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7  
8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE DISTRICT OF ARIZONA**

10 DON ADDINGTON, *et al.*,  
11 Plaintiffs,  
12 vs.  
13 US AIRLINE PILOTS ASSOCIATION, and  
14 US AIRWAYS, INC.,  
15 Defendants.

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

**[PROPOSED] FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

16 Pending before the Court is Plaintiffs' *First Amended Complaint* (doc. 86)  
17 seeking injunctive relief for Defendant's violations of its statutory duty of fair  
18 representation. Having the jury's verdict finding liability for unfair representation,  
19 memoranda provided by both parties, as well as all papers filed in this matter and  
20 having heard the evidence presented to the jury, the Court issues the following  
21 findings of fact and conclusions of law.

22 **I. FINDINGS OF FACT**

23 (1) In May 2005, two airlines, America West and US Airways, merged.  
24 The surviving entity is known as "US Airways." To distinguish it from the pre-  
25 merger entity by the same name, it is referred to hereinafter as the "Airline."  
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1 (2) The pilots who came from America West are known as the “West  
2 Pilots” and the pilots who came from US Airways are known as the “East Pilots.”

3 (3) Plaintiffs are West Pilots.  
4

5 (4) At the time of the merger, there were approximately 1800 West Pilots  
6 and 5,100 East Pilots.

7 (5) At the time of the merger, all of the West Pilots were actively working.  
8

9 (6) At the time of the merger, out of a total of 5,098 East Pilots, 1,691 were  
10 on furlough (not working but having recall rights).

11 (7) At the time of the merger, the Airline Pilots Association, International  
12 (“ALPA”) was the bargaining representative (union) for both West Pilots and East  
13 Pilots.  
14

15 (8) On September 23, 2005, the two airlines and ALPA entered into the  
16 Transition Agreement, a contract intended to govern the process of the airlines’  
17 operational merger.

18 (9) The Transition Agreement refers to the merger of pilot operations as  
19 “Operational Pilot Integration.”  
20

21 (10) The Transition Agreement provided that, until there was Operational  
22 Pilot Integration, “[t]he pilot workforces of America West and US Airways will  
23 remain separate and covered by their respective collective bargaining agreements.”  
24

25 (11) The Transition Agreement provided that Operational Pilot Integration  
26 would occur “no later than twelve (12) months following the later of (i) completion of  
27  
28

1 the integrated pilot seniority list and (ii) negotiation of the Single [Collective  
2 Bargaining] Agreement...”

3 (12) The Transition Agreement provided that completion of the integrated  
4 pilot seniority list would occur when: (i) such list was created according to an  
5 existing set of policies and procedures called “ALPA Merger Policy;” and (ii) such  
6 list was evaluated and accepted by the Airline according to criteria defined in the  
7 Transition Agreement.  
8

9 (13) The Transition Agreement, incorporating ALPA Merger Policy, by  
10 reference, provided that a pilot Joint Negotiating Committee, comprised of West  
11 Pilot and East Pilot representatives, and the Airline would negotiate a single  
12 collective bargaining agreement that would use the integrated seniority list.

13 (14) The Transition Agreement did not address whether any single  
14 collective bargaining agreement negotiated by the Joint Negotiating Committee and  
15 the Airline would be conditioned on ratification by the pilots.  
16

17 (15) Under ALPA governance, both pilot groups had standing Merger  
18 Committees comprised of two pilot Merger Representatives.

19 (16) According to ALPA Merger Policy, in the event of a merger of two pilot  
20 groups, their Merger Representatives “ha[d] complete and full authority to act for  
21 and on behalf of the flight deck crew members of their respective airlines for the  
22 purpose of concluding a single flight deck crew member seniority list, which shall  
23 not be subject to ratification.” *ALPA Merger Policy* Pt.1 § 1.D(3) (Ex. 3)<sup>1</sup>.  
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27 <sup>1</sup> “Ex.” refers to the trial exhibit number assigned to the document.  
28

1 (17) The first step to creating an integrated seniority list under ALPA  
2 Merger Policy was for the two sets of Merger Representatives to attempt negotiate a  
3 compromise seniority integration.

4 (18) In this matter, the Merger Representatives were unable to negotiate a  
5 compromise.

6  
7 (19) Although there were other points of disagreement, a particular point of  
8 disagreement concerned how to integrate 1,691 East Pilots who were on furlough at  
9 the time of the merger with the West Pilots, all of whom were actively working at  
10 the time of the merger.

11 (20) On one hand, the East Merger Representatives wanted to place these  
12 furloughed East Pilots ahead of the West Pilots on the basis that these East Pilots  
13 had earlier dates of hire with pre-merger US Airways.

