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

Don ADDINGTON, John BOSTIC, Mark
BURMAN, Afshin IRANPOUR, Roger
VELEZ; and Steve WARGOCKI,

Plaintiffs,

vs.

US AIRLINE PILOTS ASSOCIATION, and
US AIRWAYS, INC.,

Defendants.

CASE NO. 2:08-CV-1633-NVW

**FINAL PRETRIAL ORDER FOR
BENCH TRIAL**

The following is the joint Proposed Final Pretrial Order to be considered at the Final Pretrial Conference set for **April 21, 2009 at 2:00 PM.**

A. TRIAL COUNSEL FOR THE PARTIES

The parties incorporate the lists of trial counsel from their *Proposed Final Pretrial Order For Jury Trial.*

B. STATEMENT OF JURISDICTION.

The parties incorporate the Statements of Jurisdiction from their *Proposed Final Pretrial Order For Jury Trial.*

C. STIPULATIONS AND UNCONTESTED FACTS AND LAW

1. The following material facts are admitted by the parties and require no proof:

(1) The parties incorporate all admitted materials facts as set out in § C 1 of their *Proposed Final Pretrial Order For Jury Trial.*

(2) The parties also incorporate whatever findings of fact are made by the jury in the liability trial (without waiver of, or prejudice to, post-trial motions or appeal).

1 2. The following material facts, although not admitted, will not be contested
2 at trial by evidence to the contrary:

3 For Plaintiff: None

4 For Defendant: None

5 3. The following issues of law are uncontested and stipulated to by the
6 parties: The parties incorporate their respective statements in § C 3 of the *Proposed*
7 *Final Pretrial Order for Jury Trial*.

8 **D. CONTESTED ISSUES OF FACT AND LAW**

9 The parties have not reached agreement on any contested issue of fact or law.
10 Contentions in response to each party's issues, therefore, do not imply agreement.
11 Plaintiffs and Defendant hereby incorporates points and authorities contained within
12 their Contested Issues Briefs.

13 **1a.** The following are Plaintiffs' material issues of FACT to be tried and
14 decided:

15 ISSUE #1: *Whether, USAPA members would refuse to ratify any*
16 *collective bargaining agreement that uses the Nicolau Award.*

17 Plaintiffs Contend: Yes. USAPA is claiming that this Court cannot
18 compel implementation of the Nicolau Award because they have the
19 power to refuse to ratify any proposed collective bargaining agreement
20 that uses the Nicolau Award.

21 Defendant Contends: There are no stand-alone fact issues to be tried
22 although evidence in support of legal argument may be necessary (e.g. the
23 impact or practicality of compliance with injunctive relief depending on
24 the scope, assuming any is ordered). Subject to this objection, the answer
25 to Plaintiffs' Issue No. 1 is not legally relevant; members have a legal
26 right to vote to ratify a tentatively agreed-to contract and the Court lacks
27 jurisdiction to interfere with otherwise lawful internal union governance.

28 ISSUE #2: *Whether, a substantial number of East Pilots have*

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demonstrated that, if given the option, they would refuse to cooperate with the implementation of a collective bargaining agreement using the Nicolau Award.

Plaintiffs Contend: Yes. Numerous public statements by East Pilots have been made to this effect.

Defendant Contends: There are no stand-alone fact issues to be tried although evidence in support of legal argument may be necessary (e.g. the impact or practicality of compliance with injunctive relief depending on the scope, assuming any is ordered). Subject to this objection, the language “refuse to cooperate” is vague and ambiguous; the answer to Plaintiffs’ Issue No. 2 is not legally relevant; and the Court lacks jurisdiction to dictate substantive terms of a collective bargaining agreement.

ISSUE #3: *Whether, in a reasonably cost-neutral manner, West Pilots now on furlough can be recalled and East Pilots furloughed in their place.*

Plaintiffs Contend: Yes. There are more than enough East Pilots working in positions for which the West Pilots on furlough are fully trained. There are more than enough East Pilots flying in and out of the domicile cities to which the currently furloughed West Pilots were assigned. Any costs to the Airline from recalling West Pilots and furloughing East Pilots can be set off against funds that the Airline will soon be due to pay to East Pilots.

Defendant Contends: There are no stand-alone fact issues to be tried although evidence in support of legal argument may be necessary (e.g. the impact or practicality of compliance with injunctive relief depending on the scope, assuming any is ordered). Subject to this objection, the answer to Plaintiffs’ Issue No. 3 is not legally relevant; this Court lacks

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jurisdiction to interpret or apply the collective bargaining agreement or otherwise determine minor disputes under the RLA, or to impede or infringe upon the exclusive jurisdiction of the System Board of Adjustment.

