to be experts, and may also state the reasons for their opinions.

You should consider each expert opinion received in evidence in this case, and give it such weight as you think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

Authority:

Federal Jury Practice, § 104.40

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 2:

Plaintiffs object to this instruction because this subject matter is adequately covered by *Model Instruction* ST § 2.11 *Expert Opinion*.

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 2.

§ 3) Cautionary Instruction Before Court Recess.

We are about to take our first recess or break. I want to remind you of the instructions I gave you earlier. Until the trial is over, you are not to discuss this case with anyone, including other jurors, members of your family, people involved in the trial, or anyone else. You may not permit others to discuss the case with you. If anyone approaches you and tries to talk to about the case, please let me know about it immediately.

Do not read or listen to any news reports of the trial. If a newspaper headline on news broadcast catches your attention, do not examine the article or watch or listen to the broadcast any further. The person who wrote or is reporting the story may not have listened to all the testimony, may be getting information from persons whom you will not see here in court under oath and subject to cross-examination. The report may emphasize an unimportant point or may simply be wrong. You must base your verdict solely and exclusively on the evidence received in court during the trial.

Finally, you are reminded to keep an open mind until all the evidence has been received and you have heard the arguments of counsel, the instructions of the court, and the views of your fellow jurors.

If you need to speak with me about anything, simply give a signed note to the Bailiff to give to me.

Authority:

Federal Jury Practice, § 102.01

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 3:

Plaintiffs object to this instruction because this subject matter is adequately covered by *Model Instruction* ST § 1.12 *Conduct of the Jury*.

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 3.

CLOSE OF EVIDENCE INSTRUCTIONS [follow on next page]:

§ 4) Instructions Apply To Each Party.

Unless I state otherwise, you should consider each instruction given to apply separately and individually to both the Plaintiffs and to the Defendant in the case.

Authority:

Federal Jury Practice, § 103.10

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 4:

Plaintiffs object to this instruction because it is unnecessary and could potentially mislead the jury.

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 4.

§ 5) All Persons And Organizations Are Equal Before The Law.

You should consider and decide this case as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life.

Unincorporated associations, such as Unions are entitled to the same fair trial as a private individual. All persons, including unincorporated associations, stand equal before the law, and are to be treated as equals.

Authority:

Federal Jury Practice, § 103.12

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 5:

Plaintiffs object to this instruction because the first part is not applicable to this matter and the second part is confusing.

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 5.

§ 6) "If You Decide" Or "If You Find".

When I instruct you that a party has the burden of proof on any proposition, or use the expression "if you find," or "if you decide," I mean that you must be persuaded, considering all the evidence in the case, that the proposition is more probably true than not.

Authority:

Federal Jury Practice, § 104.04

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 6:

Plaintiffs object to this instruction because this subject matter is adequately covered by *Model Instruction* ST § 1.2 *Claims and Defenses*.

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 6.

§ 7) "Inferences" Defined.

You are to consider only the evidence in the case. However, you are not limited to the statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You may draw from the facts that you find have been proved such reasonable inferences as seem justified in light of your experience. "Inferences" are deductions or conclusions that reason and common sense lead you to draw from facts established by the evidence in the case.

You may infer a fact or facts only from other facts that have been proved by a preponderance of the evidence, but you may not make inferences from a speculative or remote basis that has not been established by the preponderance of the evidence.

Authority:

Federal Jury Practice, § 104.20

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 7:

Plaintiffs object to this instruction because this subject matter is adequately covered by *Instruction* ST § 1.9 *Direct and Circumstantial Evidence*.

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 7.

§ 8) Presumption of Regularity.

Unless and until outweighed by evidence to the contrary, you may find that official duty has been regularly performed, that private transactions have been fair and regular, that the ordinary course of business or employment has been followed, that things have happened according to the ordinary course of nature and the ordinary habits of life, and that the law has been obeyed.

Authority:

Federal Jury Practice, § 104.21

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 8:

Plaintiffs object to this instruction because it is not relevant to the facts of this case and would improperly mislead the jury into applying a presumption that Defendant acted in accord with its duty of fair representation. There is no such presumption. The Court, therefore, should reject Defendant's *Non-Model Instruction* § 8.

§ 9) Effect Of Prior Inconsistent Statements Or Conduct.

Evidence that, at some other time while not under oath a witness who is not a party to this action has said or done something inconsistent with the witness' testimony at the trial, may be considered for the sole purpose of judging the credibility of the witness. However, such evidence may never be considered as evidence of proof of the truth of any such statement.

Where the witness is a party to the case, and by such statement or other conduct admits some fact or facts against the witness' interest, then such statement or other conduct, if knowingly made or done, may be considered as evidence of the truth of the fact or facts so admitted by such party, as well as for the purpose of judging the credibility of the party as a witness.

An act or omission is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Authority:

Federal Jury Practice, § 105.09

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 9:

Plaintiffs object to this instruction because it is confusing and unnecessary. The subject matter is adequately covered by *Instruction* ST § 1.11 *Credibility of Witnesses*. *See United States v. Monzon*, 869 F.2d 338, 346 (7th Cir. 1989) (defendant not entitled to specific instruction on prior inconsistent statement where instruction actually given by court told jury that it should consider inconsistencies in witness testimony in determining credibility). The Court, therefore, should reject Defendant's *Non-Model Instruction* § 9.

§ 10) Admissions.

An admission is a statement made or a position taken by an adversary, either personally or through an authorized agent, which is contrary to and inconsistent with the contention being made in the litigation. There are two basic types of admissions, judicial admissions and evidentiary admissions.

Admissions made in a formal judicial proceeding like a lawsuit or a quasi-judicial proceeding such as arbitration, may constitute what are called judicial admissions. In order to constitute a judicial admission, a statement, whether written or oral, must be deliberate, clear and unequivocal, and must be made in the course of a judicial or quasi-judicial proceeding. The party who makes a judicial admission may not controvert that admission. If the fact in question has been judicially admitted, the opposing party need not offer any evidence to prove that fact. Judicial admissions, once made, are conclusive and binding upon the party making the admission.

There is another, type of admission known as an evidentiary admission. Unlike a judicial admission with this type of admission the party who has made it may attempt to controvert or explain it. You may or may not accept that party's attempt to controvert or explain it. The decision is up to you as the triers of fact.

If you find that the Plaintiff or Defendants made evidentiary admissions you may consider that admission and any other evidence on that subject to determine what you believe to be the true facts as to that particular issue.

Authority:

29A AmJur 2d, *Evidence, §* 754, p. 118, § 770, p. 138, § 772, p. 140; *Oscanyan v. Arms*, 103 U.S. 261 (1880); *Keller v. United States*, 58 F3d 1193 (7th Cir. 1995).

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 10:

Plaintiffs object to this instruction because the subject matter is adequately covered by *Model Instructions* ST § 2.2 *Stipulations of Fact* and PL § 2.3 *Judicial Notice*. Otherwise, this instruction, particularly as it is likely to be misused by Defendant, would invite the jury to make findings contrary to the weight of evidence. The Court, therefore, should reject Defendant's *Non-Model Instruction* § 10.

LIABILITY ISSUES SPECIFIC TO THIS CASE [follow on next page]:

DF § 11) A Union Can Act Only Through Its Officers, Employees Or Agents.

As you have heard, the Defendant in this case, USAPA, is a union.

As a general rule, whatever any person is legally capable of doing himself can be done through another as an agent. So, if the acts of an employee or other agent are authorized or consented to by a person, then the law holds that person responsible for such acts, the same as if the acts had in fact been done by such person.

