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

10 Don ADDINGTON, <i>et al.</i> , 11 Plaintiffs, 12 vs. 13 US AIRLINE PILOTS ASSN., <i>et al.</i> , 14 Defendants.	CASE NO. 2:08-CV-1633-PHX-NVW (Consolidated) <b>PLAINTIFFS TRIAL BRIEF ON          CONTESTED ISSUES OF LAW</b>
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15 Don ADDINGTON, <i>et al.</i> , 16 Plaintiffs, 17 vs. 18 Steven H. BRADFORD, <i>et al.</i> , 19 Defendants.	Case No. 2:08-CV-1728-PHX-NVW
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20 **PLAINTIFFS' TRIAL BRIEF ON CONTESTED ISSUES OF LAW**

21 **I. OVERVIEW**

22 Plaintiffs will prove that Defendant is liable for unfair representation  
 23 on three bases. *See Addington v. US Airline Pilots Assn.*, 588 F. Supp. 2d  
 24 1051 (D. Ariz. 2008) (recognizing the validity of each such basis for liability).  
 25 Plaintiffs' case-in-chief will prove the factual elements of each such basis for  
 26 unfair representation. Evidence that is relevant only to other bases for  
 27 unfair representation can only confuse or mislead the jury. The Court  
 28

1 should, therefore, either exclude such evidence or instruct the jury that it  
2 does not bear on Plaintiffs' claims. Plaintiffs identify the requisite factual  
3 elements to establish their unfair representation claims and identify  
4 examples of evidence that will prove each of those elements.

## 5 II. DISCUSSION

6 USAPA is liable for unfair representation because it: (1) was  
7 constituted to empower the majority to deprive the minority of an  
8 established right for the majority's benefit only; (2) promised, in an election  
9 campaign, to do so if it became the representative; *and/or* (3) did so after it  
10 becomes the representative. *See generally id.* at 1060-61.

11 Central to each of these claims is that USAPA acted to abrogate a  
12 seniority-related right benefitting the minority and/or acted to avoid a  
13 seniority-related duty burdening the majority and did so "after a merger  
14 solely for the sake of political expediency." *Id.* at 1060; *see also Barton*  
15 *Brands, Ltd. v. NLRB*, 529 F.2d 793, 800 (7th Cir. 1976) (same).

16 The seniority-related right and seniority-related duty here were  
17 established by the Transition Agreement (which incorporated ALPA Merger  
18 Policy), the Nicolau Arbitration, and the Airline's acceptance of the Nicolau  
19 Award. Together, these created Plaintiffs' right (indeed the right of all  
20 pilots) to require implementation of the Nicolau Award as a condition of  
21 integrated operations. These also created the East Pilots' duty (indeed the  
22 duty of all pilots) to bargain and ratify a single collective bargaining  
23 agreement in good faith.

24 Each action at issue—formation, campaign, and post-certification  
25 representation—were part of a continuing course of conduct intended to  
26 abrogate the seniority-related right (hereinafter the "Nicolau Right") and/or  
27 to avoid the seniority-related duty (hereinafter the "Nicolau Duty").  
28

1           **A. It is Unfair Representation Where a Union Is Created by the**  
2           **Majority, after the Merger of a Majority and a Minority, for the**  
3           **Purpose of Depriving the Minority of an Agreed Upon Seniority**  
4           **Right.**

5           1.           Plaintiffs make an "Air Wisconsin claim."

6           Plaintiffs' first claim is that "a majority of the employees in a collective  
7           bargaining unit" (the East Pilots) formed a new union (USAPA), "to oust"  
8           the old union (ALPA), for the purpose of depriving a minority (the West  
9           Pilots) of a right (the right to require implementation of the Nicolau Award  
10          in integrated operations), and for the purpose of avoiding the East Pilots'  
11          duty owed to the West Pilots (the duty to bargain and ratify a single  
12          collective bargaining agreement in good faith). This is precisely the claim  
13          recognized in *Air Wisconsin*, 909 F.2d at 217. That court (and now this  
14          Court) deemed this to be unfair representation. *Addington*, 588 F. Supp. 2d  
15          at 1060.

16          An attempt by a majority of the employees in a collective  
17          bargaining unit to gang up against a minority of employees in the  
18          fashion apparently envisaged by the plaintiffs could itself be  
19          thought a violation of the duty of fair representation by the union  
20          that the majority used as its tool. This dictum fits into the  
21          doctrinal backdrop and is well taken.

22          *Id.* (emphasis, citation, and alteration and quotation marks omitted).