1b. The following are Defendant’s material issues of FACT to be tried and decided:

Defendant Contends: There are no stand-alone fact issues to be tried although evidence in support of legal argument may be necessary (e.g. the impact or practicality of compliance with injunctive relief depending on the scope, assuming any is ordered).

2. The following are the issues of LAW to be determined:

The parties have not reached agreement on any contested issue of fact or law. Contentions in response to each party’s issues, therefore, do not imply agreement.

2a. The following are Plaintiffs’ material issues of LAW to be tried and decided:

Plaintiffs’ ISSUE #1: *Whether USAPA so violated its duty of fair representation that the Court should order it to comply with the duties that ALPA would have had if it stayed the bargaining representative and immediately engage in good faith negotiation of a single joint collective bargaining agreement that incorporates the Nicolau Award seniority list.*

Plaintiffs Contend: Yes. See 30A C.J.S. Equity § 131 (“Equity regards that as done which ought to be done. * * * The broad meaning or effect of this maxim is that where an obligation rests on a person to perform an act equity will treat the person in whose favor the act should be performed as clothed with the same interest and entitled to the same rights as though the act were actually performed.”); *Garner v. Pearson*, 374 F. Supp. 580, 585 (D.C. Fla. 1973) (“Considering the equitable nature of the relief requested, however, the Court has applied the time-honored doctrines of equity to

1 reach the essence of this action. Equity looks to substance rather than
2 form. Thus, the analysis proceeds on the assumption that the law should
3 relate to business realities.’).

4 Defendant Contends: Disagree that this is the issue; see 2b below for
5 Defendant’s statement of the legal issue; subject to the foregoing,
6 Plaintiffs’ issue and contention seeks a remedy that exceeds this Court’s
7 jurisdiction, impedes and infringes upon the exclusive jurisdiction of the
8 National Mediation Board, or otherwise is contrary to law.

9
10 Plaintiffs’ ISSUE #2: *Whether USAPA so violated its duty of fair*
11 *representation that the Court should order the airline and USAPA to*
12 *submit to NMB mediation/arbitration to create and implement a single*
13 *joint collective bargaining agreement that incorporates the Nicolau*
14 *Award seniority list.*

15 Plaintiffs Contend: Yes. *See Chicago & N. W. Ry. Co. v. United Transp.*
16 *Union*, 402 U.S. 570, 577 (1971) (holding that the duty to bargain in good
17 faith “was intended to be more than a mere statement of policy or
18 exhortation to the parties; rather, it was designed to be a legal obligation,
19 enforceable by whatever appropriate means might be developed on a case-
20 by-case basis.”); *United Air Lines, Inc. v. Air Line Pilots Assn., Intern.*
21 2008 WL 4936847, 35 (N.D. Ill. 2008) (“[T]he obligation to make and
22 maintain agreements without interruption to the carrier's operations is ...
23 an affirmative legal obligation, enforceable by ... injunction.”).

24 Defendant Contends: Disagree that this is the issue; see 2b below for
25 Defendant’s statement of the legal issue; subject to the foregoing,
26 Plaintiffs’ issue and contention seeks a remedy that exceeds this Court’s
27 jurisdiction or otherwise is contrary to law.

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Plaintiffs' ISSUE #3: *Whether USAPA so violated its duty of fair representation that the Court should enjoin it from submitting a negotiated collective bargaining agreement to membership ratification without approval by the Court.*

Plaintiffs Contend: Yes. *Loc. No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen & Packers v. Crowley*, 467 U.S. 526, 536-37 (1984) (federal law guarantees only an "equal" right to ratify, not the right itself); *Wiggins v. United Food and Commercial Workers Union, Loc. # 56*, 420 F.Supp.2d 357 (D.N.J. 2006) (no right to vote to ratify a CBA unless expressly set out in a union's constitution); *Korzen v. Local Union 705, Intl. Bhd. of Teamsters*, 75 F.3d 285, 288 (7th Cir. 1996) ("Union constitutions have been held to be contracts...."); *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 203-04 (1944) (suggesting that under RLA neither union is not "entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making").

Defendant Contends: Disagree that this is the issue; see 2b below for Defendant's statement of the legal issue; subject to the foregoing, Plaintiffs' issue and contention seeks a remedy that exceeds this Court's jurisdiction or otherwise is contrary to law.