Because the Defendant in this case is a union, it can act only through it officers, employees, or agents.

A union can be liable for its agent's actions if its agents actively participate in unlawful conduct. However, a union may only be held responsible for the authorized or ratified acts of its agents.

And for a union to be held responsible for the acts of its agents, such acts must be done within the scope of the authority delegated to the agent by the union's constitution and bylaws.

Authority:

Source: *Federal Jury Practice, §§ 108.01, 1*57.02; *Shimman v. Frank*, 625 F.2d 80 (6 Cir. 1980) *cert. denied,* 469 U.S. 1215 (1985); *General Building Contractor's Association, Inc. v. Pennsylvania,* 458 U.S. 375, 392 (1982); Restatement (Second) of Agency §1 (1958); *Carbon Fuel Company v. United Mine Workers of America,* 444 U.S. 212, 217 (1979); *Coronado Coal Co. v. United Mine Workers of America,* 268 U.S. 295, 304 (1925)

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 11.

Plaintiffs object to Defendant's *Non-Model Instruction* § 11 because the authority of USAPA's agents is not at issue. Moreover, there is no authority for limiting the valid

means of delegation to USAPA's Constitution and bylaws. No such language is used in the model instructions cited by Defendant:

> **§ 108.01 Agents of corporation**
> A corporation may act only through natural persons as its agents or employees. In general, agents or employees of a corporation may bind the corporation by their acts and declarations made while acting within the scope of their authority delegated to them by the corporation, or within the scope of their duties as employees of the corporation.

3 *Fed. Jury Prac. & Instr*. § 108.01 (5th ed.).

> Authority to act for either a corporation or a labor union in a particular matter, or in some particular way or manner, may be inferred from the surrounding facts and circumstances shown by the evidence in the case. Authority to act for a corporation or a labor union, like any other fact in issue in a civil case, need not be established by direct evidence, but may be established by indirect or circumstantial evidence.

Id. § 157.02.

The proper instruction, if agency becomes an issue, is as follows:

> **4.2 LIABILITY OF CORPORATIONS—SCOPE OF AUTHORITY NOT IN ISSUE**
> Under the law, a corporation is considered to be a person. It can only act through its employees, agents, directors, or officers. Therefore, a corporation is responsible for the acts of its employees, agents, directors, and officers performed within the scope of authority.

9th Cir. Model Jury Instr. Civil § 4.2.

§ 12) A Union Is Obligated To Follow Its Constitution.

Unions have a legal obligation to follow their Constitutions. Unions have a right to interpret their own constitutions, but union members may enforce their constitutional rights in court. For example, if a union constitution grants its members the right to vote on whether to accept or reject a tentatively bargained for contract in a ratification vote, then the members have a legally enforceable right to vote.

Under law, unions are to be democratically governed and responsive to the will of their membership.

Authority:

29 U.S.C. § 401 *et seq.* (Labor Management Reporting And Disclosure Act); *Finnegan V. Leu*, 456 US 431, 436 (1982) (when Congress enacted the LMRDA in 1959 its "primary objective" was to affirmatively "ensur[e] that unions would be democratically governed and responsive to the will of their membership"); *Hall v. Cole*, 412 U.S. § 1, 7 *and* n. 9, 83 LRRM 2177 (1973), *citing* 105 CONG. REC. S6471 (1959) (Statement of Sen. McClellan).

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 12.

Plaintiffs object to Defendant's *Non-Model Instruction* § 12 because it is irrelevant to this case. Defendant's instruction suggests that it would be an affirmative defense if it followed its Constitution. Not so. A union's proof that its actions were allowed or required by its constitution or bylaws is not an affirmative defense to violation of the duty of fair representation. *Retana v. Apartment, Motel, Hotel and Elevator Operators Union, Local No. 14, AFL-CIO*, 453 F.2d 1018, 1024-25 (9th Cir. 1972) ("It is no answer to say that the complaint relates to appellee union's "internal" policies and practices. The duty of fair representation 'arises out of the union-employee relationship and pervades it.'"). This is entirely consistent with the doctrine that a union constitution is nothing more than a contract. *Korzen v. Loc. Union 705, Intl. Bhd. of Teamsters*, 75 F.3d 285, 288 (7th Cir. 1996). A contract, even where envisioned by federal law, cannot modify a duty created by Congress. *See Davidowitz v. Delta Dental Plan of California, Inc.*, 946 F.2d 1476, 1481 (9th Cir. 1991) (ERISA plan cannot relieve ERISA fiduciary of statutory duty).

The proper instruction in this context is as follows:

> "An affirmative defense is a set of facts that, if proven by a defendant, will defeat a plaintiff's claim, whether or not that claim is otherwise proven by the evidence. A union's proof that its actions were allowed or required by its constitution or bylaws is not an affirmative defense to violation of the duty of fair representation."

§ 13) Duty Of Fair Representation Defined.

I will now define the basis for the legal claim in this case.

When a union is the exclusive representative of employees, the law requires that the union fairly represent the interests of those employees. This duty is known as the "duty of fair representation."

Once it becomes the representative, a union owes a duty of fair representation to every employee within the bargaining unit that it represents.

Plaintiffs are member of the bargaining unit represented by the Defendant, USAPA. Therefore, once it was certified on April 18, 2008, USAPA owed Plaintiffs a duty to fairly represent them.

A union breaches or violates its duty of fair representation when, in the course of negotiating, administering, or enforcing a collective bargaining agreement, the union's conduct toward a member of the bargaining unit it represents is arbitrary, discriminatory, or in bad faith.

I will explain this further.

Authority:

Federal Jury Practice, § 157.81

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 13.

Plaintiffs object to Defendant's Proposed Non-Model Instruction § 13 because it misstates the instruction in Federal Jury Practice and oversimplifies a material area of law, suggesting Defendant has an affirmative defense that does not exist. The proper instruction from Federal Jury Practice is as follows:

> **§ 157.81. Duty of fair representation**
> Defendant union is a labor organization. When a union or labor organization is the exclusive representative of employees, the law requires that the union represent the interests of those employees in a proper manner. This duty is known as the duty of fair representation.
>
> A union breaches its duty of fair representation when, in the course of negotiating, administering, or enforcing the collective bargaining agreement, the union's conduct toward a member of the bargaining unit it represents is arbitrary, discriminatory, or in bad faith. A union owes its duty of fair representation to every employee within the bargaining unit that it represents.
>
> Not every employee within a bargaining unit must be a member of that union. However, the union must represent the interests of every employee within the bargaining unit, whether or not the employee is a union member.
>
> *[Plaintiff is not a union member. However, plaintiff is in the bargaining unit represented by the defendant union. Thus, defendant union owes plaintiff the duty of fair representation. The duty owed by defendant union is the same as it would be for a union member.]*
>
> *[Plaintiff is a member of the bargaining unit represented by defendant union. The defendant union owes plaintiff the duty of fair representation.]*

3A *Fed. Jury Prac. & Instr.* § 157.81 (5th ed.). A relevant modification of the italicized language here is:

> "Some Plaintiffs and other members of the West Pilot class are union members, others are members of the bargaining unit. The defendant owes them all the duty of fair representation."

§ 14) Scope of Duty Of Fair Representation.

Before I explain the duty of fair representation, let me explain when the duty starts.

A union owes a duty to fairly represent only when it becomes the exclusive bargaining representative. There is no duty before a union is certified to represent the employees.

In this case, Defendant USAPA was not certified to represent Plaintiffs until April 18, 2008.