23          This is a classic instance of bad faith unfair representation. Bad faith  
24          is the "refusal to fulfill some duty or some contractual obligation, ...  
25          prompted by an ... interested motive." *Black's Law Dictionary* (6th ed.  
26          1990); accord *United States v. Manchester Farming P'ship*, 315 F.3d 1176,  
27          1183 (9th Cir. 2003) (applying Black's definition of bad faith). The  
28          formation of USAPA was part of a course of conduct intended to abrogate  
29          the Nicolau Right and avoid the Nicolau Duty. It was prompted by an  
30          improperly interested motive because the individuals who formed and

1 supported USAPA (the “Bradford Group”) did so because they sought to gain  
2 seniority benefits at the expense of the West Pilots.

3 The fundamental nature of reordering seniority is that it is internal to  
4 the union. Unless reordering would affect collective bargaining (as when  
5 scabs are given lower seniority to discourage workers from accepting  
6 employment during a strike in the future), is part of an exchange for better  
7 conditions made with the employer, or restores a prior scheme in the same  
8 bargaining unit, it does not create an overall benefit to the whole. *See*  
9 *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1535 (7th Cir. 1992)

10 [A] union may not juggle the seniority roster for no reason other  
11 than to advance one group of employees over another. The change  
12 must rationally promote the aggregate welfare of employees in the  
13 bargaining unit. ALPA had at least two rational and appropriate  
14 objectives from this perspective: (1) to reduce the advantages  
enjoyed by the replacements, and thus to strengthen the hand of  
organized labor in future conflicts with management, and (2) to  
restore the seniority system that United had long used.

15 *Id.* In any other context, reordering seniority to benefit one group over  
16 another merely redistributes benefits in a zero-sum game manner and  
17 cannot be done by a union just to benefit the majority with political control.

18 2. The Bradford Group formed USAPA in bad faith.

19 (a) *The Bradford Group knew that the Nicolau Right*  
20 *existed.*

21 Substantial evidence shows that, at all times relevant, the pilots on  
22 both sides understood that they could not transition to integrated operations  
23 unless they used the seniority list that came out of ALPA Merger Policy  
24 procedures.<sup>1</sup> By the end of September 2007, the East Pilots knew that the

25 \_\_\_\_\_  
26 <sup>1</sup> In Summer 2005, East Pilots were told: “The Award of the Arbitration Board  
27 shall be final and binding on all parties to the arbitration and shall be defended by  
28 ALPA.” (Ex. 4, ADD541.) “The Airline Parties will accept such integrated seniority  
list, including conditions and restrictions...” (Ex. 21, ADD264.) “The only certainty  
in seniority integration is that the outcome is never certain until the merger  
representatives reach an agreement or, failing a negotiated solution, the arbitrator issues  
an award.” (Ex. 7, ADD658.) Under ALPA governance, each of the pilot groups had a

1 Nicolau Award would be this list. For example, by this time the ALPA  
2 Executive Council found that it had “no basis ... to further consider the  
3 [East Pilot] request to set aside the Award.” (Ex. 28, USAPA312; Ex. 25,  
4 ADD3111.) Indeed, the great weight of the evidence will show that, at all  
5 times, the East Pilots anticipated, agreed to, or recognized the West Pilots’  
6 Nicolau Right.

7 *(b) The Bradford Group knew that the Nicolau Duty*  
8 *existed.*

9 As a first step to compelling East Pilot cooperation, the ALPA  
10 Executive Council stated:

11 [It] is time for the [East] MEC to comply with its representational  
12 and legal obligations under the Constitution & By-Laws, ALPA  
13 Merger Policy, the Transition Agreement, and implementing  
14 resolutions of the Executive Council. The MEC, at this meeting,  
15 should adopt a resolution (or resolutions) reversing all prior efforts  
16 to bar or precondition the continuation of joint negotiations.

17 (Ex. 19, ADD2151-52.)

18 The Executive Council also directed the East MEC to “adopt a  
19 resolution recognizing that the award is to be included in the single  
20 agreement to be negotiated under the Transition Agreement and Merger  
21 Policy....” (Ex. 19, ADD2152.)

22 On December 20, 2008, the Airline “accepted” the Nicolau Award and  
23 announced its agreement to implement it in any future single contract with  
24 its pilots. (Ex. 09, ADD699.)

25 As an example of the substantial evidence showing that the members of  
26 the Bradford group believed that ALPA could and would compel  
27 implementation of the Nicolau Award, one of them wrote as follows:

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28 Merger Committee that had “complete and full authority” to create an integrated pilot  
seniority list according to ALPA Merger Policy. (Ex. 3, ADD96; Ex. 57, ADD4834.)

