LEE SEHAM, Esq. *pro hac vice*
LUCAS K. MIDDLEBROOK, Esq. *pro hac vice*
NICHOLAS P. GRANATH, Esq., *pro hac vice*
STANLEY J. SILVERSTONE, Esq., *pro hac vice*
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
445 Hamilton Avenue, Suite 1204
White Plains, NY 10601
Tel: 914 997-1346; Fax: 914 997-7125

NICHOLAS J. ENOCH, Esq., State Bar No. 016473
LUBIN & ENOCH, P.C.
349 North 4th Avenue
Phoenix, AZ 85003-1505
Tel: 602 234-0008; Fax: 602 626 3586

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, Plaintiffs, vs. US AIRLINE PILOTS ASSOCIATION, US AIRWAYS, INC., Defendants,	Case No. 2:08-cv-1633-PHX-NVW (Consolidated) **DEFENDANT USAPA'S TRIAL BRIEF (JURY TRIAL)**
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

Pursuant to the Proposed Final Pretrial Order for Jury Trial, Defendant US Airline Pilots Association ("USAPA"), by its undersigned attorneys, submits this trial brief on all contested issues of law identified by the parties.

The parties were unable to agree on any of the issues of law. USAPA proposed that the parties agree to the following issue:

> Whether USAPA's seniority policy violates the duty of fair representation?" However, Plaintiffs' counsel responded that "[w]e will not agree to any contested issue regarding the adequacy of the C&R's [Conditions and Restrictions] as a DFR issue."

Defendant's Issue of Law:

Defendant's Issue #1.

Did USAPA violate its duty of fair representation to the US Airways pilots by adopting a constitutional objective that promoted date-of-hire seniority integration with appropriate conditions and restrictions based on each pilot's unmerged career expectations instead of adopting implementation of the Nicolau Award as its seniority integration policy?

Argument.

USAPA's seniority policy is reflected in its Constitution, which was adopted before USAPA was certified by the National Mediation Board on April 18, 2008. The USAPA Constitution contains the Association's "objective" of "maintain[ing] uniform principles of seniority based on date of hire and the perpetuation thereof, with reasonable conditions and restrictions to preserve each pilot's un-merged career

expectations." (Constitution, Art. I, Section 8(D)).

Since USAPA's seniority policy was adopted before certification, USAPA cannot be held liable for breach of the duty of fair representation because, as a matter of law, USAPA had no duty before it was certified on April 18, 2008. *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944); *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944) ("by its selection as the bargaining representative, it has become the agent of the employees"); *Dycus v. NLRB*, 615 F.2d 820, 826 (9th Cir. 1980) (a union may avoid duty to bargain by "disclaiming further interest in representing the unit"); *Bensel v. Air Line Pilots Ass'n*, 387 F.3d 298, 312 (3rd Cir. 2004) ("The scope of the duty of fair representation is commensurate with the scope of the union's statutory authority as the exclusive bargaining agent"); *Cooper v. TWA Airlines, LLC*, 349 F. Supp. 2d 495, 507 (E.D.N.Y. 2004) ("a union does not owe a duty of fair representation to those it does not represent") (*citing McNamara-Blad v. Ass'n of Prof'l Flight Attendants*, 275 F.3d 1165, 1169-70 (9th Cir. 2002)).

Even if Plaintiffs have a valid cause of action for breach of the duty of fair representation based on pre-certification conduct, USAPA could not be held liable because USAPA did not act arbitrarily, improperly, or in bad faith in deciding its seniority policy.

First, no union has *ever* been held to violate its duty of fair representation by negotiating to dovetail seniority lists, i.e. to merge seniority lists by date-of-hire seniority, following a merger of bargaining units. *Humphrey v. Moore*, 375 U.S. 335

