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

9 Don ADDINGTON, *et al.*,  
 10 Plaintiffs,  
 11 vs.  
 12 US AIRLINE PILOTS ASSN., *et al.*,  
 13 Defendants.

CASE NOS.  
 2:08-CV-1633-PHX-NVW  
 2:08-CV-1728-PHX-NVW  
 (Consolidated)  
**PLAINTIFFS TRIAL MEMORANDUM  
 ON DRAFT JURY INSTRUCTIONS**

14 Don ADDINGTON, *et al.*,  
 15 Plaintiffs,  
 16 vs.  
 17 Steven H. BRADFORD, *et al.*,  
 18 Defendants.

19  
 20 Pursuant to the instructions of the Court, Plaintiffs submit the  
 21 proposed Jury Instructions that follow below.

22 **Instruction # 1**

23  
 24 Defendant USAPA is a labor union. When a union or labor  
 25 organization is the exclusive representative of employees, the law  
 26 requires that the union represent the interests of those employees in a  
 27 proper manner. This duty is known as the duty of fair representation. A  
 28 union breaches its duty of fair representation when, in the course of  
 negotiating, administering, or enforcing the collective bargaining  
 agreement, the union's conduct toward a member of the bargaining unit it  
 represents is arbitrary, discriminatory, or in bad faith. A union owes its

1 duty of fair representation to every employee within the bargaining unit  
2 that it represents.

3 Not every employee within a bargaining unit must be a member of  
4 that union. However, the union must represent the interests of every  
5 employee within the bargaining unit, whether or not the employee is a  
6 union member.

7 Some of the Plaintiffs are members of USAPA; others are not. All  
8 are members of the bargaining unit. USAPA owes them all the duty of  
9 fair representation.<sup>1</sup>

### 10 **Instruction # 2**

11 Unions owe their members a contractual obligation to follow their  
12 constitutions. A union constitution, however, cannot alter the duty of fair  
13 representation. If a union constitution calls for the union to act in a way  
14 that violates its duty of fair representation, and the union takes such  
15 action, the union may still be held liable for the violation.<sup>2</sup>

### 16 **Instruction # 3**

17 A union owes a duty of fair representation only from the time that it  
18 becomes the exclusive bargaining representative. It has no duty to  
19 represent employees in a bargaining unit before it is certified as the  
20 exclusive bargaining representative for the bargaining unit.

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21 <sup>1</sup> This instruction, taken from 3A *Fed. Jury Prac. & Instr.* § 157.81  
22 (5th ed.), largely covers the subject matter of the Court's proposed  
23 Instructions 1 and 2. It also incorporates the "classic" language used to  
24 define the duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171, 190  
(1967).

25 <sup>2</sup> See *Retana v. Apartment, Motel, Hotel and Elevator Operators*  
26 *Union, Local No. 14, AFL-CIO*, 453 F.2d 1018, 1024- 1025 (9th Cir. 1972)  
27 ("It is no answer to say that the complaint relates to appellee union's  
28 "internal" policies and practices. The duty of fair representation 'arises  
out of the union-employee relationship and pervades it."); cf. *Davidowitz*  
*v. Delta Dental Plan of California, Inc.*, 946 F.2d 1476, 1481 (9th Cir.  
1991) (ERISA plan cannot relieve ERISA fiduciary of statutory duty).

1 In this case, Defendant USAPA was certified as the union for all  
2 pilots of US Airways on April 18, 2008. USAPA's duty of fair  
3 representation started on that day. In deciding whether USAPA  
4 breached its duty of fair representation after April 18, 2008, however, you  
5 may consider the conduct and motives of the organizers and founder of  
USAPA before April 18, 2008 as evidence of USAPA's conduct and  
6 motives after April 18, 2008.<sup>3</sup>

7  
8 **Instruction # 4**

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

11 If you find that USAPA breached its duty of fair representation, then  
12 your verdict must be for Plaintiffs. If your verdict is in favor of Plaintiffs,  
13 it will not be necessary for you to determine the amount of any money  
14 damages owed to Plaintiffs, because that determination will take place in  
15 a later phase of the case by another jury.