Plaintiffs' ISSUE #4: *Whether USAPA so violated its duty of fair representation that the Court should direct it to make whatever concessions are necessary to allow the airline to recall furloughed West Pilots and, if necessary to furlough equivalently trained East Pilots in their place.*

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Plaintiffs Contend: Yes. *See* 30A C.J.S. *Equity* § 131 (“Equity regards that as done which ought to be done. * * * The broad meaning or effect of this maxim is that where an obligation rests on a person to perform an act equity will treat the person in whose favor the act should be performed as clothed with the same interest and entitled to the same rights as though the act were actually performed.”).

Defendant Contends: Disagree that this is the issue; see 2b below for Defendant’s statement of the legal issue; subject to the foregoing, Plaintiffs’ issue and contention seeks a remedy that exceeds this Court’s jurisdiction, invades the exclusive jurisdiction of the System Board, or otherwise is contrary to law.

Plaintiffs’ ISSUE #5: *Whether USAPA so violated its duty of fair representation in disputing the validity of the Nicolau Arbitration Award that the Court should award Plaintiffs their reasonable attorneys’ fees and non-taxable costs.*

Plaintiffs Contend: Yes. *Intl. Union of Petroleum & Indus. Workers v. Western Indus. Maintenance, Inc.*, 707 F.2d 425, 428 (9th Cir. 1983) (“[A]n unjustified refusal to abide by an arbitrator's award may equate an act taken in bad faith, vexatiously or for oppressive reasons.”); *Phoenix Newspapers, Inc. v. Phoenix Mailers Union Local 752, Intern. Bhd. of Teamsters*, 989 F.2d 1077, 1084 (9th Cir. 1993) (same); *see also Intl. Assn. of Machinists & Aerospace Workers, Dist. 776 v. Texas Steel Co.*, 538 F.2d 1116, 1122 (5th Cir. 1976) (awarding fees because “the refusal to abide by [an] arbitration award [creating a compromise integration of seniority lists] was without justification.”).

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Defendant Contends: Disagree that this is the issue; see 2b below for Defendant’s statement of the legal issue; subject to the foregoing, Plaintiffs’ issue and contention seeks a remedy that exceeds this Court’s jurisdiction or otherwise is contrary to law.

2b. The following are Defendant’s material issues of LAW to be tried and decided:

Defendant’s ISSUE # 1: *Whether the Court has the legal authority to order USAPA not to amend the West CBA without either the approval of the Court or ratification by a majority of West Pilots?* (Dt. # 86, ¶ 123 A. (3))

Plaintiffs Contend: This issue is improperly stated using citation to the record. Separate operations is not an acceptable outcome of this dispute. The Court should not address this issue. Rather, it should fashion a remedy that leads to integrated pilot operations .

Defendant Contends: That the Court lacks the legal authority to order the requested relief because it would invade the province of USAPA as the NMB certified labor representative to negotiate a CBA and to self-govern. Such an order would also compel USAPA to violate its own Constitution, which violation would expose USAPA to DFR-liability.

Defendant’s ISSUE # 2: *Whether the Court has the legal authority to command that USAPA negotiate and implement a single collective bargaining agreement that fully implements the Nicolau list?* (Dt. # 86, ¶ 123 B.)

Plaintiffs Contend: This issue is improperly stated using citation to the record. The Court has a wide range of equitable powers that allow this

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remedy. *See* Plaintiffs’ Contention Issue #1.

Defendant Contends: That the Court lacks the legal authority to order the requested relief because, *inter alia*, the Court has not and cannot as a matter of law conclude that the Nicolau award is binding on USAPA and the Court cannot command USAPA to violate its Constitution without first concluding that the Constitution is per se invalid under law, which it has not done and cannot do as a matter of law. The Court also cannot mandate a specific bargaining result; rather its authority is limited to an order requiring that USAPA avoid conduct that is arbitrary, discriminatory or in bad faith.

Defendant’s ISSUE # 3: *If the Court answers Issue 1 in the affirmative, what is the scope of the requested injunction (i.e. to order USAPA not to amend the West CBA without either the approval of the Court or ratification by a majority of West Pilots)?*

Plaintiffs Contend: Plaintiffs’ position is set out under “Plaintiffs Contend” Issues 1-3.

Defendant Contends: There is no basis in fact or in law to involve the Court in on-going bargaining or related internal union processes; that any injunction cease in effect at a time certain and on objective events; that any injunction be limited in scope to ensuring that USAPA comply with its Constitution and the RLA.

