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

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

12 Plaintiffs,

13 vs.

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

15 Defendants,

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

18 Plaintiffs,

19 vs.

20 Steven H. BRADFORD, Paul J. DIORIO,
Robert A. FREAR, Mark. W. KING,
Douglas L. MOWERY, and John A.
STEPHAN,

21 Defendants.
22

Case No. 2:08-cv-1633-PHX-NVW
(Consolidated)

**USAPA’S COMMENT ON THE
COURT’S PROPOSED SUBSTANTIVE
JURY INSTRUCTIONS
AND SPECIAL INTERROGATORIES**

Case No. 2:08-cv-1728-PHX-NVW

1 **I. DEFENDANT’S RESERVATION OF OBJECTIONS:**

2 Pursuant to the Court’s in-trial, on the record instruction on April 29 (Tr. 522:18;
3 525:22) to submit comments on the Court’s proposed instructions, Defendant hereby
4 submit its comments to the Court’s April 27 proposed substantive jury instructions.
5 This submission is without prejudice to USAPA’s previously submitted proposed jury
6 instructions (part of Doc. # 348), which are hereby incorporated by reference into this
7 submission. Defendant reserves all objections to either the Court’s or the Plaintiffs’
8 instructions, other than those that are substantially the equivalent of what Defendant has
9 already proposed and filed (Doc. # 348). Where, herein below, any one proposed
10 instructions is deemed acceptable in whole or part, Defendant nevertheless reserves the
11 right to withdraw its acceptance and renew objection until *all* instructions are either
12 accepted or objected to on the record. This submission is made in reliance on the
13 Court’s representation that Defendant will yet have an opportunity to make appeal-
14 record objections to the *final* instructions (Tr. 526:2-13), therefore Defendant withholds
15 its objections now and makes the following suggested edits with explanation, which
16 Defendant is hopeful the Court will find helpful.

1 **II. DEFENDANT’S COMMENTS ON THE COURT’S PROPOSED**
2 **SUBSTANTIVE INSTRUCTIONS DATED APRIL 27:**

3 { all following numbered instructions starts on a new page }¹

4 **Instruction # 1**

5 As you have heard, the Defendant in this case, USAPA, is a union. When a union is the
6 exclusive representative of employees, the law requires that the union fairly represent
7 the interests of those employees. ~~represent the interests of those employees in a proper~~
8 ~~manner.~~ This duty is known as the “duty of fair representation.”

9 Explanation:

10 It is more accurate to describe the duty as the cases do, grounding the duty on “fair
11 representation.” “Proper manner” departs from this standard and invites error. *See*
12 *Also*, Defendant’s Instruction § IV, No. 13 in (Doc. # 348).

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¹ Language proposed to be deleted is ~~struck through~~, language that is proposed to be
22 added is underlined.

1 **Instruction # 2**

2 Once it becomes the representative, a union owes a duty of fair representation to every
3 employee within the bargaining unit that it represents. Not every employee within a
4 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 a given employee
is a member of the union.

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

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8 Explanation:

9 No change. (Noting that while not all plaintiffs are members of USAPA, all are
10 employees in the RLA craft or class the NMB certified USAPA to represent on April
11 18, 2008.)

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1 **Instruction # 3**

2 Unions owe their members a contractual obligation to follow their constitutions. Unions
3 have a right to interpret their own constitutions. However, a union constitution cannot
4 alter the duty of fair representation. ~~If a union constitution calls for the union to act in a
way that violates its duty of fair representation, and the union takes such action, the
union may still be held liable for the violation.~~

5 Explanation:

6 As drafted, the last sentence is misleading because it directly or inevitably implies that
7 the jury could find that USAPA's constitutional objective of date-of-hire seniority with
8 reasonable conditions and restrictions 'calls' for USAPA to act in a way that violates its
9 duty. But that cannot be the case. As the Court has previously observed, there is
10 nothing wrong with date-of-hire *per se* and indeed no court has ever found a DFR
11 violation based on a date-of-hire integration. Also, this sentence might lead the jury to
12 predicate its findings on a valid constitutional objective that was promulgated and
13 published *before* USAPA was certified hence before it had any duty. With the deletion
14 of the last sentence, however, the point of Instruction No. 3, i.e. that a union cannot
15 excuse a violation by virtue of its constitution is preserved but without the implication
16 that could invite the jury to stray.