16 If, on the other hand, you decide that Plaintiffs have not proven, by a  
17 preponderance of evidence, that USAPA breached its duty of fair  
18 representation, then your verdict must be for the Defendant, USAPA.

19  
20 **Instruction # 5**

21 A union can be liable for unfair representation when its conduct is  
22 designed to mislead or deceive, or is not prompted by an honest mistake  
23 or belief as to the merits of the matter, but is based upon some ulterior  
24 motive or intent to harm. Whether or not the result of a union's conduct  
25 is rationally related to a legitimate union objective, the union can be  
26 liable for unfair representation if its actions fail to show good faith and  
27 honesty of purpose.<sup>4</sup>

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28 <sup>3</sup> *United States v. Yashar*, 166 F.3d 873, 878 (7th Cir. 1999)  
(recognizing, in a different context, that "pre-limitations conduct as part  
of an ongoing scheme was relevant for the purpose of interpreting post-  
limitations conduct").

<sup>4</sup> *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1176, n.2 (7th  
Cir. 1995) ("the Supreme Court in *O'Neill* ... rejected this court's narrow  
reading of the duty of fair representation [and] stated that the union's  
actions must not only show 'good faith and honesty of purpose,' but must

**Instruction # 6**

1  
2 A union has a duty to protect all its members equally. This duty  
3 includes the requirement that the union's actions must be taken in good  
4 faith and with an honest purpose.

5 The fact that one group of workers is adversely affected by an action  
6 taken by the union is not enough, in and of itself, to establish that the  
7 union breached the duty of fair representation. A union may comply with  
8 its duty of fair representation if its decisions and actions were primarily  
9 intended to promote the interests of the bargaining unit as a whole. The  
10 law allows a union to reconcile differences between two groups of workers,  
as long as its actions are done in good faith, and were not taken to benefit  
one group of workers over another without an offsetting benefit to the  
bargaining unit as a whole.

11 In determining whether Defendant USAPA's seniority proposal was  
12 intended to benefit the bargaining unit as a whole, you may consider  
13 whether USAPA properly considered the interests of all members before  
14 adopting its seniority proposal. If you find Defendant USAPA did not  
15 properly consider the interests of the West Pilots in formulating the  
16 seniority proposal it adopted, and that USAPA's seniority proposal was  
not intended to benefit the bargaining unit as a whole, then your verdict  
should be in favor of Plaintiffs

17 If you find that Defendant USAPA properly considered the interests  
18 of West Pilots in formulating its seniority proposal, and that seniority  
19 proposal was developed in good faith and with an honest intent to benefit  
20 the bargaining unit as a whole, then your verdict should be in favor of  
USAPA.

**Instruction # 7**

21  
22 As the exclusive bargaining representative for the members of a  
23 bargaining unit, it is a legitimate objective of the union to negotiate with  
24 the employer over the terms and conditions of employment. The union has  
25 the right to determine the terms and conditions it will bargain for in a  
26 collective bargaining agreement on behalf of all of the members of the  
bargaining unit. As defined elsewhere in these instructions, the interests

27  
28 also be within a 'wide range of reasonableness,' which includes 'a  
prohibition against 'arbitrary' conduct.'").

1 of all employees the union represents must be considered during these  
2 negotiations.

3 In representing the interests of all members of the union, the union  
4 is not permitted to bargain for certain terms and conditions solely to  
5 obtain majority support for the union in a manner that has no relation to  
6 the union's collective bargaining with the employer.<sup>5</sup> The union is not  
7 permitted to negotiate certain terms and conditions of the bargaining  
8 agreement solely to win the votes of a majority of employees who act to  
9 further their individual self-interest rather than the aggregate welfare of  
10 the bargaining unit as a whole.

11 It is a legitimate union objective to resolve the conflicting interests of  
12 members of the bargaining unit or groups of members within the  
13 bargaining unit. However, it is not a legitimate union objective to resolve  
14 a conflict that was already resolved by contract between the members or  
15 groups of members. The union may, however, revisit a dispute resolved  
16 by contract if the union does so in good faith and for the purpose of  
17 benefitting the bargaining unit as a whole.<sup>6</sup>

### 18 **Instruction # 8**

19 A contract may provide that a dispute is to be resolved by  
20 arbitration, and that the parties will be contractually bound to the results  
21 of the arbitration. Parties to a contract act in bad faith if they attempt to  
22 modify the terms of a contract without obtaining the consent of all other  
23 affected parties. Workers who voluntarily and actively participated

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24 <sup>5</sup> *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 800 (7th Cir. 1976).