14  
15 (21) On the other hand, the West Merger Representatives wanted to put  
16 these East Pilots behind the West Pilots because, having jobs, the West Pilots had  
17 better career expectations at the time of the merger.

18 (22) Following ALPA Merger Policy, the Merger Representatives entered  
19 into mediation to create a single integrated seniority list.

20  
21 (23) Following ALPA Merger Policy when mediation failed to create a  
22 single integrated seniority list, the Merger Representatives entered into arbitration.

23 (24) This arbitration was chaired by George Nicolau and is referred to by  
24 the parties and here as the "Nicolau Arbitration."  
25  
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1 (25) Under ALPA Merger Policy the award resulting from the Nicolau  
2 Arbitration was to be “final and binding” and would “not be subject to ratification”  
3 by either group of pilots.

4 (26) Prior to and during the Nicolau Arbitration, both pilot groups had  
5 ample notice and understanding that the arbitration award would be a final  
6 determination of the integration of their seniority lists.

7  
8 (27) Prior to and during the Nicolau Arbitration, both pilot groups had  
9 ample notice and understanding and that neither side could work under a new  
10 collective bargaining agreement unless that agreement implemented the integrated  
11 seniority list awarded by the arbitration.

12 (28) Prior to and during the Nicolau Arbitration, both pilot groups expected  
13 to work together to complete negotiation and implementation of a single collective  
14 bargaining agreement using the integrated seniority list awarded by the  
15 arbitration.

16  
17 (29) Indeed, just prior to announcement of the award of the arbitration the  
18 two pilot groups jointly stated: “[W]e are united in our fight for a fair, single  
19 contract.” (Ex. 12.)

20 (30) The Nicolau Arbitration Board considered substantial evidence and  
21 argument from both sides:

22  
23 After receiving pre-hearing statements of position, the Arbitration  
24 Board held a hearing over eighteen days in Washington, D.C. in the  
25 months of December, 2006 and January and February, 2007, during  
26 which both Parties were afforded full opportunity to offer evidence and  
27 argument and to present, examine and cross-examine witnesses. A  
28 transcript, consisting of 3102 pages, was taken. There were 20  
witnesses and 14 volumes of exhibits. Subsequent to the hearing, the  
Parties filed comprehensive post-hearing briefs, with the Record closed

1 on March 23, 2007, the day of their receipt. Thereafter, the Board met  
2 in a number of executive sessions to weigh the arguments and reach its  
3 conclusions. In doing so and in the process of fashioning the Award, it  
4 called upon and received, with the express permission of the Parties,  
the assistance and comments of their technical experts, with no  
objection raised as to the fairness or regularity of the proceedings.”

5 *Nicolau Opinion* at 3 (Ex. 2).

6 (31) The award of the arbitration (the “Nicolau Award”) was announced the  
7 first week of May, 2007.

8 (32) The Nicolau Award placed the 1,691 East Pilots who were on furlough  
9 at the time of the merger below the West Pilots,  
10

11 (33) The Nicolau Award reserved approximately 500 top positions for the  
12 most senior East Pilots and, in general, blended together the remaining East Pilots  
13 active at the time of the merger and the West Pilots in relative proportion to their  
14 numbers.  
15

16 (34) A strong majority of East Pilots immediately and strenuously objected  
17 to the Nicolau Award and vowed to prevent its implementation.

18 (35) On May 16, 2007, East Pilot Steven Bradford wrote to ALPA National  
19 that, although the East Pilots “don’t not want to leave ALPA,” they would do so  
20 “just to ... write our own merger policy into our bylaws ....” (Ex. 107.)  
21

22 (36) Soon after the announcement of the Nicolau Award, Mr. Bradford and  
23 other East Pilots formed a committee to explore whether by forming a new union  
24 and ousting ALPA they could prevent implementation of the Nicolau Award and, in  
25 its place, impose the East Pilot seniority integration scheme.  
26  
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1 (37) In June 2007, Mr. Bradford and these other East Pilots were advised  
2 that, as a matter of law, it would be improper to form a new union and oust ALPA  
3 for the purpose of preventing implementation of the Nicolau Award seniority list.

4 (38) Specifically, Mr. Bradford and these other East Pilots were:

5  
6 cautioned, the language you use in setting up your new union and how  
7 you go about talking and writing about your solutions to this award  
8 can be used against you. You need to stress the positives of the new  
9 union and not dwell on the award. Don't give the other side a large  
10 body of evidence that the sole reason for the new union is to abrogate  
11 an arbitration, the Nicolau award, that in the opinions of most judges,  
12 should be allowed to stand.

13 (Ex. 14.)

14 (39) Regardless, Mr. Bradford and these other East Pilots formed  
15 Defendant US Airline Pilots Association ("USAPA") in June, 2007, primarily so that  
16 they could prevent implementation of the Nicolau Award seniority list by using the  
17 power and authority of a federally certified bargaining agent to abrogate the West  
18 Pilots' right to insist that any new collective bargaining agreement would  
19 implement the Nicolau Award seniority list.