Therefore, the law applied in this case is that Defendant USAPA had no duty to Plaintiffs before April 18, 2008. April 18, 2008 is when USAPA's duty starts.

This means that you may not base any verdict in favor of Plaintiffs by finding that USAPA breached its duty of fair representation before April 18, 2008.

Authority:

Steele v. Louisville & Nashville Railroad Co., 323 US 192 (1944); *Wallace Corp. v NLRB*, 323 US 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); *McNamara-Blad, v. The Assn. of Professional Flight Attendants*, 275 F.3d 1165, 1169-70 (9th Cir. 2002). *Bensel v. Air Line Pilots Ass'n, 387 F.3d 298 (3d Cir. 2004).*

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 14.

Plaintiffs object to Defendant's *Non-Model Instruction* § 14 because it misstates the law and intentionally misleads the jury. It is the law of the case that USAPA is unfairly representing Plaintiffs if, prior to the election, it "renounced any good faith effort to reconcile the interests of both pilot groups." *Addington v. US Airline Pilots Assn*., 588 F.Supp.2d 1051, 1060 (D. Ariz. 2008); *see also Truck Drivers & Helpers, Local Union*

568 v. NLRB, 379 F.2d 137, 145 (D.C. Cir. 1967) (finding unfair representation where a union promised unfair representation if elected because to make such promises "would . . . constitute a default by [the union] in its obligation to represent fairly all the employees in the unit for which it becomes the exclusive bargaining representative."). Such actions is an unfair labor practice even before the union is "an exclusive bargaining agent" because the "very commitment presently restrains the employees of the bargaining unit in the exercise of their … right to freedom of choice in the selection or rejection of a bargaining representative." *Id.* at 144.

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 14 completely and rely on 3A *Fed. Jury Prac. & Instr.* § 157.81 (5th ed.) as set out in Plaintiffs' objection to § 13.

§ 15) What Is A Breach Of The Duty Of Fair Representation.

Now, in this case you must decide whether Defendant has breached the duty of fair representation owed to Plaintiffs.

Specifically, you must decide whether Plaintiff has proven by a preponderance of the evidence that the challenged actions of the Defendant were taken in bad faith, or were discriminatory or were arbitrary. In addition, to find a breach or violation of the duty you must find that there is a direct connection between a breach and any resulting damages to Plaintiffs.

If you decide that Plaintiffs have proven their case, then you will have found that Defendant is liable to Plaintiffs and your verdict must be for Plaintiff. In that case, you must then go on to consider the issue of the amount damages, but that will take place in a second phase of the trial.

If, on the other hand, you decide that Plaintiff has not proven these facts, then your verdict must be for the Defendant.

Authority:

Federal Jury Practice, § 157.91; *Vaca v. Sipes, 386 U.S. 171, 177, 87 S. Ct. 903, 910, 17 L. Ed. 2d 842 (1967)*; *Poole v. Budd Co*., 706 F.2d 181, 183 (6th Cir. 1983); *Walk v. P.I.E. Nationwide, Inc*., 958 F.2d 1323, 1326 (6th Cir. 1992); *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985); *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1018 (3d Cir.), *cert. denied*, 434 U.S. 837, 54 L. Ed. 2d 98, 98 S. Ct. 126 (1977) (liability will only attach, however, where there is a direct nexus between breach of this duty and resultant damages to the individual or minority segment as an element of liability).

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 15.

Plaintiffs object to Defendant's *Non-Model Instruction* § 15 because it is loosely based on the model instruction for a § 301 hybrid claim. Hybrid claims are predicated on a breach of the collective bargaining agreement. *See* 3 *Fed. Jury Prac. & Instr.* § 157.91 notes ("This instruction is the second instruction in a Section 301 hybrid claim."). That claim is not being made here. The proposed instruction also improperly refers to damages. This is misleading because there will be no evidence presented on damages. Indeed, there is "no need" to present any such evidence at a trial that is limited to liability. *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 457 (7th Cir. 1982).

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 15.

§ 16) Bad Faith Defined.

Now I want to define some of the terms I have mentioned in describing the duty of fair representation. As I said, it is a violation of the duty for union to act in bad faith, or to discriminate or to act arbitrarily.

First, what is bad faith?

Bad faith on the part of a union requires a showing of fraud, deceit or dishonest action. Personal hostility alone is not enough to establish unfair representation if the union's representation was adequate and there is no evidence that the personal hostility caused the union's actions. Conduct is "bad faith" when it is designed to mislead or deceive, or is not prompted by an honest mistake or belief as to the merits of the matter, but is based upon some ulterior motive or intent to harm.

In order to establish that a union has engaged in bad faith conduct, there must be substantial evidence of fraud, deceitful action or dishonest conduct.

And, if the result of a union's conduct is rationally related to a legitimate union objective, then the union has not acted in bad faith even where the underlying motive is attributable to hostility. A bad faith motive, standing alone, is not a sufficient basis for a find that a labor union has violated its duty of fair representation.

Authority:

Federal Jury Practice, § 157.102; *Humphrey v. Moore,* 375 U.S. 335, 348 (1964); To establish that a union acted in "bad faith," a plaintiff must provide "substantial evidence of fraud, deceitful action, or dishonest conduct," *Humphrey v. Moore,* 375 U.S. 335, 348 (1964), or evidence that the union was motivated by personal animus toward the

plaintiff. *See Conkle v. Jeong*, 73 F.3d 909, 916 (9th Cir.1995) (including personal animus as basis for finding of bad faith); *Smith, v. United Steelworkers of America Local 7898*, 834 F.2d 93 (4th Cir. 1987); *Amalgamated Assoc. of Street, Elec. R.R. and Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 299 (1971) (In order to establish that a union has engaged in bad faith conduct, "there must be 'substantial evidence of fraud, deceitful action or dishonest conduct.'"); *Mock v. T.G. & Y. Stores Co*., 971 F.2d 522, 531 (10th Cir. 1992); *Rakestraw v United Air Lines, Inc*., 981 F.2d 1524, 1532 (7th Cir. 1992), *cert den. sub nom*.; *Hammond v. Airline Pilots*, 510 US 861 (1993) *citing Palmer v. Thompson*, 403 U.S. 217 (1971) ("Slapping the label "bad faith" or "discrimination" on a classification that is rationally related to a legitimate objective does not alter the analysis. A discriminatory motive without a discriminatory rule does not condemn a statute").

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 16.

Plaintiff's object to Defendant's *Non-Model Instruction* § 16. Plaintiffs agree, because "bad faith" lacks a generally-enough understood meaning, that the Court should give an instruction. *Cf. United States v. Garza-Juarez*, 992 F.2d 896, 910 (9th Cir. 1993) (no plain error to not define a term of general use).

Plaintiff objects to this instruction for "bad faith" because it gives a confused and flawed recital of elements without giving a clear definition of bad faith. In fact, it never says what bad faith is, rather, its focus is on what bad faith is not. Moreover, this instruction is substantially different than the cited pattern instruction:

> A union breaches its duty of fair representation if it acts in "bad faith." "Bad faith" on the part of a union requires a showing of fraud, deceitful action, or dishonest action. Personal hostility alone is insufficient to establish unfair representation if the union's representation was adequate and there is no evidence that the personal hostility tainted the union's actions.

3 *Fed. Jury Prac. & Instr*. § 157.102 (5th ed.).