17 *See Also*, Defendant's Instruction § IV, No. 12 in (Doc. # 348).

1 **Instruction # 4**

2 A union owes a duty of fair representation only from the time that it becomes the
3 exclusive bargaining representative. There is no duty to represent the employees before
a union is certified as the exclusive bargaining representative for the bargaining unit.

4 In this case, Defendant USAPA was not certified to represent Plaintiffs until April 18,
5 2008. This means that you may not base any verdict in favor of Plaintiffs upon a
6 finding that USAPA breached its duty of fair representation before April 18, 2008.
However, you may still consider the circumstances before USAPA was certified but
7 only as context for any finding with respect to USAPA's duty of fair representation on
or after April 18, 2008.

8 Explanation:

9 The addition clarifies the intent of the instruction without diminishing it.
10 *See Also*, Defendant's Instruction § IV, No. 14 in (Doc. # 348).

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1 **Instruction # 5**

2 A union breaches or violates its duty of fair representation only when, in the course of
3 negotiating a collective bargaining agreement, the union's conduct toward a member of
4 the bargaining unit it represents is ~~discriminatory~~ or in bad faith, as ~~these~~ that terms are
5 is explained in these instructions.

6 Explanation:

7 The complete statement referenced in *Vaca* at 386 U.S. 190 is: "A breach of the
8 statutory duty of fair representation occurs only when a union's conduct toward a
9 member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."
10 To omit the complete sentence is unnecessarily suggestive because it omits "only."
11 Second, "a 'bad' motive does not spoil a collective bargaining agreement that rationally
12 serves the interests of workers as a whole ..." *Rakestraw v. United Airlines, Inc.*, 981
13 F.2d 1524, 1535 (7th Cir. 1992). Third, Plaintiffs allege only the bad faith prong and
14 have *waived* any discrimination claim in binding, on the record statements by counsel:
15 "We believe it's only on the bad faith side so we're not making a discrimination claim."
16 (Tr. Apr. 28, 2009, vol. I, 130:3-4). And before that Plaintiffs objected (Doc. # 348 at p.
17 87:16) to a discrimination instruction proposed by Defendant because it would "set up a
18 straw man that is easy for Defendant to defeat ..." *See Also*, Defendant's Instruction §
19 IV, No. 15 and 20 in (Doc. # 348).

1 **Instruction # 6**

2 In this case you must decide whether USAPA has breached the duty of fair
3 representation owed to Plaintiffs.

4 Specifically, you must decide whether Plaintiff has proven that the challenged actions of
5 USAPA were taken in bad faith, ~~or were discriminatory~~. If you decide that Plaintiffs
6 have proven their case, then you will have found that USAPA is liable to Plaintiffs and
7 your verdict must be for Plaintiff. In that case, it will be necessary to determine the
8 amount of any money damages owed to Plaintiffs, but that determination will take place
9 in a later phase of the case by another jury. ~~In this trial, you are not asked to determine
10 the amount of any money damages owed.~~

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

13 Explanation:

14 Plaintiffs allege only the bad faith prong and have *waived* any discrimination claim in
15 binding, on the record statements by counsel: “We believe it’s only on the bad faith side
16 so we’re not making a discrimination claim.” (Tr. Apr. 28, 2009, vol. I, 130:3-4). And
17 before that Plaintiffs objected (Doc. # 348 at p. 87:16) to a discrimination instruction
18 proposed by Defendant because it would “set up a straw man that is easy for Defendant
19 to defeat ...”