1 “Separate Operations” is not possible if we stick with ALPA. If we  
2 vote ALPA in, we will be forced to eat the Nicolau award in the not  
too distant future. ALPA=Nicolau.

3 (Ex. 20, ADD2353.)

4 Indeed, the great weight of the evidence will show that, at all times, the  
5 East Pilots anticipated, agreed to, or recognized their Nicolau Duty.

6 (c) *The Bradford Group formed USAPA to abrogate the*  
7 *Nicolau Right and to avoid the Nicolau Duty.*

8 Substantial evidence shows that the Bradford Group formed USAPA  
9 for the purpose of abrogating the Nicolau Right and avoiding the Nicolau  
10 Duty. For example, soon after the announcement of the Nicolau Award Mr.  
11 Bradford decided to form a new union if he found that he could not abrogate  
12 the Nicolau Right and avoid the Nicolau Duty inside ALPA. He wrote:

13 Make no mistake, we don't not want to leave ALPA, but we will  
14 just to ensure we can have some say in the next merger. We will  
write our own merger policy into our bylaws and defend it in civil  
court if we have to....

15 (Ex. 107, ADD4945.) “We must leave ALPA if this award stands.” (Id.)

16 Soon after the Nicolau Award was announced, Mr. Bradford “started ...  
17 interviewing law firms to see if there is anything we can do about this. ... if  
18 we became independent we could mitigate the uh seniority award and we  
19 could also gain some other benefits.” (Ex. 1, video.) The Bradford Group  
20 widely disseminated statements that these law firms told them that with a  
21 new union they could abrogate the Nicolau Right and avoid the Nicolau  
22 Duty. (Exs. 14, 324, 315.) Indeed, this was so the focus of the reason for  
23 forming USAPA that Mr. Bradford later wrote that “[i] any one of the[se law  
24 firms] ha[d] said this ... [was] likely to fail then USAPA would not exist.”  
25 (Ex. 314, ADD2354.).  
26  
27  
28

1 Indeed, the great weight of the evidence will show that USAPA was  
2 formed for the purpose of abrogating the Nicolau Right and avoiding the  
3 Nicolau Duty.

4 **B. A Union Breaches its Duty of Fair Representation If, in its**  
5 **Campaign to be Elected the Single Bargaining Representative,**  
6 **it Promised to Disregard established rights and duties between**  
7 **the members of the bargaining unit for the benefit of the**  
8 **majority only.**

9 1. Plaintiffs make a *Truck Driver's* claim.

10 The court in *Truck Drivers & Helpers, Local Union 568 v. NLRB*, 379  
11 F.2d 137 (D.C. Cir. 1967), held that, in the course of a representation  
12 election campaign, a union promising to favor the seniority status of the  
13 majority at the expense of a minority “would . . . constitute a default by [the  
14 union] in its obligation to represent fairly all the employees in the unit for  
15 which it becomes the exclusive bargaining representative,” because it would  
16 have the effect of renouncing any good faith effort to reconcile the interests  
17 of the two groups. *Truck Drivers & Helpers, Local Union 568 v. NLRB*, 379  
18 F.2d 137, 145 (D.C. Cir. 1967). Addressing Defendant’s argument to the  
19 contrary, this Court held that it “flies against the headwind of cases from  
20 other circuits.” *Addington*, 588 F. Supp. 2d at 1060.

21 The fundamental problem with such promises is that a union’s “pledge”  
22 to impair the rights of a minority for the benefit of the majority “presently  
23 restrains the employees of the bargaining unit in the exercise of their  
24 Section 7 right to freedom of choice in the selection or rejection of a  
25 bargaining representative.” *Truck Drivers*, 379 F.2d at 145.

26 [I]nterjection of what would be an illegal union policy into the  
27 campaign may have coerced members of both unions into thinking  
28 they had best sit tight with their current representation, it seems  
probable that employees were restrained from the full exercise of  
'the complete and unhampered freedom of choice which the Act  
contemplates.' *Id.*

1 The factual predicate of this claim is that the Bradford Group promised  
2 to abrogate the Nicolau Right and avoid the Nicolau Duty to benefit the  
3 East Pilot majority. If so, they campaigned in bad faith.

4 2. The Bradford Group campaigned in bad faith.

5 Substantial evidence shows that the Bradford Group campaigned by  
6 making promises to abrogate the Nicolau Right and to avoid the Nicolau  
7 Duty. They made it clear in its campaign that the election would be a  
8 referendum on abiding by the Nicolau Award.

9 [T]he question of East/West will be decided by a vote for ALPA or  
10 USAPA. When USAPA becomes the bargaining agent, there will  
11 be no West and a simple majority can renegotiate seniority  
integration.