Defendant’s ISSUE # 4: *If the Court answers Issue 2 in the affirmative, what is the scope of the requested injunction (i.e. to command that USAPA negotiate and implement a single collective bargaining agreement that fully implements the Nicolau list)?*

1 Plaintiffs Contend: Plaintiffs’ position is set out under “Plaintiffs
2 Contend” Issues 1-3.

3 Defendant Contends: There is no basis in fact or in law to involve the
4 Court in on-going bargaining or related internal union process; that any
5 injunction cease in effect at a time certain and on objective events; that no
6 injunction should do more than enforce existing legal duties of USAPA
7 under the RLA and avoid infringing on the NMB’s prerogative and
8 exclusive jurisdiction under the RLA; that an injunction should be limited
9 in scope to obligating USAPA to bargain in a manner that fairly represents
10 the interests of all represented pilots, East and West, and that the
11 injunction should be dissolved in the event that USAPA’s members reject
12 a tentative agreement that complies with the Court’s order.

13 **E. LIST OF WITNESSES**

14 **1. Plaintiffs’ Witnesses**

15 **a. Witnesses who shall be called at trial:**

16 Don Addington

17 John Bostic

18 Mark Burman

19 Afshin Iranpour

20 Roger Velez

21 Steve Wargoeki

22 Doug Dotter

23 Russ Payne

24 Ken Stravers

25 Brian Stockdell

26 **b. Witnesses who may be called at trial:**

27 Eric Ferguson

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1 Jeff Koontz
2 Eric Ferguson
3 Jeff Koontz

4 c. Witnesses who are unlikely to be called at trial:

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6 2. Defendant's Witnesses

7 a. Witnesses who shall be called at trial:

8 None anticipated based on Defendant's statement of the issues.

9 b. Witnesses who may be called at trial:

10 Defendant incorporates and references § E(a) of the *Proposed Final*
11 *Pretrial Order for Jury Trial.*

12 c. Witnesses who are unlikely to be called at trial:

13 Defendant incorporates and references § E(a) of the *Proposed Final Pretrial*
14 *Order for Jury Trial.*

15 3. Each party understands that it is responsible for ensuring that the
16 witnesses it wishes to call to testify are subpoenaed. Each party further understands that
17 any witness a party wishes to call shall be listed on that party's list of witnesses; the
18 party cannot rely on the witness having been listed or subpoenaed by another party.

19
20 **F. LIST OF EXHIBITS**

21 1. The following exhibits are admissible in evidence and may be marked in
22 evidence by the Clerk:

23 The parties incorporate by this reference the Exhibits exchanged before
24 the liability trial and/or admitted at the liability trial in this matter.

25 2. **As to the following exhibits, the parties have reached the following**
26 **stipulations:**

27 The parties incorporate by this reference any stipulations contained in the
28 Proposed Joint Pretrial regarding Exhibits exchanged and admitted at the liability trial in

1 this matter as though incorporated herein.

2 3. As to the following exhibits, the party against whom the exhibit is to be
3 offered objects to the admission of the exhibit and offers the objection stated below:

4 a. Plaintiff's Exhibits

5 Defendant incorporates all objections made to Plaintiffs' exhibits as fully
6 described in the Proposed Joint Pretrial Order For Jury Trial.

7 b. Defendant's Exhibits

8 Plaintiff incorporates all objections made to Defendant's exhibits as fully
9 described in the Proposed Joint Pretrial Order For Jury Trial.

10 4. Each party hereby acknowledges by signing this joint Proposed Final
11 Pretrial Order that any objections not specifically raised herein are waived.

12 **G. DEPOSITIONS TO BE OFFERED**

13 1. The parties shall list the depositions that may be used at trial. The
14 portions to be read or submitted at trial shall be identified by page and line number.
15 Additionally, the party offering the deposition shall provide the Court with a copy of the
16 offered deposition testimony. The offering party shall highlight, in color, the portions
17 of the deposition to be offered. If multiple parties are offering the same deposition, only
18 one copy of such deposition shall be provided. Such copy shall contain each party's
19 highlighting (each party should use a different color). Any party objecting to the
20 admission in evidence of any portion of a deposition shall identify by page and line
21 number the portion to which objection is made and shall state the grounds of objection
22 specifically.