20 The struck sentence in the second paragraph appears redundant.

21 *See Also*, Defendant’s Instruction § IV, No. 9 in (Doc. # 348).

1 **Instruction # 7**

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

8 In order to establish that a union has engaged in bad faith conduct, there must be
9 substantial evidence of fraud, deceitful action or dishonest conduct. And, if the result of
10 a union's conduct is rationally related to a legitimate union objective, then the union has
11 not acted in bad faith even where the underlying motive is attributable to hostility. A
12 bad faith motive, standing alone, is not a sufficient basis for a find that a labor union has
13 violated its duty of fair representation.

14 Explanation:

15 No change.

16 *See Also*, Defendant's Instruction § IV, No. 16 in (Doc. # 348).

1 **Instruction # 8**

2 ~~A union has a duty to protect all its members equally, without unlawful discrimination.~~
3 ~~For a finding of discrimination in violation of the duty of fair representation, there must~~
4 ~~be substantial evidence that the discrimination is intentional, severe, and unrelated to~~
5 ~~any legitimate union objective.~~

6 ~~Discriminatory treatment without discriminatory motive is not a violation of the duty of~~
7 ~~fair representation: there must be both. To prove discriminatory treatment, a plaintiff~~
8 ~~must show that the union's conduct was directed at particular employees.~~

9 ~~Mere knowledge that some groups gain or lose as a result of what the union does is not~~
10 ~~discrimination. The union does not violate its duty of fair representation when its~~
11 ~~actions promote the interests of the bargaining unit as a whole, even where some~~
12 ~~members of the bargaining unit are adversely affected. The law recognizes that~~
13 ~~inevitable differences arise in the manner and degree in which any negotiated agreement~~
14 ~~will affect individual employees and classes of employees. The law, in short, allows for~~
15 ~~differences and allows unions to reconcile those differences. The mere existence of~~
16 ~~differences does not mean that a union did not meet its duty of fair representation. A~~
17 ~~union is free to negotiate for, and agree to, contract terms that either directly or~~
18 ~~indirectly cause differing treatment of distinct classes of employees as long as its~~
19 ~~actions are related to a legitimate union objective.~~

20 Explanation:

21 The entire instruction should be struck because Plaintiffs allege only bad faith and
22 affirmatively *waived* any discrimination claim in binding, on the record statements by
counsel: “We believe it’s only on the bad faith side so we’re not making a
discrimination claim.” (Tr. Apr. 28, 2009, vol. I, 130:3-4). And before that Plaintiffs
objected (Doc. # 348 at p. 87:16) to a discrimination instruction proposed by Defendant
because it would “set up a straw man that is easy for Defendant to defeat ...” What
Plaintiffs disclaim as harmful to their own case, the Court cannot insist on adding
without risking partiality.

1 **Instruction # 9**

2 Because the union is the exclusive bargaining representative for the members of a
3 bargaining unit, it is a legitimate objective of the union to negotiate with the employer
4 over the terms and conditions of employment. During this negotiation, or collective
5 bargaining, the interests of all employees the union represents are to be considered. A
6 wide range of reasonableness must be allowed a union bargaining to serve all the
7 members of the unit it represents subject to good faith.

8 However, a union's actions are not rationally related to any legitimate union objective
9 when the union acts solely to win the votes of a majority of employees who act to
10 further their individual self-interest rather than the aggregate welfare of the bargaining
11 unit as a whole. In other words, a union may not pursue seniority-related bargaining
12 objectives solely on the basis of political expediency to obtain majority support for the
13 union in a manner that has no relation to the union's collective bargaining with the
14 employer. However, if not done in bad faith, a union may pursue date-of-hire as an
15 objective when a majority of employees prefer it even if a minority does not. Personal
16 hostility toward a class of employees is also not a legitimate union objective. However,
17 the existence of personal hostility and/or a desire for political expediency does not alone
18 prove a lack of legitimate union objectives.