Black's Law Dictionary defined "bad faith" as:

> the opposite of 'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a **neglect or refusal to fulfill some duty** or some contractual obligation, not **prompted by** an honest mistake as to one's rights or duties, but by **some interested or sinister motive.**

Black's Law Dictionary (6th ed. 1990 (emphasis added). It currently defines "good faith" as "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one' s duty or obligation, … or (4) absence of intent to defraud r seek unconscionable advantage." *Black's Law Dictionary* (7th ed. 1999). Under both definitions, the subjects are the defendant's state of mind and the plaintiff's rights—not the other way around.

A more easily understood definition is: "***the intentional or malicious refusal to perform some duty or contractual obligation***."*West's Encyclopedia of American Law*, (2d ed.) "Bad Faith" (http://legal-dictionary.thefreedictionary.com/bad+faith).

Plaintiffs, therefore, propose the following jury instruction for bad faith: "***the intentional refusal to perform some duty***," if one is needed.

§ 17) Arbitrary Conduct Defined.

Second, what is arbitrary mean?

A union's actions are arbitrary if, in the light of circumstances, its behavior is so far outside a "wide range of reasonableness" it is wholly irrational.

In order to find that the union acted in an arbitrary manner you must find that the union's challenged conduct took place without any valid reason and without the exercise of judgment.

Now, it is not arbitrary for a union to pick winners and losers, as long as the union is legitimately trying to advance the interest of everyone in the bargaining unit. The law is that a union does not violate the duty of fair representation even if a contract proposal works to the advantage of one group of employees but to the disadvantage of another group. A union's conduct is not arbitrary where it is based on relevant differences between the two groups of employees.

Authority:

Federal Jury Practice, § 157.100; *Airline Pilots Association International v. O'Neil*, 499 U.S. 65, 78 (1991); *Poole v. Budd Co*., *supra;* Walk v. P.I.E. Nationwide, Inc.; *Alvey v. General Eclectic Co*., 622 F.2d 1279, 1287 (7th Cir. 1980) ("a union does not violate the duty of fair representation it owes the employees it represents even if a contract proposal or term works to the advantage of one group of employees and to the disadvantage of another group ..."); *Rakestraw v United Air Lines, Inc*., 981 F.2d 1524, 1532 (7th Cir. 1992), *cert den. sub nom*

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 17.

Plaintiffs object to Defendant's *Non-Model Instruction* § 17 because it instructs on a claim that Plaintiffs will not try to prove. Plaintiffs are not going to try to prove the arbitrary component of unfair representation. Plaintiffs will prove the bad faith

component. Unfair representation can be established with proof that "a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory ***or*** in bad faith." *Vaca v. Sipes,* 386 U.S. 171, 190 (1967) (emphasis added). "[E]ach of these requirements represents a distinct and separate obligation." *Simo v. Union of Needletrades, Indus. & Textile Employees, Southwest Dist. Council*, 322 F.3d 602, 617 (9th Cir. 2003). Giving this instruction is prejudicial because it would suggest that nonarbitrary action is a defense to bad faith. It is not.

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 17.

§ 18) Discriminatory Conduct Defined.

Third, what does discrimination mean?

A union has a duty to protect all its members equally, without discrimination. This means that a union must treat employees who are similarly situated in the same way, while treating employees who are not similarly situated differently is not discrimination.

A union engages in unlawful discrimination if its treatment results in discrimination and it treatment was motivated by discriminatory desire based on reasons such as race, sex, or union membership.

However, mere knowledge that some groups gain or lose as a result of what the union does is not discrimination.

Discriminatory treatment without discriminatory motive is not a violation of the duty of fair representation: there must be both.

To prove discriminatory treatment, a plaintiff must show by a preponderance of the evidence that the union's conduct was directed at particular employees. A union acts discriminatorily only when it takes action against employees upon considerations or classifications that are irrelevant, invidious or unfair. To prove discrimination, there must be substantial evidence that discrimination is intentional, severe, and unrelated to any legitimate union objective.

Authority:

Federal Jury Practice, § 157.101; *Bruno v. United Steelworkers of America*, 784

F. Supp. 1286, 1310 (N.D. Oh. 1992); *Rakestraw v United Air Lines, Inc*., 981 F.2d 1524, 1532 (7th Cir. 1992), *cert den. sub nom*.; *Hammond v. Airline Pilots*, 510 US 861 (1993) *citing Palmer v. Thompson*, 403 U.S. 217 (1971) ("Slapping the label "bad faith" or "discrimination" on a classification that is rationally related to a legitimate objective does not alter the analysis. A discriminatory motive without a discriminatory rule does not condemn a statute"); *Breininger v. Sheet Metal Workers Int'l Assoc*., 493 U.S. 67, 73-74, 110 S. Ct. 424, 429, 107 L. Ed. 2d 388 (1989) (*citing Teamsters Local 553*, 140 N.L.R.B. 181 185 (1962)) (A union acts discriminatorily only when it takes action against an employee upon considerations or classifications which are irrelevant, invidious or unfair); *Amalgamated Assoc. of Street, Elec. R.R. and Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 301 (1971) (to show a breach of duty on the basis of discrimination, the claimant must adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives); *Delara v. Safeway Stores, Inc*., 1991 U.S. App. LEXIS 12106, (9th Cir. 1991) (To prove discriminatory treatment, the plaintiff must show that the union's conduct was directed at that particular employee).

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 18.

Plaintiffs object to Defendant's *Non-Model Instruction* § 18 because it instructs on a claim based on the discrimination component of the duty of fair representation. Unfair representation can be established with proof that "a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) (emphasis added). "[E]ach of these requirements represents a distinct and separate obligation." *Simo v. Union of Needletrades, Indus. & Textile Employees, Southwest Dist. Council*, 322 F.3d 602, 617 (9th Cir. 2003). Plaintiffs will not be trying to prove discrimination in their case in chief. *See Bench Memo in Support of Plts' MILs*, #4-#6 (Apr. 7, 2009) (doc. 315). Rather, they will prove breach of the bad faith component.

This instruction, therefore, would set up a "straw man" that is easy for Defendant to defeat, misleading the jury into thinking that Defendant has, in fact, defeated Plaintiffs' actual claim. *See United States v. Mutuc*, 349 F.3d 930, 936 (7th Cir. 2003) (holding that district court properly refused to give the defendant's proffered "good faith" instruction, which it termed a "straw man," because the instructions would have misled the jury). Giving this instruction is prejudicial because it would suggest that failure to prove discriminatory action supports a defense verdict. It does not.

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 18.

§ 19) Specific Issues In This Case.

Now we come to the specific issue of this case.

Plaintiffs claim that USAPA breached a duty of fair representation owed to Plaintiffs as members of the bargaining unit that USAPA represented, after USAPA was certified on April 18, 2008 as the union to represent all pilots at US Airways.

Plaintiffs' claim is that USAPA did not fairly represent the interests of the pilots that were employed by America West Airlines before it merged with US Airways.

This group, as you have heard, is called the "West pilots" for shorthand.

The pilots that work within US Airways' East operations are referred to as "East pilots" for shorthand.

Plaintiffs claim that USAPA did not fairly represent the West pilots by not giving them due consideration in forming USAPA's policy or objective to integrate the two groups of pilots, East and West, into a single, new seniority list after the merger. Specifically, Plaintiffs claim that it was a violation of the duty for USAPA not to base its seniority list on an arbitration that was conducted pursuant a Merger Policy of a de-certified predecessor, and which occurred before USAPA was certified, called the Nicolau arbitration.