25 <sup>6</sup> *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1535 (7th Cir.  
26 1992) (“[A] union may not juggle the seniority roster for no reason other  
27 than to advance one group of employees over another. The change must  
28 rationally promote the aggregate welfare of employees in the bargaining  
unit. ALPA had at least two rational and appropriate 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.”). Neither reason applies here. There is no deviation from any  
established seniority system here because there is no history at either  
airline of merging pilots on furlough in with active pilots.

1 through representatives in a merger related seniority arbitration are  
2 bound by its outcome as if they were formal parties to that arbitration.<sup>7</sup>

3 In this case, Plaintiffs claim that the pilots employed by US Airways  
4 and the pilots employed by America West Airlines at the time of the  
5 merger are bound as parties to the Transition Agreement and to the  
6 Nicolau Arbitration, as parties who contractually agreed in advance to be  
7 bound by the outcome of the Nicolau Arbitration. Plaintiffs further  
8 contend that USAPA is bound by the terms and conditions of those prior  
9 agreements because it is the successor to the prior bargaining agent.<sup>8</sup>

10 Defendant USAPA contends that it is not bound by any prior  
11 contract because it was not a party to those agreements. USAPA also  
12 contends that it is not required to use the Nicolau seniority list in any  
13 collective bargaining agreement. USAPA further contends that any  
14 collective bargaining agreement has to be ratified, or approved, by vote by  
15 its members before it could be put into effect.

16 To find that the parties agreed to a given contract term, you must  
17 find that they each intended to be bound by the term, and that they made  
18 that intention known to the other party. Because intent, including intent  
19 to be bound, is seldom susceptible to direct proof because it relates to a  
20 person's state of mind, the law presumes that a person intends the  
21 natural and probable consequences of that person's acts. The intention  
22 may be expressed wholly or partly by written or spoken words or by other  
23 acts or conduct. An internal or unexpressed intention not to be bound is  
24 ineffective.

25 The law provides that if a contract grants one party the power to  
26 exercise its discretion over some portion of the contract, that discretion is  
27 limited by an implied duty to not unfairly deprive another party of the  
28 benefits that they reasonably expected to get from other portions of the  
contract. To the extent that the pilots had discretion to not ratify a  
negotiated single collective bargaining agreement they had to exercise  
that discretion fairly.

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25 <sup>7</sup> *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1103 (2d Cir.  
26 1991) (holding that workers who “voluntarily and actively” participated  
27 through representatives in a merger related seniority arbitration were  
28 “bound by its outcome”).

<sup>8</sup> *Association of Flight Attendants, AFL-CIO v. USAir, Inc.*, 24 F.3d  
1432, 1434 (C.A.D.C. 1994).

1 You may find, regardless that the pilots expected to have an  
2 opportunity to vote on whether to ratify any negotiated single collective  
3 bargaining agreement, that the Transition Agreement requires the pilots  
4 to treat the outcome of the Nicolau Arbitration as the final resolution of  
5 their seniority dispute, not subject to ratification.

6 You are instructed that, as the successor to the prior union,  
7 Defendant USAPA was bound by the Transition Agreement.<sup>9</sup> You are  
8 also instructed that USAPA was bound to follow ALPA's internal policies  
9 or procedures if the Transition Agreement required it to follow those  
10 policies and procedures.<sup>10</sup>

### 11 **Instruction # 9**

12 In deciding what the terms of a contract mean, you should attempt to  
13 determine what the parties intended at the time that the contract was  
14 formed. You may consider the surrounding facts and circumstances as  
15 you find them to have been at the time that the contract was formed. It is  
16 for you to determine what those surrounding facts and circumstances  
17 were. To determine what the parties intended the terms of a contract to  
18 mean, you may consider the language of the written agreement; the acts  
19 and statements of the parties themselves before any dispute arose; the  
20 parties' negotiations; any prior dealings between the parties; any  
21 reasonable expectations the parties may have had as the result of the  
22 promises or conduct of the other party; and any other evidence that sheds  
23 light on the parties' intent.