19 It is a legitimate union objective to resolve the conflicting interests of members of the
20 bargaining unit or groups of members within the bargaining unit. ~~However, it is not a
21 legitimate union objective to resolve a conflict that was already resolved by contract
22 between the members or groups of members.~~ The union may, however, revisit a ~~dispute
resolved by contract~~ terms in a contract including seniority terms if the union does so in
a manner related to another union objective that is legitimate.

23 Explanation:

24 The first addition is directly from the seminal *Ford Motor Co. v. Huffman* Supreme
25 Court case (345 at 338), states the proper rule, and is a necessary sentence to set off the
26 following paragraph.

27 The second condition is necessary because there is nothing invalid about date of hire
28 and a union may lawfully pursue date-of-hire when preferred by the majority, as unions
29 typically do, because "Equal treatment does not become forbidden because the majority
30 prefers equality, even if formal equality bears more harshly on the minority."
31 *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1533 (7th Cir. 1992).

32 The deletion is necessary because there was no contract between "members or groups of
members" (the State claim was dismissed), and the CBA including the TA are labor

1 contracts under the RLA that are subject to the exclusive jurisdiction of a System Board
2 of Adjustment, and Nicolau was only binding on USAPA's predecessor and then only
3 for a bargaining proposal which could have been rejected by ALPA members in a
4 ratification vote and then revisited by ALPA and is not binding on USAPA (and any
5 claim that the TA or CBA that USAPA succeeded to is breached if USAPA does not
6 follow it is a claim over which this jury and this Court has no jurisdiction, rather the
7 System Board of Adjustment convened to here dismissed Counts I and II in May does,
8 as this Court has already recognize).

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See Also, Defendant's Instruction § IV, No. 24 in (Doc. # 348).

1 **Instruction # 10**

2 A contract may provide that a dispute is to be resolved by arbitration, and that the
3 parties will be contractually bound to the results of the arbitration. In this case, Plaintiffs
4 claim that the parties to the Transition Agreement and the Nicolau Arbitration
5 contractually agreed in advance to be bound by the outcome of the Nicolau Arbitration.
6 USAPA disagrees, claiming that neither USAPA or the East pilots were parties to the
7 Nicolau arbitration, rather that only the prior union, that is ALPA's bargaining
8 representatives (its MEC representatives, for both East and West) were the parties.
9 Also, USAPA claims that these agreements did not at the time require the East Pilots
10 and West Pilots to accept the outcome of the Nicolau Award unless each group
11 approved of the award by a majority vote of its members in a contract ratification vote
12 that ALPA was obligated to allow.

13 ~~A contract is a bargained-for agreement between two or more persons or entities. It is~~
14 ~~undisputed that a contract relating to the Nicolau Arbitration existed in this case. The~~
15 ~~parties disagree about what the terms of the contract relating to the Nicolau Arbitration~~
16 ~~were. A term of a contract is a portion of the agreement that relates to a particular~~
17 ~~matter. [Source: Revised Arizona Jury Instructions (Civil), 4th: Contract 3;~~
18 ~~Restatement (Second) of Contracts § 5.]~~

19 ~~To find that the parties agreed to a given contract term, you must find that they each~~
20 ~~intended to be bound by the term, and that they made that intention known to the other~~
21 ~~party. Because intent, including intent to be bound, is seldom susceptible to direct proof~~
22 ~~because it relates to a person's state of mind, the law presumes that a person intends the~~
23 ~~natural and probable consequences of that person's acts. The intention may be~~
24 ~~expressed wholly or partly by written or spoken words or by other acts or conduct. An~~
25 ~~internal or unexpressed intention not to be bound is ineffective. [Source: Revised~~
26 ~~Arizona Jury Instructions (Civil), 4th: Contract 3; Federal Jury Practice and Instructions~~
27 ~~§ 126.01.]~~