(1964); *Winston v. Teamsters Local 89*, 93 F.3d 251 (6th Cir. 1996); *Rakestraw v. United Airlines, Inc*., 981 F.2d 1524, 1533 (7th Cir. 1992), *cert. denied sub nom. Hammond v. Air Line Pilots*, 510 U.S. 861 (1993); *Borowiec v. Boilermakers Local 1570*, 889 F.2d 23 (1st Cir. 1989), *aff'g* 626 F. Supp. 296, 303 (D. Mass. 1986); *Ratkosky v. United Transp. Union*, 843 F.2d 869 (6th Cir. 1988*); Teamsters Local 42* v. NLRB, 825 F.2d 608, 611-14 (1st Cir. 1987), *enforcing 281* NLRB 974 (1986); *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); *King v. Space Carriers, Inc.,* 608 F.2d 283 (8th Cir. 1979); *Ekas v. Carling Nat'l Breweries, Inc.,* 602 F.2d 664, 668 (4th Cir. 1979), *em. denied,* 444 U.S. 1017 (l980); *Bell v. IML Freight, Inc*., 589 F.2d 502 (5th Cir. 1979); *Walters v. Roadway Express, Inc*., 557 F.2d 521, 525 (5th Cir. 1977); *Laturner v. Burlington Northern, Inc*., 501 F.2d 593, 599 (9th Cir. 1974); *Morris v. Werner Continental, Inc*., 466 F.2d 1185, 1190 (6th Cir. 1972); *Price v. Teamsters*, 457 F.2d 605 (3rd Cir. 1972); *Fuller v. Teamsters Local 107*, 428 F.2d 503 (3rd Cir 1970); *Teamsters Local 568 v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967); *In re ABF Freight Sys., Inc., Labor Contract Litig*., 988 F. Supp. 556 (D. Md. 1997), *aff'd per curiam sub nom. Gorge v. Carey*, 166 F.3d 1209, 1998 U.S. App. LEXIS 37632 (4th Cir. 1998).

Second, even if Plaintiffs have a valid cause of action for breach of the duty of fair representation based on USAPA's pre-certification formulation of its seniority policy, USAPA did not act arbitrarily, improperly or in bad faith because (i) USAPA's procedure for formulating its seniority integration policy was consistent with the other

work groups on the US Airways property; and (ii) USAPA's seniority integration policy does give due consideration to the interests of the West Pilots.

One of the most familiar judicial definitions of the concept of the duty of fair representation is whether a union's conduct is "so far outside a wide range of reasonableness that it is wholly irrational or arbitrary." *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 78 (1991) (citations omitted). The question of whether USAPA's seniority policy is within this "wide range of reasonableness" cannot be analyzed in a vacuum. In order to determine what the "wide range of reasonableness" consists of in this case and what standard governs any alleged breach of the duty of fair representation, it is necessary to examine the common practice in the industry. *Sears v. Automobile Carriers*, 711 F.2d 1059 (6th Cir. 1983) ("This court has held that a union's reliance on past industry practice is an explanation sufficient to avoid liability."); *Connally v. Transcon Line*, 583 F.2d 199, 202 (5th Cir. 1978); *Robertson v. Burlington Northern and Santa Fe Railway*, 2007 U.S. App. LEXIS 2418, at **6 (10th Cir. 2007); *Ferrara v. Pacific Intermountain Express Company*, 301 F. Supp. 1240, 1245 (N.D. Ill. 1969).

At US Airways, every other unionized work group on the property integrated their seniority on a date-of-hire basis. The Association of Flight Attendants ("AFA"), the International Association of Machinists & Aerospace Workers ("IAM"), and the Transportation Workers Union ("TWU") did not have any sort of hearing or procedure that afforded opportunity to present arguments and evidence relating to the formulation

of their respective seniority integration policies.[1] The same is true for ALPA and its merger policy.

Unlike the other work groups, however, USAPA did consider West pilot interests in deciding its seniority policy. USAPA considered West pilot interests by adopting a Constitutional objective of date-of-hire seniority that is balanced with conditions and restrictions to protect West interests while advancing the lawful and traditional goal of promoting date-of-hire seniority that benefits the bargaining unit as a whole. The Conditions and Restrictions protect West pilots' interests by prohibiting East pilots from exercising their seniority to obtain West positions (except to the extent that West pilots bid into the East system), which is, in essence, a ten-year fence.

In order to establish a DFR claim, plaintiffs must show that USAPA acted in an arbitrary, discriminatory, or bad faith manner. *Bautista v. Pan Am. World Airlines, Inc*, 828 F.2d 546, 549 (9th Cir. 1987) (*quoting Vaca v. Sipes,* 386 U.S. 171, 190 (1967)). USAPA's refusal to "treat the Nicolau Award as binding and final" cannot be found to be arbitrary, discriminatory, or in bad faith because (i) the Nicolau Award was an internal ALPA process that was final and binding only on ALPA, and, as a matter of law, cannot bind any other union; and (ii) the Nicolau Award could never have been

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

implemented under ALPA, and USAPA has pursued negotiation of a single CBA based on date of hire with conditions and restrictions in order to break through the logjam that existed under ALPA.

USAPA's decision not to treat the Nicolau Award as final and binding, but instead to pursue seniority integration based on date of hire with appropriate conditions and restrictions, was based on the following facts: First, under both ALPA Merger Policy and the Transition Agreement ("TA"), no integrated seniority list could be implemented without a single CBA. Second, under ALPA Merger Policy, no single CBA could be implemented without both ALPA MEC's and both pilot groups approving the single CBA. Third, as plaintiffs testified in their depositions, both the East MEC and East pilot group were unalterably opposed to any single CBA that implemented the Nicolau Award. Fourth, the West MEC categorically refused to consider any modification of the Nicolau Award (including any conditions and restrictions). Fifth, ALPA acknowledged that there was a logjam and also recognized that the logjam could continue indefinitely since it would not interfere with MEC decisional authority and East pilot ratification rights, both of which were protected under the ALPA structure.