12 (Ex. 35, USAPA2353.)

13 They repeatedly made assertions like the following:

14 Upon certification of USAPA, the Nicolau Award is rendered moot.  
15 It doesn't have to be fixed, changed, renegotiated, or modified as it  
16 is no longer relevant to the US Airways pilots. Negotiations will  
17 then take place within the Board of Pilot Reps (BPR) who will  
start with a DOH list, and then develop conditions and restrictions  
to protect all pilot's pre-merged career expectations, with an  
emphasis on protections for the West pilots.

18 (Ex. 24, ADD3107.)

19 The Bradford Group asserted that USAPA has "abandoned the Nicolau  
20 Award, would not be "bound" to honor the Nicolau Award, and that "on  
21 USAPA's watch, it [the Nicolau Award] will go away. It also stated: "Inside  
22 ALPA, the only issue preventing a ratifiable joint contract is the existence of  
23 two MECs, and therefore mandatory dual-ratification;" "USAPA will remove  
24 this impediment and will promptly enter into negotiations with  
25 management for a quality contract;" and "ALPA is required to defend the  
26 Award." (Ex. 37, USAPA2379.)  
27  
28



1 Indeed, a great weight of evidence will show that USAPA campaigned  
2 primarily on its promises to abrogate the Nicolau Right and avoid the  
3 Nicolau Duty.

4 **C. A Union Breaches its Duty of Fair Representation If, After a**  
5 **Merger, it Disregards Minority Views on Seniority Rights.**

6 “Irrespective of whether seniority rights ‘vest’ in a proprietary sense, a  
7 union may not arbitrarily abridge those rights after a merger solely for the  
8 sake of political expediency.” *Addington*, 588 F. Supp. 2d at 1060. A union  
9 cannot decide a seniority dispute by giving consideration only to the views of  
10 the majority. *See id.* (recognizing a “union's duty to consider the views of all  
11 those it represents”). A union, therefore, may not delegate its decision-  
12 making function to a committee whose members “will be motivated solely by  
13 their own personal considerations.” *See also Branch 6000, Natl. Assn. of*  
14 *Letter Carriers v. NLRB*, 595 F.2d 808, 812 (D.C. Cir. 1979) (disapproving  
15 deciding issue by membership referendum).

16 *Letter Carriers* held that a union violates the duty of fair  
17 representation if it decides a bargaining position without considering the  
18 interests of all represented workers.<sup>2</sup> Rather, the bargaining agent must  
19 “ascertain” the “wishes of non-union employees” and “take them into  
20 account.” *Id.* at 813. “Where, ... as a practical matter one segment of the  
21 bargaining unit has been excluded from consideration,” there is a breach of  
22 the duty of fair representation.” *Id.*

23 The factual predicate here is that USAPA decided to disregard the  
24 Nicolau Award at the moment it was constituted for that purpose, that it

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25  
26 <sup>2</sup> The court distinguished “a poll of the union membership to ascertain its views  
27 prior to formulation of the negotiating posture for the bargaining unit,” noting that in  
28 that situation, “the bargaining responsibility remains with an individual or committee  
charged with the obligation of fair representation, requiring some consideration of the  
interests of all employees.” *Id.* at 812.

1 never considered doing otherwise when it formulated its seniority  
2 bargaining position and that, without making any attempt to consider the  
3 views of the West Plots, it has made no effort to support implementation of  
4 the Nicolau Award.

5 The factual predicate of the legal issue here, therefore, is on point to  
6 the factual predicate addressed in *Barton Brands* and *Letter Carriers*.  
7 Surely, pursuing a date-of-hire seniority proposal and completely  
8 disregarding the West Pilot view that, because the Company had already  
9 accepted the Nicolau Award, it was a final settled matter, is a specific  
10 example of deciding a representational issue without giving any  
11 consideration to a minority view.

12 There will be no evidence at trial showing that USAPA took any action  
13 to consider the West Pilot view on the finality of the Nicolau Award.

14 **III. CONCLUSION**

15 The Court has decided the issues of law. What remains is to affirm  
16 that those are still the material issues in this case and to determine  
17 whether there are any genuine factual issues to be decided in regard to  
18 those issues. Defendant must come forward with evidence that creates a  
19 genuine dispute as to such issues. It has yet to do so.

20 Dated this 16th day of April, 2008.

21 POLSINELLI SHUGHART PC

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23  
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**CERTIFICATE OF SERVICE**

I hereby certify that on April 16, 2008, 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 to the following CM/ECF registrant(s).

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Andrew S. Jacob