28 ~~You may find that the parties to the contract agreed to treat the outcome of the Nicolau~~
29 ~~Arbitration as the final resolution of their dispute even if the losing party retained the~~
30 ~~right to approve other elements of the collective bargaining process. The law provides~~
31 ~~that if a contract grants one party the power to exercise its discretion over some portion~~
32 ~~of the contract, that party may not exercise its discretion in a manner solely calculated to~~
33 ~~impair the value of a separate obligation to the other party. However, if you find that~~
34 ~~the parties agreed to retain the right to approve the outcome of the Nicolau Arbitration,~~
35 ~~then you must find that the parties did not intend to treat the award as the final~~
36 ~~resolution of their dispute. [Restatement (Second) of Contracts § 205 cmt. d]~~

37 It is undisputed that the Defendant, USAPA, was bound by the contractual obligations

1 of the union that had previously represented the pilots, the Air Line Pilots Association,
2 also known as ALPA. However, USAPA was not bound to follow the internal policies
and procedures of ALPA ~~unless a contract required it to follow those policies and~~
3 ~~procedures.~~ However, under federal law, airline employees have the absolute right to
choose their own representative or union.

4 Explanation:

5 Changes in paragraph one: the added language is absolutely necessary to convey what
USAPA's position is on a critical issue: to what extant USAPA could possibly be bound
6 by the Nicolau award. And Defendants have already *stipulated* that the "MEC's
through their appointed representatives" were the parties to the Nicolau arbitration
7 (Doc. # 77 at ¶¶ 24, 25, 26) so to omit this is doubly unfair prejudice. The last addition
is also necessary to accurately convey what USAPA's positions is and that ALPA
8 would have provided a ratification vote and was obligated to do so, which is not in
dispute. This gets to the crux of the impasse issue and is critical for USAPA's defense.

9 Changes in paragraph two: The first sentence is deleted because there is no issue pled
10 or raised in this case that calls for the jury to decide contract formation; the State claim
has been dismissed and the RLA, and the exclusive jurisdiction the RLA gives the
11 NMB, govern contract formation under the RLA. The deletion re the "undisputed"
assertion is necessary to avoid error and unfair prejudice because it *is* disputed that there
12 is a "contract relating to the Nicolau arbitration." Plaintiffs claimed this very contract in
the state case which this Court properly dismissed upon Defendant's motion. The only
13 other contract that could relate to Nicolau is an RLA collective bargaining agreement
that in the first instance is the exclusive province of the System Board of Adjustment to
14 "interpret and apply" upon dispute and indeed there is a pending arbitration on Counts I
and II now schedule (May 2009). In the second instance, the most that the TA (which it
15 is undisputed is part of the CBA) does is to incorporate by reference ALPA merger
policy but that policy at most was binding only on ALPA to make a bargaining proposal
16 after arbitration that was both subject to rejection in a ratification vote and absolutely
something that could be revisited by ALPA because seniority rights are creatures of
17 bargaining and *do not vest*. The reference to Arizona law is struck because the law
governing RLA contracts is federal, not state (injecting state law invites trial error).

18 Changes in paragraphs three and four: These are struck because there is no issue pled or
19 raised in this case that calls for the jury to decide contract formation; the State claim has
been dismissed and the RLA, and the exclusive jurisdiction that the RLA gives the
20 NMB, governs contract formation under the RLA.

21 Changes in paragraph five: The additional sentence is necessary to avoid misleading the
22 jury into the belief that USAPA can be bound by ALPA internal rules when it can only

1 succeed to CBA that ALPA negotiated. This is the result of the fundamental right that
2 the RLA expressly provides for (45 USC § 152 Third and Fourth) that allows employees
3 to choose their own representatives without interference and thus change unions in order
4 to enjoy the constitutional or any other changes new representation brings.