USAPA denies all these claims. USAPA asserts that it was not a party to the Nicolau arbitration and cannot be bound by the internal policy of a predecessor union, ALPA, which was de-certified. That under ALPA Merger Policy, both East and West pilots had a right to a democratic vote to determine whether they would accept a final

contract incorporating the Nicolau award. Since the East pilots were determined not to ratify a contract the embodied the Nicolau award, and the West pilots refused to consider any modification of the Nicolau award, a stalemate had arisen. In view of this pre-existing stalemate, it was within the wide range of reasonableness permitted to USAPA to propose a date of hire seniority integration with conditions and restrictions designed to protect the West pilots. USAPA further asserts that the impasse arising under ALPA Merger Policy had deprived the entire bargaining unit of the benefits of a new contract.

If you conclude that USAPA acted reasonably to break the resulting impasse and obtain contractual benefits for the entire bargaining unit, then you may determine that USAPA is not in violation of its duty of fair representation.

Authority:

Amended Complaint; Answer; Joint Final Pre-Trial Order For Jury Trial

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 19.

Plaintiffs object to Defendant's *Non-Model Instruction* § 19 because it not only misstates their theory of the case, but hardly states it at all. This instruction is an instruction on Defendant's theory—a theory that should be rejected as a matter of law and never even be put to the jury. Instructions "should be judicial and not one sided or argumentative; and when the judge instructs as to one party's theory, he should also instruct as to the other party's contentions." *Paramount Film Distributing Corp. v. Applebaum*, 217 F.2d 101, 123 (5th Cir. 1954). This instruction is a text-book example of what an instruction should not be.

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 19.

§ 20) A Union's Duty of Fair Representation When Negotiating A Collective Bargaining Agreement – Generally.

Now, because Plaintiffs' claims are made in the context of contract negotiations between the union and the company, I will give you special instructions on the law with respect to the duty to fairly represent in the context of collective bargaining.

The negotiations between a union and an employer usually result in a collective bargaining agreement, or 'CBA' or just 'contract' for short.

As the exclusive bargaining representative for the members of a bargaining unit, a union must responsibly negotiate with the employer over the terms and conditions of employment. During this negotiation, or collective bargaining, the interests of all employees the union represents are to be considered. However, the union does not violate its duty of fair representation when its actions promote the interests of the bargaining unit as a whole, even where the interests of individual employees may be adversely affected.

And the law recognizes that inevitable differences arise in the manner and degree in which any negotiated agreement will affect individual employees and classes of employees. The law, in short, allows for differences and allows unions to reconcile those differences. The mere existence of differences does not mean that a union did not meet its duty of fair representation. The union is free to negotiate for, and agree to, contract terms that either directly or indirectly cause differing treatment of distinct classes of employees even when those classes do not agree.

Authority:

Federal Jury Practice, § 157.82; *Ford Motor Co. v. Huffman*, 345 U.S. 330-38 (1953) (duty of fair representation applies to negotiation of collective bargaining agreement). A union's actions are arbitrary "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be 'irrational.'" *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991). *See also Conkle v. Jeong*, 73 F.3d 909, 916 (9th Cir.1995) (citing *Vaca*, 386 U.S. at 191) (holding that a union's decision is arbitrary if it lacks a rational basis); *Johnson v. United States Postal Serv.*, 756 F.2d 1461, 1465 (9th Cir.1985) (holding that reckless disregard may constitute arbitrary conduct); *Tenorio v. NLRB*, 680 F.2d 598, 601 (9th Cir.1982) (defining arbitrary as the "egregious disregard for the right of union members"); *Rakestraw v United Air Lines, Inc*., 981 F.2d 1524, 1532 (7th Cir. 1992), *cert den. sub nom*.; *Hammond v. Airline Pilots*, 510 US 861 (1993) ("... the effort to aid one group at the expense of another is not itself arbitrary or in bad faith").

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 20.

Plaintiffs object to Defendant's *Non-Model Instruction* § 20 because it misstates their theory of the case and is far too argumentative. Instructions "should be judicial and not one sided or argumentative; and when the judge instructs as to one party's theory, he should also instruct as to the other party's contentions." *Paramount Film Distributing Corp. v. Applebaum*, 217 F.2d 101, 123 (5th Cir. 1954).

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 20.

§ 21) Collective Bargaining – Political Hostility.

The Plaintiffs allege that the Defendant breached its duty of fair representation by refusing to consider the Nicolau Award in making its seniority integration proposal. Plaintiffs claim it is the Nicolau Award that represents their true interests, rather than USAPA's 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 Defendant denies this asserting that it considered the interests of the entire bargaining unit by breaking the existing impasse that existed under ALPA Merger Policy, resuming negotiations toward a single collective bargaining agreement and establishing a seniority integration policy that considered the interests of all pilots including Plaintiffs on a non-discriminatory basis.

As a matter of law, a union may not pursue arbitrary and discriminatory seniority-related bargaining objectives solely on the basis of political expediency. Where, however, there are reasoned and logical purposes for particular seniority-related bargaining objectives, the mere fact that such a change may benefit some or all of a majority group to the disadvantage of the smaller group would not constitute a breach of the duty of fair representation.

If you determine that the Defendant's actions were for the sole purpose of promoting the interests of a political majority in an arbitrary and discriminatory manner, then the Defendant has breached its duty fair representation and you must decide in

favor of the Plaintiffs.

If, however, you determine that the Defendant's actions were not for the sole purpose of promoting the interests of a political majority in an arbitrary and discriminatory manner, then you must decide in favor of the Union.

Authority:

Ford Motor Co. versus Hoffman, 345 US 330 (1953); *Rakestraw v United Air Lines, Inc*., 981 F.2d 1524, 1532 (7th Cir. 1992), *cert den. sub nom*.; *Hammond v. Airline Pilots*, 510 US 861 (1993) ("A rational person could conclude that dovetailing seniority lists in a merger ... serves the interests of labor as a whole ... If the union's leaders took account of the fact that the workers at the larger firm preferred this outcome, so what? Majority rule is the norm. Equal treatment does not become forbidden because the majority prefers equality, even if formal equality bears more harshly on the minority."); *Employment Division v. Smith, 494 U.S. 872 (1990)*; *Alvey v. General Eclectic Co*., 622 F.2d 1279, 1287 (7th Cir. 1980) ("a union does not violate the duty of fair representation it owes the employees it represents even if a contract proposal or term works to the advantage of one group of employees and to the disadvantage of another group ...").

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 21.

Plaintiffs object to Defendant's *Non-Model Instruction* § 21 because it misstates their theory of the case and is far too argumentative. Instructions "should be judicial and not one sided or argumentative; and when the judge instructs as to one party's theory, he should also instruct as to the other party's contentions." *Paramount Film Distributing Corp. v. Applebaum*, 217 F.2d 101, 123 (5th Cir. 1954).

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 21.

§ 22) Collective Bargaining – Discrimination.

The Plaintiffs alleges that the Defendant breached its duty of fair representation by failing to propose or negotiate towards a provision in the collective bargaining agreement that had as its purpose the establishment of seniority based on the Nicolau award.

If you determine that Defendants constitutional objective regarding seniority integration is discriminatory then you may decide that the Defendant has breached its duty of fair representation and you must decide in favor of the Plaintiffs.

If, however, you determine that the Defendant's constitutional objective regarding seniority integration is not arbitrary or discriminatory, then you must decide in favor of USAPA.