20 (40) On October 1, 2007, the ALPA Executive Council determined that  
21 there is no ground under ALPA Merger Policy to set aside the Nicolau Award  
22 seniority list:

23 With respect to the ... merger, it is time for the MEC to comply with its  
24 representational and legal obligations under the Constitution & By-  
25 Laws, ALPA Merger Policy, the Transition Agreement, and  
26 implementing resolutions of the Executive Council. The MEC, at this  
27 meeting, should adopt a resolution (or resolutions) reversing all prior  
28 efforts to bar or precondition the continuation of joint negotiations.

1 (Ex. 19.)<sup>2</sup>

2 (41) ALPA's President, therefore, directed the East Pilots to "adopt a  
3 resolution recognizing that the award is to be included in the single agreement to be  
4 negotiated under the Transition Agreement and Merger Policy, provided only that  
5 the Association and all MECs will comply with valid court orders, if any, affecting  
6 the terms of the award." (Ex. 19.)

7  
8 (42) On December 20, 2007, the Airline formally "accepted" the Nicolau  
9 Award. (Ex. 9).

10 (43) Under ALPA Merger Policy, "[a]ny attempt by a member or members  
11 of ALPA to obtain an agreement which would operate to frustrate the objectives of  
12 this policy shall be considered an act contrary to the best interests of ALPA and its  
13 members." *ALPA Merger Policy*, Pt. 3 § C (Ex. 3).

14  
15 (44) The ALPA Constitution provided its President the authority to expel  
16 any member "[d]oing any act contrary to the best interests of the Association or its  
17 members." ALPA Const. art. VIII § 1(A)(10).

18 (45) The ALPA Constitution also provided its President the authority to  
19 place any pilot group or its representatives under a trusteeship controlled by the  
20 ALPA National Executive Council "in the event that such pilot group or its  
21 representatives shall have acted so as to place itself at basic variance with the  
22 Constitution and By-Laws and policy of the Association." ALPA Const. art. XIX  
23 § 5(A).

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<sup>2</sup> "MEC" refers to the ALPA body administering the union affairs of the East  
28 Pilots.



1 (46) Relying on these powers at the end of 2007, ALPA National took steps  
2 to place the East Pilots into a trusteeship and negotiate a single collective  
3 bargaining agreement using the Nicolau Award seniority list.

4 (47) In the fall of 2007, USAPA took steps to challenge ALPA to be the  
5 single bargaining representative of the entire pilot group (West and East).  
6

7 (48) On November 29, 2007, the National Mediation Board (“NMB”)  
8 certified a representation election.

9 (49) In this election, East Pilots outnumbered West Pilots 3,542 to 1,771.  
10

11 (50) USAPA directed its campaign almost exclusively at the East Pilots and  
12 focused its campaign on the Nicolau Award.

13 (51) In this campaign, USAPA asserted that ALPA had the power and  
14 intention to negotiate and implement a single collective bargaining agreement using  
15 the Nicolau Award seniority list.  
16

17 (52) In this campaign, USAPA promised that, if elected, it would refuse to  
18 negotiate or implement a single collective bargaining agreement that utilized the  
19 Nicolau Award.

20 (53) On April 18, 2008, the NMB certified that USAPA won the election and  
21 USAPA became the bargaining representative of the pilots.  
22

23 (54) As the bargaining representative, USAPA determined that it would  
24 integrate pilot seniority using a date-of-hire scheme that was substantially different  
25 from the Nicolau Award seniority integration.  
26  
27  
28

1 (55) USAPA created a Merger Committee comprised only of East Pilots that  
2 was charged with creating proposed contract language that would implement a  
3 date-of-hire scheme that was substantially different from the Nicolau Award  
4 seniority integration.

5 (56) In delegating this task to its Merger Committee, USAPA did not  
6 consider West Pilot views either with respect to seniority integration or with respect  
7 to the finality of the Nicolau Award.  
8

9 (57) In fulfilling this task, the USAPA Merger Committee did not consider  
10 West Pilot views either with respect to seniority integration or with respect to the  
11 finality of the Nicolau Award.

12 (58) At present, the Airline is bound by the Transition Agreement to  
13 implement the Nicolau Award seniority list in any single collective bargaining  
14 agreement that it negotiates with USAPA.  
15

16 (59) At present, USAPA is refusing to negotiate with the Airline any single  
17 collective bargaining agreement that would implement the Nicolau Award seniority  
18 list.