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See Also, Defendant's Instruction § IV, No. 19 in (Doc. # 348).

1 **Instruction # 11**

2 ~~In deciding what the terms of a contract mean, you should attempt to determine what the~~
3 ~~parties intended at the time that the contract was formed. You may consider the~~
4 ~~surrounding facts and circumstances as you find them to have been at the time that the~~
5 ~~contract was formed. It is for you to determine what those surrounding facts and~~
6 ~~circumstances were. To determine what the parties intended the terms of a contract to~~
7 ~~mean, you may consider the language of the written agreement; the acts and statements~~
8 ~~of the parties themselves before any dispute arose; the parties' negotiations; any prior~~
9 ~~dealings between the parties; any reasonable expectations the parties may have had as~~
10 ~~the result of the promises or conduct of the other party; and any other evidence that~~
11 ~~sheds light on the parties' intent. [Source: Revised Arizona Jury Instructions (Civil),~~
12 ~~4th: Contract 26.]~~

8 ~~Where the parties have attached the same meaning to a contract term, it is interpreted in~~
9 ~~accordance with that meaning. Where the parties have attached different meanings to a~~
10 ~~contract term, it is interpreted in accordance with the meaning attached by one of them~~
11 ~~if at the time the agreement was made that party did not know of any different meaning~~
12 ~~attached by the other, and the other knew the meaning attached by the first party; or that~~
13 ~~party had no reason to know of any different meaning attached by the other, and the~~
14 ~~other had reason to know the meaning attached by the first party. [Source: Restatement~~
15 ~~(Second) of Contracts § 201.]~~

12 Explanation:

13 This instruction cannot be edited because it unavoidably invites the jury to exceed the
14 jurisdiction of the Court and to invade the province of the exclusive jurisdiction of the
15 System Board of Adjustment to resolve minor disputes over the interpretation and
16 application of contracts governed by the RLA. The jury can only fact-find on the DFR
17 claim as pled; it cannot resolve any claim of a breach of the TA, or any part of the TA,
18 or any part of the CBAs. Only a System Board of Adjustment can. The State claim,
19 advancing a non-RLA contract theory, has been properly dismissed. The claim that this
20 instruction address is the subject of a pending arbitration in May before Arbitrator
21 Bloch.

18 *See Also*, Defendant's Instruction § IV, No. _ in (Doc. # 348).

1 **Instruction # 12**

2 Plaintiffs claim that Defendant breached its duty of fair representation owed to Plaintiffs
3 from the time that Defendant was certified on April 18, 2008, as the union to represent
4 all pilots at US Airways. The pilots who were employed by America West Airlines
5 before it merged with US Airways are called the “West Pilots.” The pilots that worked
6 within US Airways’ East operations are referred to as “East Pilots.” All Plaintiffs are
7 West Pilots.

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6 Explanation:
No change.

1 **Instruction # 13**

2 Plaintiffs claim that Defendant breached its duty to fairly represent West Pilots by
3 committing itself to disregarding the Nicolau Award in favor of a seniority policy that
4 was substantially less favorable to West Pilots than the Nicolau Award solely to benefit
5 the personal interests of East Pilots, in a manner unrelated to legitimate union
6 objectives. Plaintiffs also claim that Defendant violated its duty of fair representation
7 by adopting and promoting a seniority list that was substantially less favorable to West
8 Pilots than the Nicolau Award, in a manner unrelated to legitimate union objectives.
9 Defendant denies both of these claims. Defendant claims that their objective of, and
proposal for, a seniority integration list based on date-of-hire with conditions and
restrictions was aimed at benefiting the West pilots and did benefit them. Defendant
claims that this is because in the short run the conditions and restrictions lessened the
effect of date-of-hire while in the long run it gave the more younger, more junior West
pilots the benefits of seniority as the more senior, older East pilots retire.