Examples of considerations relevant to wages and working conditions that are both non-discriminatory and non-arbitrary include:

1. Differences in seniority;

2. The type of work performed;

3. The competency and skill of the employee;

4. The time of day and play?? works;

5. Injuries and employee has received in the course of service;

6. An employee's family responsibilities;

7. An employee's labor devoted to public service, whether civil or military, voluntary or involuntary.

Authority:

Ford Motor Co. versus Hoffman, 345 US 330 (1953); *Ramey v District 141 Int'l Assoc. of Machinists and Aerospace Workers*, 378 F.3d 269 (2nd Cir. 2004).

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 22.

Plaintiffs object to Defendant's *Non-Model Instruction* § 21 because it incorrectly suggests that Defendant's Constitutional provision is on trial. What is on trial is the bad faith motives for drafting that provision with the direct goal of depriving the West Pilots of their right to have the Nicolau Award be treated as final and binding. This instruction would validate a defense that this Court has already soundly rejected:

> In essence, USAPA argues that it can never be a breach of the duty of fair representation for the majority to seize its own interest. With respect, this is a very poor argument. Minority rights imply a limitation on rights of the majority.

Addington v. US Airline Pilots Assn., 588 F.Supp.2d 1051, 1062 (D. Ariz. 2008) (internal quotation marks omitted). Instructions "should be judicial and not one sided or argumentative." *Paramount Film Distributing Corp. v. Applebaum*, 217 F.2d 101, 123 (5th Cir. 1954). They surely should not advance a wrong argument.

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 21.

§ 23) Collective Bargaining – Methods of Seniority Integration Not Preferred.

While the Plaintiffs and the Defendant in this case have strong differences of opinion on which method of seniority integration or proposal is to be preferred, the law does not favor any one method over another. Under the law, a union is free to negotiate seniority terms by any method it deems reasonable: dovetailing, end tailing, date of hire, with or without conditions, or any other method. This is because the law permits union a wide range of reasonableness in deciding what is in the best interests of the entire group it represents.

Seniority integration based on date of hire, or classical seniority, has long been recognized to be within the wide range of reasonableness that must be allowed a union in serving the unit it represents. It may be an acceptable and fair method to resolve inevitable conflicts which arise whenever a merger occurs and there is a need to combine two rosters or lists.

You should not, therefore, in this case find that Defendant has breached its duty of fair representation simply or only because had as a goal, or ever proposed, date of hire as a method of seniority integration.

Authority:

No union has been held to violate its duty of fair representation by negotiating to dovetail seniority lists following the merger of bargaining units. *Humphrey v. Moore,* 375 US 355 (1964); *Winston v. Teamsters Local 89*, 93 F.3d 251 (6th Cir. 1996); *Rakestraw v United Air Lines, Inc*., 981 F.2d 1524, 1533 (7th Cir. 1992), *cert den. sub nom*.; *Hammond v. Airline Pilots*, 510 US 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 Transportation Union, 843 F.2d 869 (6th Cir. 1988); *Teamsters Local 42 v. NLRB*, 825 F.2d 608, 611 – 14 (1st Cir. 1987) *enforcing* 281 NLRB 974; *Baker v. Newspaper & Graphic Communications Local 6,* 628 F.2d 156, 166 – 67 (D. C. Cir. 1980), *aff'g* 461 F. Supp. 109 (D.D.C. 1978); *Laturner v. Burlington Northern, Inc.*, 501 F.2d 593, 599 (9th Cir. 1974) ("It has long been recognized that the use of such a method to integrate seniority rosters is an equitable arrangement for resolving the inevitable conflicts which arise whenever a merger occurs ... we thus view the implementation of a date of hire consolidation to be well within the "wide range of reasonableness [which] must be allowed a statutory bargaining representative in serving the unit it represents.") *citing Humphrey v. Moore*, 375 U.S. 335, 347 (1964).

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 23.

Plaintiffs object to Defendant's *Non-Model Instruction* § 23 because it misstates Plaintiffs' claim. Plaintiffs do not object to dovetailing or to date-of-hire as a concept. They object to Defendant's failure to support and implement dovetailing in accordance with the Nicolau Award. By suggesting Plaintiffs object to dovetailing, this instruction would set up a "straw man" that is easy for Defendant to defeat, misleading the jury into thinking that Defendant has, in fact, defeated Plaintiffs' actual claim. *See United States v. Mutuc*, 349 F.3d 930, 936 (7th Cir. 2003) (holding that district court properly refused to give the defendant's proffered "good faith" instruction, which it termed a "straw man," because the instructions would have misled the jury).

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 23.

§ 24) Collective Bargaining – Interests Of Entire Bargaining Unit Even If It Considers Majority Preference.

Now, negotiation means compromise and the law is that when negotiating a collective bargaining agreement a union may act reasonably even though groups or certain classes of employees it represents are affected differently. For example, a union may legitimately choose to give preference to those union members who are veterans of the Armed Forces over those that are not veterans. That is not illegal, that is not a violation of the duty of fair representation.

This means that a union acts reasonably even when it favors one faction or class of employees over another. That is the law as long as the union has a rational purpose and has the effect of advancing the interests of the bargaining unit as a whole.

And in determining its negotiating objectives, a union is permitted to take into consideration that a majority of its member's votes may be necessary to ratify a contract. One of the premises of the law is that unions are to act democratically to reach collective decisions. All things being equal, a majority is entitled to prevail in a democracy. This means that a union's effort to aid one group at the expense of another is not itself arbitrary or in bad faith. Workers generally may decide by majority vote where their interests lie. That union's leaders take account of the fact that a majority prefers one outcome is allowed because majority rule is the norm.

Thus, while a union cannot accede to the majority if to do so would result in an arbitrary, discriminatory or bad faith disregard for the rights of the minority, if a union

bases its decision on legitimate differences among its members then a union can lawfully follow the wishes of the majority.

Authority:

Airline Pilots Association International v. O'Neil, 499 U.S. 65 (1991); *Rakestraw v United Air Lines, Inc*., 981 F.2d 1524, 1533 (7th Cir. 1992), *cert den. sub nom*.; 45 U.S.C. §151 *et seq.;* 29 U.S.C. 401, *et seq*.

Plaintiffs' Objections to Defendant's *Non-Model Instruction* § 24

Plaintiffs object to Defendant's *Non-Model Instruction* § 24 because it completely misstates the law. Regardless whether a union has a rationale basis, it must still act with the utmost good faith. *See Plts.' MIL* # 4 (doc. 312). Bad faith is determined by the intention at the time of the conduct, not by the result of the conduct. Hence it is defined with terms such as "fraud, deceitful action, or dishonest action." 3 *Fed. Jury Prac. & Instr.* § 157.102 (5th ed.). It cannot be excused, therefore, by the result of the conduct. Hence, it is no defense, as Defendant would have the Court instruct, whether there was a benefit to the bargaining unit as a whole. There must have been an intention to benefit the bargaining unit as a whole. This instruction misleads on that point. A union's discretion is always subject to the duty of utmost good faith to all members of the bargaining unit. This instruction, therefore, is patently wrong.

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 24.

§ 25) Collective Bargaining – No Interpretation of Prior Contracts.

Plaintiffs claim that an arbitration conducted by the union that represented pilots at US Airways and America West before USAPA was certified, ALPA, is binding on USAPA. Plaintiffs claim this is so because they say USAPA inherited a contractual obligation from its predecessor. This is the Nicolau arbitration award that you have heard about.

USAPA denies this.

However, whether the Nicolau arbitration award is binding on USAPA as a matter of contract is not an issue that you are to decide. That is an issue that will be determined in another forum, but not here in this court. Therefore you should not find that Defendant breached its duty of fair representation towards Plaintiffs because it had any contractual duty to follow the Nicolau award. You should not consider this issue at all.