24 Where the parties have attached the same meaning to a contract  
25 term, it is interpreted in accordance with that meaning. Where the  
26 parties have attached different meanings to a contract term, it is  
27 interpreted in accordance with the meaning attached by one of them if at  
28 the time the agreement was made that party did not know of any  
different meaning attached by the other, and the other knew the meaning  
attached by the first party; or that party had no reason to know of any  
different meaning attached by the other, and the other had reason to  
know the meaning attached by the first party.

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26 <sup>9</sup> *Association of Flight Attendants, AFL-CIO v. USAir, Inc.*, 24 F.3d  
27 1432, 1434 (C.A.D.C. 1994).

28 <sup>10</sup> *Korzen v. Loc. Union 705, Intl. Bhd. of Teamsters*, 75 F.3d 285,  
288 (7th Cir. 1996) (union constitution is nothing more than a contract).

**Instruction # 10**

1  
2 Plaintiffs claim that Defendant breached its duty to fairly represent  
3 West Pilots by committing itself to disregarding the Nicolau Award in  
4 favor of a seniority policy that was substantially less favorable to West  
5 Pilots than the Nicolau Award solely to benefit the personal interests of  
6 the East Pilot majority, in a manner unrelated to legitimate union  
7 objectives as I have defined those terms elsewhere in these instructions.

8 If you find that Defendant USAPA violated its duty of fair  
9 representation by adopting and promoting a seniority list that was  
10 substantially less favorable to West Pilots than the Nicolau Award, in a  
11 manner unrelated to legitimate union objectives, then your verdict should  
12 be in favor of Plaintiffs. If you find that USAPA fulfilled its duty of fair  
13 representation by adopting and promoting a seniority list that provided  
14 benefits to the bargaining unit as a whole then your verdict should be for  
15 USAPA. By definition, benefits are not provided to a bargaining unit as a  
16 whole, however, if they are obtained at the sole expense of a minority  
17 within the bargaining unit.

**Instruction # 11**

18 Plaintiffs claim that on and after April 18, 2008, Defendant  
19 committed itself to disregarding the Nicolau Award in favor of a date-of-  
20 hire seniority policy that was substantially less favorable to West Pilots  
21 than the Nicolau Award and did so without actually intending to obtain a  
22 benefit for the pilot group overall or to further any other legitimate union  
23 objectives. If you find that Plaintiffs have proven this claim, you must  
24 find that Defendant violated its duty of fair representation.

**Instruction # 12**

25 Plaintiffs claim that on and after April 18, 2008, Defendant adopted  
26 and promoted a date-of-hire seniority policy that was substantially less  
27 favorable to West Pilots and did so without actually intending to obtain a  
28 benefit for the pilot group overall or to further any other legitimate union  
29 objectives. If you find that Plaintiffs have proven this claim, you must  
30 find that Defendant violated its duty of fair representation.

**Instruction # 13**

The East Pilots and the West Pilots have strong differences of opinion on how their seniority should be integrated. You are not asked to decide how their seniority ought to be integrated. You are not asked to decide whether Mr. Nicolau properly conducted the arbitration or reached a proper result. You must decide whether, under the specific circumstances of this case, Defendant's actions violated the duty of fair representation that it owed to the West Pilots.

**Special Interrogatories:**

Did USAPA intentionally violate its duty of fair representation for reasons unrelated to any legitimate union objective, by committing itself to disregard the Nicolau Award in favor of a seniority policy that was substantially less favorable to West Pilots than the Nicolau Award?

Did USAPA intentionally violate its duty of fair representation for reasons unrelated to any legitimate union objective, by adopting and promoting a seniority policy that was substantially less favorable to West Pilots than the Nicolau Award?

Respectfully submitted, this 1st day of May, 2009.

POLSINELLI SHUGHART PC

By: /s/  
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**CERTIFICATE OF SERVICE**

I hereby certify that on May 1, 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*

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