9 Explanation:

10 The additional language is a necessary counter balance to the preceding sentences –
11 especially without editing them – which all elaborate on Plaintiffs’ claims. If the jury
12 hears the Plaintiffs’ theory of how they say USAPA breached the duty, then the jury
13 should hear Defendant’s theory of how it did not. This is just necessary balance that
14 goes to the heart of the bad faith allegation.

15 *See Also*, Defendant’s Instruction § IV, No. 21 in (Doc. # 348).

1 **Instruction # 14**

2 If you determine that Defendant's commitment to disregarding the Nicolau Award or its
 3 adoption and promotion of a different seniority list were in bad faith ~~or discriminatory~~
 4 toward Plaintiffs ~~and you determine that Defendant's seniority policy was substantially~~
 5 ~~less favorable to West Pilots than the Nicolau Award~~, then Defendant has breached its
 6 duty fair representation and you must decide in favor of the Plaintiffs. If, however, you
 7 determine that Defendant's commitment to disregard the Nicolau Award and its
 8 adoption and promotion of a different seniority list were not in bad faith but rather
 9 reasonable to benefit the bargaining unit as a whole, even if Plaintiffs were not satisfied
 10 and were not discriminatory toward Plaintiffs, or you determine that Defendant's
 11 seniority policy was not substantially less favorable to West Pilots than the Nicolau
 12 Award, then you must decide in favor of Defendant.

8 Explanation:

9 It is necessary to strike all references to discrimination because Plaintiffs do not make
 10 this claim and have specifically disavowed it a harmful to their case and thereby waived
 11 it both in filings and on the record in open Court.

11 It is necessary to strike the language about "substantially less favorable" because unlike
 12 the preceding instruction, here the jury is not being told what is claimed but rather is
 13 being instructed on what is the law but this is not the law. The test is not comparative
 14 disadvantage but rather rational purpose to benefit the bargaining unit as a whole. And
 15 this is settled law. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) ("wide range of
 16 reasonableness must be allowed a statutory bargaining representative in serving the unit
 17 it represents"); *Humphrey v. Moore*, 375 U.S. 335, 349 (1964) ("wide range of
 18 reasonableness"); *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 55, 67 (1991) (applying
 19 *Ford Motor* "wide range of reasonableness" to the "factual and legal landscape at the
 20 time of the unions actions" and specifically "including contract negotiation").

17 It is necessary to add the language clarifying that a union does not breach the duty
 18 merely because some members, including the Plaintiffs, are not satisfied or even
 19 disadvantaged. The law does not require a union to benefit equally, rather a union has
 20 the discretion similar to a legislature to, within bounds, give some more and some less.
 21 *Rakestraw v United Air Lines, Inc.*, 981 F.2d 1524, 1532 (7th Cir. 1992), *cert den. sub*
 22 *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").

21 *See Also*, Defendant's Instruction § IV, No. 21 and 23 in (Doc. # 348).

1 **Instruction # 15**

2 The ~~East Pilots and the West Pilots~~ parties have strong differences of opinion on which
3 method of seniority integration or proposal is to be preferred. ~~You~~ But you are not
4 asked to decide whether the Nicolau Award or the Defendant's ~~later~~ seniority proposal
5 is to be preferred. ~~A date-of-hire seniority policy does not automatically violate a~~
6 ~~union's duty of fair representation, but it can become a violation depending on the facts,~~
7 ~~circumstances, and agreements in a particular case.~~ You must decide whether, under the
8 specific circumstances of this case, Defendant violated the duty of fair representation
9 that it owed to the West Pilots.

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7 Explanation:

8 It is inaccurate to view the parties to this case as the East Pilots vs. the West Pilots.
9 This is a DFR action brought by six named plaintiffs and the class against the defendant
10 Union, not the East Pilots, not the "Bradford group," not any individual.

10 The word "later" in the second sentence should be struck, as it misleadingly suggests
11 that USAPA's seniority proposal was "late" or delayed. That is neither a claim or an
12 issue.