You may, however, consider what USAPA reasonably believed to be true at the time. For example, you may consider whether USAPA reasonably believed it was bound to follow Nicolau, or, on the other hand, that it reasonably believed it was not bound. You may also consider whether USAPA reasonably believed that ALPA Merger Policy, or any other circumstances known to USAPA at the time, created conditions that made the implementation of the Nicolau award impossible and, therefore, justified a different approach.

Authority:

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). Defendant's motion in limine.

Plaintiffs' Objections to Defendant's *Non-Model Instruction* § 25

Plaintiffs object to Defendant's *Non-Model Instruction* § 25 because it completely misstates the significance of the Nicolau Arbitration and wrongly suggests that any claims against USAPA will be decided at the System Board. The Nicolau Arbitration created a contractual obligation between the two pilot groups that persists despite the East Pilots reconstituting themselves as USAPA. *See Plts.' Resp to USAPA MIL* # 32 (doc. 325). The System Board only has jurisdiction over "disputes between an employee or group of employees and a carrier or carriers." *Glover v. St. Louis-S.F. Ry. Co.*, 393 U.S. 324, 328 (1969). Defendant's instruction, suggesting otherwise, is plainly wrong. Whether the Award is binding on USAPA will not be decided in any other forum.

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 25.

§ 26) Collective Bargaining – When Bargaining Not Completed.

In this case, there is no dispute that Defendant USAPA has not yet concluded the process of collective bargaining with the employer. Consequently, no contract has yet been negotiated or ratified. The law allows the Defendant to make new or different proposals, whether based on Nicolau, or on date of hire, or something else.

Therefore, in considering whether the Defendant has violated or not violated its duty of fair representation, you should consider USAPA's constitutional objective rather than the proposal that it has already made in furtherance of that objective.

There is no dispute that USAPA's constitutional objective is "seniority based on date of hire and the perpetuation thereof, with reasonable conditions and restrictions to preserve each pilots un-merged career expectations."

So, you may consider USAPA's current seniority integration bargaining proposal as illustrative of its constitutional objective; however, you should not find that USAPA has violated its duty based on any specific proposal it has made.

Authority:

Original Complaint; Amended Complaint, Doc # 86 at ¶ 108 "USAPA seniority policy" (action commenced before any proposal ever made by USAPA); *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 79 (1991) (emphasis added); *Marquez v. Screen Actors Guild, Inc*., 124 F.3d 1034, 1037 (9th Cir. 1997); *Federal Express Corp. v. Air Line Pilots Ass'n*, 67 F.3d 961, 964-65 (D.C. Cir. 1995); *Huff v. Int'l Union of Sec. Officers*, 2002 U.S. Dist. LEXIS 2003, at *17-18 (N.D. Cal. Jan. 31, 2002).

Plaintiffs' Objections to Defendant's *Non-Model Instruction* § 26.

Plaintiffs object to Defendant's *Non-Model Instruction* § 26 because USAPA's Constitutional objective does not, and cannot, modify its duty of fair representation. A duty created by Congress can be changed only by Congress, not by a private agreement. A contract, even where envisioned the federal law creating the duty, cannot modify that duty. *See Davidowitz v. Delta Dental Plan of California, Inc.*, 946 F.2d 1476, 1481 (9th Cir. 1991) (ERISA plan cannot relieve ERISA fiduciary of statutory duty). A union constitution is nothing more than a contract, a private agreement. *Korzen v. Loc. Union 705, Intl. Bhd. of Teamsters*, 75 F.3d 285, 288 (7th Cir. 1996). USAPA's constitution, therefore, cannot change its duty of fair representation.

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 26.

§ 27) Collective Bargaining – No Vested Seniority Rights.

Finally, the law is that seniority rights are creatures of contract. This means that unions and employers are free to negotiate over and to adjust seniority terms. Another way of saying this is that seniority rights do not vest, that is, they are not permanent because a union is free to revisit seniority terms in contract bargaining from one contract negotiation to the next.

What this means is that you should not find that Defendant breached its duty of fair representation towards Plaintiffs merely because it made any new proposals for seniority integration terms. Just making proposals is not a violation of the duty.

Nor is it unlawful for a union and a company to make an agreement to modify seniority rights. Seniority rights have no legal existence outside a collective bargaining agreement, and they can be changed by a company and union through the collective bargaining process. In proposing or agreeing to an adjustment in seniority rights, a union is permitted a wide range of reasonableness within which it can act. A union does not violate its duty of fair representation even if the modification of seniority rights works to the advantage of one group of employees and to the disadvantage of another group unless its conduct is based on hostile discrimination or undertaken for arbitrary reasons unrelated to relevant differences between the two groups of employees affected by the adjustment.

Authority:

Hass v. Darigold Dairy Prod. Co., 751 F.2d 1096, 1099 (9th Cir. 1985) (citing

cases) (internal citations omitted) (emphasis added). *See also Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1535 (7th Cir. 1992); *In re Continental Airlines*, 484 F.3d 173, 182 (3d Cir. 2007); *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 232 (1st Cir. Case 2:08-cv-01633-NVW 1996); *United Food & Commercial Workers Int'l Union v. Gold Star Sausage Co.*, 897 F.2d 1022, 1026 (10th Cir. 1990) (*citing Cooper v. General Motors Corp.*, 651 F.2d 249, 251 (5th Cir. 1981)); *Baker v. Newspaper and Graphic Communication Union, Local 6*, 628 F.2d 156, 160 (D.C. Cir. 1980); *Alvey v. General Eclectic Co.*, 622 F.2d 1279, 1287 (7th Cir. 1980).

Plaintiffs' Objections to Defendant's *Non-Model Instruction* § 27.

Plaintiffs object to Defendant's *Non-Model Instruction* § 27 because it attempts to state the entire doctrine of unfair representation while omitting the bad faith component. Moreover, it makes an argument that this Court and others have firmly rejected. "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." *Addington v. US Airline Pilots Assn.*, 588 F.Supp.2d 1051, 1060 (D. Ariz. 2008); *see also Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 800 (7th Cir.1976). This is substantially prejudicial because Plaintiffs' claim is based on breach of the bad faith component of the duty as it applies to respecting established seniority rights.

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 27.

§ 28) Limitation On Use Of Pre-Certification Evidence.

Plaintiffs have offered evidence of USAPA's conduct prior to its certification on April 18, 2008 by the National Mediation Board as the union representing all of the Pilots at US Airways.

That evidence was admitted, however, for a limited purpose.

The purpose was to explain conduct that occurred after April 18, 2009.

This is the only purpose you must consider this evidence for.

You are not to consider such evidence to find that Defendant is liable for any conduct that occurred before April 18, 2008.

Authority:

Defendant's motion in limine No. 14.
9th Cir. Civ. Jury Instr. 1.8 (2007).
9th Cir. Civ. Jury Instr. 1.8 comment (2007).

Plaintiffs' Objections to Defendant's *Non-Model Instruction* § 28

Plaintiffs object to Defendant's *Non-Model Instruction* § 28 because it is based on the same errors as Defendant's MIL #14. Plaintiffs adopt their argument responding to that motion by reference as if fully set out here. For those reasons, the Court should reject Defendant's *Non-Model Instruction* § 28.

DAMAGE ISSUES SPECIFIC TO THIS CASE [follow on next page]:

§ 29) Effect of Instructions As To Damages

The fact that I have instructed you as to the proper measure of damages should not be considered as indicating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance only in the event you should find in favor of the Plaintiff from a preponderance of the evidence in the case in accordance with the other instructions.