19 (60) The Jury found that USAPA's refusal to negotiate with the Airline any  
20 single collective bargaining agreement that would implement the Nicolau Award  
21 seniority list, coupled with its bad faith motivation to disregard the West Pilots'  
22 right to insist that any single collective bargaining agreement must implement the  
23 Nicolau Award seniority list, violates the duty of fair representation.  
24

25 **II. CONCLUSIONS OF LAW**  
26  
27  
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1 (1) Unfair representation can be established with proof that “a union's  
2 conduct towards a member of the collective bargaining unit is arbitrary,  
3 discriminatory *or* in bad faith.” *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) (emphasis  
4 added).

5 (2) “[E]ach of these requirements represents a distinct and separate  
6 obligation.” *Simo v. Union of Needletrades, Indus. & Textile Employees, Southwest*  
7 *Dist. Council*, 322 F.3d 602, 617 (9th Cir. 2003).

8  
9 (3) “Whereas the arbitrariness analysis looks to the objective adequacy of  
10 the Union’s conduct, the discrimination and bad faith analyses look to the subjective  
11 motivation of the union officials.” *Id.* at 618. *See also Neal v. Newspaper Holdings,*  
12 *Inc.*, 349 F.3d 363, 369 (7th Cir. 2003) (“Whether or not a union’s actions are  
13 discriminatory or in bad faith calls for a subjective inquiry and requires proof that  
14 the union acted (or failed to act) due to an improper motive.”).

15 (4) Bad faith is the “refusal to fulfill some duty or some contractual  
16 obligation, ... prompted by an ... interested motive.” *Black's Law Dictionary* (6th  
17 ed. 1990); *accord United States v. Manchester Farming P'ship*, 315 F.3d 1176, 1183  
18 (9th Cir. 2003).

19  
20 (5) A union violates the duty of fair representation if it allows itself to be  
21 used by the majority of workers to avoid the implementation of a properly  
22 arbitrated seniority award. *Air Wisconsin Pilots Protection Committee v.*  
23 *Sanderson*, 909 F.2d 213, 217 (7th Cir. 1990).

24 (6) The Court agrees, based on the foregoing, that USAPA’s refusal to  
25 abide by the Nicolau Award equates to an act taken in bad faith.  
26  
27  
28

1 (7) In ordering relief here, the Court should disregard the fact that the  
2 East Pilots essentially reconstituted themselves as an entirely new union. *See*  
3 *Garner v. Pearson*, 374 F. Supp. 580, 585 (D.C. Fla. 1973) (“Considering the  
4 equitable nature of the relief requested, however, the Court has applied the time-  
5 honored doctrines of equity to reach the essence of this action. Equity looks to  
6 substance rather than form. Thus, the analysis proceeds on the assumption that  
7 the law should relate to business realities.”).

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

13  
14 (9) The duty to bargain in good faith is “more than a mere statement of  
15 policy or exhortation to the parties; rather, it was designed to be a legal obligation,  
16 enforceable by whatever appropriate means might be developed on a case-by-case  
17 basis.” *Chicago & N. W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 577 (1971);  
18 *See also United Air Lines, Inc. v. Air Line Pilots Assn., Intl.*, 2008 WL 4936847, 35  
19 (N.D.Ill. 2008) (“[T]he obligation to make and maintain agreements without  
20 interruption to the carrier's operations is ... an affirmative legal obligation,  
21 enforceable by ... injunction.”).

22 **III. ORDER**

23 Based on the foregoing and the entire record in this action, it is hereby  
24 ORDERED THAT:

25 (1) Defendant USAPA and its officers, committees, representatives,  
26 agents, and members shall immediately, and in good faith, take all reasonable  
27

1 efforts to negotiate and implement a single collective bargaining agreement with US  
2 Airways that will implement the Nicolau Award seniority list according to its terms.

3 (2) Defendant USAPA and its officers, committees, representatives,  
4 agents, and members shall immediately, and in good faith, take all reasonable  
5 efforts to support and defend the seniority rights provided by or arising from the  
6 Nicolau Award.

7 (3) The Court retains jurisdiction for \_\_\_\_\_ months after the entry of this  
8 order, subject to extension upon motion of any party.

9  
10 It is so Ordered.

11 DATED this \_\_ day of May, 2009.

12 \_\_\_\_\_  
13 Honorable Neil V. Wake  
14 United States District Court Judge

15 Dated this 24th day of April, 2009

16 POLSINELLI SHUGHART PC

17  
18 By: s/  
19 Andrew S. Jacob  
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21 Suite 1200  
22 Phoenix, AZ 85012

23 **CERTIFICATE OF SERVICE**

24 I hereby certify that on April 24, 2009, I electronically transmitted the  
25 foregoing document to the U.S. District Court Clerk's Office by using the CM/ECF  
26 System for filing and transmittal of a Notice of Electronic Filing.

27 s/ Andrew S. Jacob  
28 \_\_\_\_\_