12 The third sentence should be struck because there is no legal authority to support the
13 argument that a date-of-hire seniority policy can become a DFR violation, in fact, no
14 union has *ever* been held to violate its duty of fair representation by negotiating a date-
15 of-hire seniority integration following the merger of bargaining units. This sentence is
16 misleading and confusing following the preceding sentences which put aside the issue
17 of what seniority term is better. That is not an issue as this instruction properly intends
18 to say.

16 *See Also*, Defendant's Instruction § IV, No. 23 in (Doc. # 348).

1 **Special Interrogatories:**

2 ~~Did USAPA discriminate against Plaintiffs in a manner that was intentional, severe, and~~
3 ~~unrelated to any legitimate union objective, in violation of its duty of fair representation,~~
4 ~~by committing itself to disregarding the Nicolau Award in favor of a seniority policy~~
5 ~~that was substantially less favorable to West Pilots than the Nicolau Award?~~

6 Did USAPA act in bad faith toward Plaintiffs in a manner that was fraudulent, deceitful,
7 or dishonest, and unrelated to any legitimate union objective, in violation of its duty of
8 fair representation, by committing itself at any time after April 18, 2008 to disregarding
9 the Nicolau Award ~~in favor of a seniority policy that was substantially less favorable to~~
10 ~~West Pilots than the Nicolau Award?~~

11 ~~Did USAPA discriminate against Plaintiffs in a manner that was intentional, severe,~~
12 ~~and unrelated to any legitimate union objective, in violation of its duty of fair~~
13 ~~representation, by adopting and promoting a seniority policy that was substantially less~~
14 ~~favorable to West Pilots than the Nicolau Award?~~

15 Did USAPA act in bad faith toward Plaintiffs in a manner that was fraudulent, deceitful,
16 or dishonest, and unrelated to any legitimate union objective, in violation of its duty of
17 fair representation, by adopting and promoting a seniority policy ~~that was substantially~~
18 ~~less favorable to West Pilots~~ other than the Nicolau Award?
19

20 Explanation:

21 The two discrimination interrogatories are be struck because Plaintiffs allege only bad
22 faith and affirmatively *waived* any discrimination claim in binding, on the record
statements by counsel: “We believe it’s only on the bad faith side so we’re not making a
discrimination claim.” (Tr. Apr. 28, 2009, vol. I, 130:3-4). And before that Plaintiffs
objected (Doc. # 348 at p. 87:16) to a discrimination instruction proposed by Defendant
because it would “set up a straw man that is easy for Defendant to defeat ...”
Respectfully, for the Court to insist on advancing a claim or theory of liability that
Plaintiffs have freely and repeatedly disavowed and waived risks the appearance, or
substance, of partiality towards Plaintiffs.

The April 18 language is added to avoid leading the jury into fixing liability before that
date, when the duty did not run.

The language relating to “substantially less favorable” is struck because the test is any
rational purpose that benefits the bargaining unit as a whole, regardless of comparative
favor to any one component or another. *Air Line Pilots Ass’n v. O’Neill*, 499 U.S. 55, 67
(1991) (applying Ford Motor “wide range of reasonableness” to the “factual and legal

1 landscape at the time of the unions actions” and specifically “including contract
negotiation”).

2 *See Also*, Defendant’s Proposed Special Verdict Form (Doc. # 350).

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1 Respectfully Submitted,

2 Dated: May 1, 2009

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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*,

- USAPA’s Comment On The Court’s Proposed Substantive Jury Instructions And Special Interrogatories
- 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:

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Further, I certify the same were email to The Honorable Neil V. Wake, in editable format to the email address: Wake_Chambers@azd.uscourts.gov (with copy to Sandra_Fredlund@azd.uscourts.gov and to counsel for plaintiffs: DStevens@Polsinelli.com)

On May 1, 2009, by:

/s/ Nicholas Paul Granath, Esq.