Authority:

Federal Jury Practice, § 106.02

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 29:

This instruction is misleading because there will be no evidence presented on damages. Indeed, there is "no need" to present any such evidence at a trial that is limited to liability. *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 457 (7th Cir. 1982).

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 29.

§ 30) Causation.

Because the Plaintiff seeks to recover damages, they must prove by a preponderance of evidence not only that Defendant breached the duty of fair representation, but also that such breach was the proximate cause of any damages Plaintiffs claims.

Proximate cause exists where an act or failure to act, in a natural and continuous sequence, directly produces the damages and without which it would not have occurred.

Under the law, a Union can only be responsible for those damages that flowed from its own conduct. In other words, damages may only be awarded against a Union defendant if that union's conduct is the cause of those damages, i.e. that "but for" that Union Defendant's conduct the Plaintiff would not have suffered the damages in question.

If you find Plaintiffs have proved by a preponderance of the evidence that Defendant breached its duty of fair representation, you must also then determine whether Plaintiff has proved by a preponderance of the evidence that there is a causal connection between that breach and the damages claimed by Plaintiff.

A party is not responsible for damages to another if its misconduct is a remote cause and not a proximate cause.

A cause is remote when the result could not have been reasonably foreseen or anticipated as being the likely cause of any damages.

Since, in this case, an integrated seniority list could not be implemented until the

implementation of a single collective bargaining agreement, if you find that USAPA has not willfully delayed the negotiation of a single collective bargaining agreement, you must find that there is no causation of damages.

Authority:

Federal Jury Practice, § 157.110; *Czosek v. O'Mara*, 397 U.S. 25, 29 (1970); *Wood v. Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local* 406, 807 F.2d 493, 502 (6th Cir. 1986) *cert. den.* 483 U.S. 1006 (1987).

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 30:

This instruction is misleading because there will be no evidence presented on damages. Indeed, there is "no need" to present any such evidence at a trial that is limited to liability. *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 457 (7th Cir. 1982).

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 30.

§ 31) Damages Must Be Reasonable.

If you should determine that the Defendant breached the duty of fair representation, then in a separate phase of the trial you may award the Plaintiffs only the damages that will reasonably compensate the Plaintiffs for their earnings, including benefits, as you conclude from a preponderance of the evidence that they lost as a result of the Defendant's actions. You are not permitted to award damages based on speculation.

The damages that you award, if any, must be fair and reasonable, not inadequate or excessive. You should not award damages for speculative loss of income but only for those loses that the Plaintiffs have proved that they actually suffered as a result of the Defendant's conduct, which you determine was unlawful.

Authority:

Vaca v. Sipes, 386 U.S. 171, 1998 (1967); *Gurley v. Hunt*, 287 F.3d 728, 733 (8th Cir. 2002) ("The only damages available in a claim for breach of the duty of fair representation are make-whole damages).

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 31:

This instruction is misleading because there will be no evidence presented on damages. Indeed, there is "no need" to present any such evidence at a trial that is limited to liability. *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 457 (7th Cir. 1982).

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 31.

§ 32) Back Pay, Mitigation

Calculating back pay begins with determining the amount that Plaintiff would have earned from the employer if he/she had not suffered job loss up to the date of the trial. Then you must subtract from that figure all earnings actually received by the Plaintiff from other employers and all amounts the Plaintiff could have earned if he/she had reasonably tried to find other employment.

Authority:

Vaca v. Sipes, 386 U.S. 171, 1998 (1967); *Gurley v. Hunt*, 287 F.3d 728, 733 (8th Cir. 2002) ("The only damages available in a claim for breach of the duty of fair representation are make-whole damages).

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 32:

This instruction is misleading because there will be no evidence presented on damages. Indeed, there is "no need" to present any such evidence at a trial that is limited to liability. *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 457 (7th Cir. 1982).

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 32.

§ 33) Front Pay, Mitigation

Front pay is intended to compensate the Plaintiff for a loss of income in the future, after the date of the trial. In calculating the amount of front pay, if any, to award to the plaintiff, you should compute the difference between what you think Plaintiff would have earned at the past employer had he/she not suffered job loss and the amount you think he /she is likely to earn in the future if he/she reasonably tries to find work elsewhere.

Authority:

Vaca v. Sipes, 386 U.S. 171, 1998 (1967); *Gurley v. Hunt*, 287 F.3d 728, 733 (8th Cir. 2002) ("The only damages available in a claim for breach of the duty of fair representation are make-whole damages).

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 33:

This instruction is misleading because there will be no evidence presented on damages. Indeed, there is "no need" to present any such evidence at a trial that is limited to liability. *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 457 (7th Cir. 1982).

The Court, therefore, should reject Defendant's *Non-Model Instruction* § 33.

INSTRUCTIONS CONCERNING DELIBERATIONS [follow on next page]:

§ 34) Election of Foreperson; Unanimous Verdict.

You must follow the following rules while deliberating and returning your verdict:

First, when you go to the jury room, you must select a foreperson. The foreperson will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury and try to reach agreement.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with the other jurors, and listen to the views of all other jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not make a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations you may send a note to me through the bailiff, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone – including me – how your votes stand numerically.

Fourth, your verdict must be based solely on the evidence and on the law that I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest to you what your verdict should be – that is entirely

for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. The verdict form reads as follows:

You will take this form to the jury room, and when each of you has agreed on the verdict, you're for person will fill in the form, signed and dated, and advise the bill if you are ready to return to the courtroom.

Authority:

Federal Jury Practice, § 103.35

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 34:

This instruction is unnecessary because the subject is adequately covered by *Model Instruction* ST § 3.1.

§ 35) Common Closing Remarks.

The court cannot embody all the law in any single part of these instructions. In considering one portion, you must consider it in the light of and in harmony with all the instructions.

The court has instructed you on all the law necessary for your deliberations. Whether or not certain instructions are applicable may depend upon the conclusions you reach on the facts by a preponderance of the evidence. If you have an impression that the Court has indicated how any disputed fact should be decided, you must put aside such an impression because that decision must be made by you, based solely upon the facts presented to you in this courtroom.

Circumstances in the case may arouse sympathy for one party or the other. Sympathy is a common, human emotion. The law does not expect you to be free of such normal reactions. However, the law and your oath as jurors require you to disregard sympathy and not to permit it to influence your verdict.

You must not be influenced by any consideration of sympathy or prejudice. It is your duty to weigh the evidence, to decide the disputed questions of fact, to apply the instructions of law to your findings and to render your verdict accordingly. Your duty as jurors is to arrive at a fair and just verdict.

Your initial conduct upon commencing deliberations is a matter of importance. It is not wise to express immediately a determination to insist upon a certain verdict. Having so expressed yourself, your sense of pride may be aroused, and you may hesitate

to give up your position even if shown that it is not correct.

Consult with one another in the jury room, and deliberate with a view to reaching an agreement if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself. You should do so, however, only after a discussion of the case with the other jurors. Do not hesitate to change an opinion if convinced that it is wrong.

However, you should not surrender your considered opinion concerning the weight of the evidence in order to be congenial or to reach a verdict solely because of the opinion of other jurors.

Authority:

1 Ohio Jury Instructions, § 25.29

Plaintiffs' Objection to Defendant's *Non-Model Instruction* § 35:

This instruction is unnecessary because the subject is adequately covered by *Model Instruction* ST § 3.1.

Dated this 16th day of April, 2009.

Seham, Seham, Meltz & Petersen, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on April 16th, 2009, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

/s/ Nicholas P. Granath