Thus, the lack of single CBA consigned all pilots to indefinite separate operations. Plaintiffs testified that they are aware that the Company has taken the bargaining position that it will not agree to any economic improvements for the pilots without a single CBA.

USAPA's determination to break through the logjam and negotiate a single CBA based on date of hire with conditions and restrictions cannot be considered arbitrary, discriminatory, or in bad faith because (1) ALPA Merger Policy would never have permitted implementation of the Nicolau Award; (2) breaking the logjam advances unit-wide interests by permitting access to improvements in wages, benefits, and work rules; (3) junior West pilot interests are advanced by immediately placing all East pilots under them; (4) the interests of senior West pilots are advanced by giving them access to international flying; (5) date of hire is the gold standard and no court has ever found a DFR based on a date of hire integration; (6) USAPA does not propose a pure date of hire integration (which every other employee group is employing) but has hefty conditions and restrictions that diminish East pilot seniority rights by prohibiting the exercise of such seniority to obtain West positions (except to the extent that West pilots bid into the East system) -- in essence, a ten-year fence.

Plaintiffs' Issues of Law:

Plaintiffs' Bench Memorandum in Support of Plaintiffs' Motions in Limine to Exclude Evidence & Argument from the Jury Trial on Liability (Dkt. No. 315) identifies the following three issues that Plaintiffs will present at trial:

Plaintiffs' Issue #1.

Whether USAPA was created so that the East Pilots could use their majority power to disregard the Nicolau Award.

Argument.

Plaintiffs rely on dicta contained in *Air Wisconsin Pilots Prot. Comm. v. Sanderson*, 909 F.2d 213 (7th Cir. 1990) in support of their first issue. However, the *Air Wisconsin* dicta, which questioned the propriety of re-visiting an implemented seniority integration, was clearly rejected by the Seventh Circuit's subsequent decision in *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524 (7th Cir. 1992).

Rakestraw is particularly instructive with respect to the application of DFR principles to seniority because it addresses both the impermanency of determinations related to contractual seniority as well as the right of a democratic majority to insist on dovetailing. The *Rakestraw* decision consolidated disputes at two different carriers: the first involving the TWA/Ozark merger, and the second the modification of a "permanent" seniority agreement between United Airlines ("United") and ALPA in the aftermath of the 1985 strike.

In the TWA case, the court, however, found nothing wrong with ALPA's acquiescence to the majority's preference for a date-of-hire integration despite allegations that ALPA had improperly disregarded its own Merger Policy. *Id*. at 1533.

The United portion of the *Rakestraw* case concerned ALPA's negotiation of a reversal of the relative position of two distinct pilot groups despite an express contractual promise "never" to do so. *Id*. at 1528-29. The Seventh Circuit reversed the district court's decision, which was based on the contractually guaranteed permanency of the prior seniority arrangement, holding:

> "Forever" in labor relations means "until the next collective bargaining agreement." Excepting vested rights, a promise lasts only until renegotiation or the expiration of the agreement. *Litton Financial Printing Division v. NLRB*, 115 L. Ed. 2d 177, 111 S. Ct. 2215, 2226 (1991).

Id. at 1536.

Unlike ALPA in the United portion of the *Rakestraw* decision, USAPA does *not* seek to re-negotiate a *previously implemented* seniority arrangement that it had *agreed to* as a *permanent* settlement of a seniority dispute. Unlike ALPA with respect to the TWA/Ozark pilot integration, USAPA is not disregarding its own Merger Policy, but rather abiding by its own constitutional mandate in pursuing date-of-hire integration.

Plaintiffs' Issue #2.

Whether USAPA promised that, if elected as the bargaining representative, it would use East Pilot majority power to disregard the Nicolau Award.

Argument.

Plaintiffs rely on one case, *Truck Drivers & Helpers Local Union 568 v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967), in support of this issue. In *Truck Drivers*, however, the union violated its DFR by promising to evade the equitable concept of date-of-hire seniority integration. *Id*. at 139. The promise made in *Truck Drivers* bears no resemblance to USAPA's constitutional seniority integration policy of date-of-hire plus preservation of each pilot's un-merged career expectations. In fact, the court in *Truck Drivers* described straight date-of-hire seniority integration as "equitable and feasible." *Id*. at 143 n.10. By adopting the additional consideration of "un-merged career

expectations" into its policy, USAPA has committed itself to a greater consideration of "minority" interests than the *Truck Drivers* court, and the federal judiciary in general, have required.