23 a. Plaintiff's Depositions

24 Deposition and trial testimony of Al Hemenway

25 Deposition and trial testimony of Steven Bradford

26 b. Defendant's Depositions

27 Defendant incorporates its list of depositions in § G of the Proposed Final
28

1 Pretrial Order For Jury Trial.

2 **2.** Each party hereby acknowledges by signing this joint Proposed Final
3 Pretrial Order that any deposition not listed as provided herein will not be allowed,
4 absent good cause.

5 **H. MOTIONS IN LIMINE**

6 Motions in limine shall be filed as separate pleadings *and responded to in*
7 *accordance with the instructions contained in the Order Setting Final Pretrial*
8 *Conference.*

9 **I. LIST OF PENDING MOTIONS**

10 None.

11 **J. PROCEDURES FOR EXPEDITING TRIAL**

12 The parties shall discuss and report on all available procedures that might be
13 used to expedite trial, including but not limited to (a) presenting stipulated summaries of
14 deposition testimony rather than reading deposition excerpts; (b) editing videotaped
15 depositions to limit the amount of time required for presentation; (c) using summary
16 exhibits in place of voluminous documentary evidence; (d) stipulations on authenticity
17 and foundation; (e) presenting direct expert testimony through summary or written
18 reports; (f) using the courtroom technology to expedite the presentation of evidence.

19 The parties are invited to contact Sandra Fredlund, Judge Wake's Courtroom Deputy
20 Clerk, to arrange a time to visit the courtroom and examine its technology. Information
21 about courtroom technology can also be found at www.azd.uscourts.gov under Judicial
22 Officer Information.

23 **K. ESTIMATED LENGTH OF TRIAL**

24 1.5 hours for opening statements and closing arguments

25 4.0. hours for Plaintiff(s) case, including cross-examination of other parties'
26 witnesses

27 6.0 hours for Defendant(s) case, including cross-examination of other
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1 parties' witnesses

2 0.5 hours for Plaintiff(s) rebuttal

3 12.0 hours TOTAL ESTIMATED TIME

4 **L. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR**
5 **BENCH TRIALS**

6 The separately lodged Proposed Findings of Fact and Conclusions of Law are
7 incorporated by reference into this joint Proposed Final Pretrial Order.”

8 **M. CERTIFICATIONS**

9 The undersigned counsel for each of the parties in this action do hereby certify
10 and acknowledge the following:

- 11 1. All permitted discovery has been completed.
- 12 2. The identity of each witness has been disclosed to opposing counsel.
- 13 3. Each exhibit listed herein: (1) is in existence; and (2) has been disclosed
14 and shown to opposing counsel.
- 15 4. The parties have complied in all respects with the mandates of the Court’s
16 Rule 16 Scheduling Order and Order Setting Final Pretrial Conference.
- 17 5. The parties have made all of the disclosures required by the Federal Rules
18 of Civil Procedure (unless otherwise previously ordered to the contrary).
- 19 6. The parties acknowledge that once this Proposed Final Pretrial Order has
20 been signed and lodged by the parties, no amendments to this Order can
21 be made without leave of Court.

22 Defendant’s Separate Statement: Defendant incorporates all statements by
23 Defendant form § S of the Proposed Pretrial Order For Jury Trial.

24 **T. INFORMATION FOR COURT REPORTER**

25 In order to facilitate the creation of an accurate record, please file a "Notice to
26 Court Reporter" one week before trial containing the following information that may be
27 used at trial:

- 28 1. Proper names, including those of witnesses.

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- 2. Acronyms.
- 3. Geographic locations.
- 4. Technical (including medical) terms, names or jargon.
- 5. Case names and citations.

Please also send (or transmit electronically) to the court reporter a copy of the concordance from key depositions.

DATED this 16 day of April, 2009.

/s/ Andrew S. Jacob

/s/ Andrew S. Jacob (with permission)

Andrew S. Jacob
 POLSINELLI SHUGHART, P.C.
 3636 N. Central Ave., Suite 1200
 Phoenix, AZ 85012
Attorney for Plaintiffs

Nicholas P. Granath
 SEEHAM, SEHAM, MELTZ & PETERSEN, LLP
 445 Hamilton Ave., Suite 1204
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Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 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/ Andrew S. Jacob

Based on the foregoing,

IT IS ORDERED that this Proposed Final Pretrial Order jointly submitted by the parties is hereby **APPROVED** and **ADOPTED** as the official Pretrial Order of this Court.

DATED this ___ day of _____, 2009.

Neil V. Wake
 United States District Judge