Finally, Plaintiffs' "promise"-based argument is not ripe. USAPA's policy "promise" is embodied in its constitution, a document that incorporates both date-of-hire and career expectation considerations. Accordingly, until there is a final agreement with US Airways concerning seniority integration, there can be no means of determining whether USAPA has either violated its balanced constitutional principles or violated DFR standards by adopting a final agreement that is so far outside a wide range of reasonableness that it is wholly irrational. *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 78 (1991).

Plaintiffs' Issue #3.

Whether USAPA has disregarded the Nicolau Award without procedures that gave due consideration to West Pilot views.

Argument.

The Plaintiffs find fault with USAPA's formation of its seniority integration policy in that it did not give "due consideration" to the interests of a "minority." As a threshold matter, USAPA contends that there is no acceptable means of evaluating what Plaintiffs contend is USAPA policy until that policy finds its expression in an agreement with US Airways. However, even assuming that USAPA adopted and

implemented a pure date-of-hire seniority integration policy based on the determination of a democratic majority:

> A rational person could conclude that **dovetailing** seniority lists in a merger … **serves the interests of labor as a whole**. … The propriety of dovetailing, treating the two groups identically, follows directly. If the union's leaders took account of the fact that 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.

Rakestraw, 981 F.2d at 1533 (emphasis supplied).

The case at bar, however, does not involve a majority's adoption of a pure date-of-hire seniority integration policy. Rather, the only official embodiment of USAPA policy – the USAPA Constitution – balances the date-of-hire objective with "reasonable conditions and restrictions to preserve each pilot's un-merged career expectations." (Dkt. No. 36, 4:1). Thus, USAPA, as a matter of constitutional mandate, does in fact consider the "minority" interests of West pilots.

Plaintiffs cite a single case in support of their "due consideration" argument, *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 798-99 (7th Cir. 1976). Not only are *Barton Brands*' facts entirely distinguishable, but both the decision's own discussion of then-existing precedent, and the Seventh Circuit's subsequent treatment of *Barton Brands*, support USAPA's course of conduct.

In *Barton Brands*, the union had *negotiated* and obtained membership ratification of a seniority integration that dovetailed the employees working at two plants referred to as Barton and Glencoe. *Id*. at 795. When the employer subsequently closed one of the

two plants, the *same* union re-negotiated the contractual integration in order to *endtail* the employees at the smaller Glencoe plant, thereby shifting the burden of layoffs *exclusively* to the smaller group. *Id*. at 796. The Seventh Circuit upheld the NLRB's finding of a DFR violation based on its determination that the union had rejected a previously negotiated, and implemented, date-of-hire seniority integration in favor of endtailing the Glencoe employees, for no apparent reason other than political expediency. *Id*. at 800.

USAPA is not attempting to reverse a seniority arrangement that it had previously negotiated, ratified, and implemented in favor of the endtailing of a disfavored minority. As held in the Seventh Circuit's subsequent *Rakestraw* decision, USAPA's policy of seeking pilot integration on a date-of-hire basis cannot be deemed arbitrary, discriminatory, or in bad faith, since dovetailing "serves the interests of labor as a whole." *Rakestraw*, 981 F.2d at 1533.

Significantly, even in the *Barton Brands* case, the Seventh Circuit recognized, and distinguished its own holding from existing NLRB precedent permitting a union to negotiate the revocation of a seniority integration instituted pursuant to a "final and binding" arbitration process where the union considered the arbitration decision to be objectionable. 529 F.2d at 799-800 (*citing Associated Transport, Inc.,* 185 N.L.R.B. 631 (1970)).

Respectfully Submitted,

Dated: April 16, 2009

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

Nicholas P. Granath, Esq. (*pro hac vice*)
ngranath@ssmplaw.com
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
2915 Wayzata Blvd.
Minneapolis, MN 55405

Lee Seham, Esq. (*pro hac vice*)
Stanley J. Silverstone, Esq. (*pro hac vice*)
Lucas K. Middlebrook, Esq. (*pro hac vice*)
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
445 Hamilton Avenue, Suite 1204
White Plains, NY 10601

James K. Brengle, Esq. (*pro hac vice*)
Duane Morris, LLP
30 South 17th Street
Philadelphia, PA 19103-4196

Nicholas Enoch, Esq. State Bar No. 016473
stan@lubinandenoch.com
LUBIN & ENOCH, PC
349 North 4th Avenue
Phoenix, AZ 85003-1505

CERTIFICATE OF SERVICE

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

- Defendant USAPA's Trial Brief (Jury Trial)
- Certificate of Service

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

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

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

On April 16, 2009, by:

/s/ Nicholas Paul Granath, Esq.