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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, US AIRWAYS, INC., Defendants,	Case No. 2:08-cv-1633-PHX-NVW (Consolidated) **USAPA'S COMMENT ON THE COURT'S PROPOSED SUBSTANTIVE JURY INSTRUCTIONS AND SPECIAL INTERROGATORIES ON "DRAFT 5/4/09"**
Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, Plaintiffs, vs. Steven H. BRADFORD, Paul J. DIORIO, Robert A. FREAR, Mark. W. KING, Douglas L. MOWERY, and John A. STEPHAN, Defendants.	Case No. 2:08-cv-1728-PHX-NVW

I. DEFENDANT'S RESERVATION OF OBJECTIONS:

Defendant USAPA submits the comments and explanations herein below that are directed to the Court's proposed substantive jury instructions labeled "DRAFT 5/4/09," as requested by the Court on the record on Day 5 (May 4) of the on-going trial.

As with Defendant's prior comments, this submission is for discussion purposes only. Defendant herby reserves all objections to any jury instructions not in accordance with Defendant's previously submitted proposed jury instructions (Doc. # 348). Defendant specifically preserves its right to make future objections to any instructions the Court adopts, and states that no waiver of any right, substantive or procedural, is stated or implied notwithstanding the below comments, absence of comment, explanation, absence of explanation, or reserved legal grounds for objection.

II. DEFENDANT'S COMMENTS ON THE COURT'S PROPOSED SUBSTANTIVE INSTRUCTIONS "DRAFT 5/4/09":

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

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

Instruction # 1

As you have heard, the Defendant in this case, USAPA, is a union. When a union or labor organization is the exclusive representative of employees, the law requires that the union represent the interests of those employees in a proper manner. This duty is known as the "duty of fair representation."

Explanation:

- No change.

Instruction # 2

Once it becomes the representative, a union owes a duty of fair representation to every employee within the bargaining unit that it represents. Not every employee within a 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.

Some Plaintiffs are not members of USAPA, but all Plaintiffs are members of the bargaining unit represented by the Defendant, USAPA. Therefore, once it was certified on April 18, 2008, USAPA owed all Plaintiffs a duty to fairly represent them.

Explanation:

- No change.

Instruction # 3

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

If you decide that Plaintiffs have proven their case, then you will have found that USAPA is liable to Plaintiffs and your verdict must be for Plaintiff. In that case, it will be necessary to determine the amount of any money damages owed to Plaintiffs and whether other relief should be granted, but those determinations will be made in a later phase of the case by another jury or by the Court. In this trial, you are not asked to determine the amount of any money damages owed or what other relief should be granted.

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

Explanation:

- No change.

Instruction # 4

Now I will instruct you on the scope and nature of the union's duty of fair representation.

Unions owe their members a contractual obligation to follow their constitutions. Unions have a right to interpret their own constitutions and policies. A union constitution, however, cannot alter the duty of fair representation. A union's conduct may still violate the duty of fair representation whether or not the conduct is consistent with the union's constitution.

Explanation:

- Adding "policies" is necessary because there is concrete evidence in the form of ALPA resolutions and letters and testimony which the jury must evaluate in order to make the factual determination about what does ALPA policy mean. Unlike the TA, a collective bargaining agreement, which is reserved under the RLA for a System Board of Adjustment to interpret and apply, interpretation of the predecessor union's policy is a fact issue for the jury.

Instruction # 5

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

In this case, Defendant USAPA was not certified to represent Plaintiffs until April 18, 2008. This means that you may not base any verdict in favor of Plaintiffs upon a finding that USAPA breached its duty of fair representation before April 18, 2008. ~~You may still consider the circumstances before USAPA was certified and USAPA's actions before then in determining whether USAPA violated its duty of fair representation on or after April 18, 2008.~~ You may still consider the circumstances before that date to consider USAPA's motive for its actions after that date.

Explanation:

- The struck sentence creates confusion with the previous sentence and risks tempting the jury to base a liability finding on conduct that pre-dates the Duty. The Court has also noted this concern on the record in the discussion on May 4, and indicated that centering this on "motivation" is acceptable to the Court. This is necessary not only to avoid leading the jury outside the temporal limits of the scope of the Duty, but also to avoid the implication of collective guilt of East pilots, which the Court indicated, "was not what I had in mind" (Tr. 1064: 23).

Instruction # 6

A union breaches or violates its duty of fair representation when, in the course of negotiating a collective bargaining agreement, the union's conduct toward a member of the bargaining unit it represents is ~~arbitrary, discriminatory, or~~ in bad faith. When bargaining for a new contract a union has a wide range of reasonableness to negotiate for the bargaining unit. In this case, the union violated its duty if it intentionally and substantially harmed the interests of the West Pilots for reasons unrelated to any legitimate union objective. ~~Even if the union's conduct could be rationally related to a legitimate union objective, the union can be liable for violating its duty of fair representation if its actions shown to lack good faith and honesty of purpose.~~

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

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

Explanation:

- Removal of "arbitrary" and "discriminatory" is consistent with Plaintiffs' claims and theory (as previously noted, these prongs are both waived and not pursued as indicated by their own proposed instructions and non-objection of the Court's 5/4/09 draft, Tr. 1054:17).
- The wide range of reasonableness is fundamental labor law. *Bautista v. Pan Am. World Airlines, Inc*, 828 F.2d 546, 549 (9th Cir. 1987) ("In the context of representing its members **at the bargaining table**, a union must be allowed 'a wide degree of reasonableness' because it must be able to focus on the needs of its membership as a whole without undue fear of lawsuits from individuals disgruntled by the result of the collective process."). And, "Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities ... For that reason, the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a "wide range of reasonableness," *Ford Motor Co.* v. *Huffman*, 345 U.S., at

338, that it is wholly "irrational" or "arbitrary."" *O'Neill* 499 US at 78. *See also*,

- The sentence removed is struck as inconsistent with *Rakestraw*.
- The added language defining bad faith is exactly as previously written by the Court in its old Instruction # 7. Because the only prong advanced by Plaintiffs is bad faith, it is critical that the jury get a defining instruction.

Instruction # 7

A union has a duty to ~~protect~~ fairly represent ~~all its members equally~~ the members of the bargaining unit. This duty includes the requirement that the union's actions must be taken in good faith and with an honest purpose.

The fact that one group of workers is adversely affected by an action taken by the union is not enough, in and of itself, to establish that the union breached the duty of fair representation. In general, a union complies with its duty of fair representation if its decisions and actions were intended to promote the interests of the bargaining unit as a whole. The law allows a union to reconcile differences between two groups of workers, as long as its actions are done in good faith, and ~~are not taken to benefit one group of workers over another but rather with an intent~~ with the intent to benefit to the bargaining unit as a whole.

In determining whether Defendant USAPA's seniority proposal was intended to benefit the bargaining unit as a whole, you may consider whether USAPA properly considered the interests of ~~all members~~ the bargaining unit as a whole before adopting its seniority proposal.

Explanation:

- First paragraph: "Equally" is deleted because it may mislead the jurors about the law. While in a non-discrimination sense there is a duty to treat equally, there is in a very real sense no such obligation because in proper exercise of its discretion to act in wide range of reasonableness (i.e. not wholly irrational) the union is free to treat unequally. *eg*. *Alvey* 622 F.2d at 1287 ("the mere fact that such [change in long standing contract practice] ... may benefit some or all of a majority group to the disadvantage of the smaller group would not constitute a breach of the duty ..."); *Rakestraw*, 981 F.2d at 1530-31 (7th Cir. 1992) ("bargaining has winners and losers ... *Huffman* and *O'Neill* show that a conflict among workers does not undercut the union's ability to choose"). The other changes made accurately reflect the scope that the Duty runs to.
- Second paragraph: the change is to avoid the implication that there is something inherently wrong with "benefit" to one group but not another. That is not the law. Bargaining unions are like legislatures, they do in fact get to pick 'winners' and 'losers' as long as there is a rationale reason related to the unit as a whole and the union is not acting in bad faith (*Rakestraw* 981 F.2d at 1532). Also, the concept of different groups is addressed in Instruction No. 8.
- Third paragraph: the change conforms to the law ("all the member" means the bargaining "unit it represents" as a whole; *Huffman* 345 US at 338) and makes the last two paragraphs consistent.

Instruction # 8

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

~~However, a union's actions are not related to any legitimate union objective when the union acts solely to win the votes of a majority of employees who act to further their individual self-interest rather than the aggregate welfare of the bargaining unit as a whole. In other words, a union may not pursue seniority-related bargaining objectives solely on the basis of political expediency to obtain majority support for the union, rather than with an actual intent to further the union's collective bargaining with the employer. [*See Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269, 277 (2d Cir. 2004) (discussing *Rakestraw*).]~~ However, a union may not legitimately make seniority decisions solely or exclusively to benefit a stronger, more politically favored group over a minority group. While a union's motive for its proposals may be considered, the date of hire method is a ordinarily a fair and equitable method for combining merging groups of union workers.

It is a legitimate union objective to resolve the conflicting interests of members of the bargaining unit or groups of members within the bargaining unit. The law does not demand that all members be satisfied with the resolution. ~~However, in general it is not a legitimate union objective merely to change the outcome of a conflict that was already resolved by contract between the members or groups of members.~~ The union may~~, however,~~ revisit terms in a contract including seniority terms if in doing so, the union is actually motivated, in part, to further a union objective that is legitimate.

Explanation:

- First paragraph: because the duty is owed to all the members of the bargaining unit and the word "members" can be misleading because some jurors may confuse that with *union* members rather than *unit* members, this change clarifies the paragraph.
- Second paragraph: the substitution is to make the instruction comport with the law. The language tracks with this statement in *Barton Brands* 529 at 798: "... such decisions may not be made *solely* for the benefit of a stronger, more politically favored group over a minority group." In addition, the method of date of hire is Ninth Circuit approved. *Laturner* 501 F.2d at 599: "It has long been recognized that the use of such a method to integrate seniority rosters is an equitable arrangement for resolving inevitable conflicts which arise whenever a merger occurs." (*Ramey* is distinguishable and inapposite).

- Third paragraph: the deletion of the "already resolved" language is necessary in order to avoid directing the jury how to find a disputed fact issue, as well as to avoid misstating the law in a fundamental way. The issue of the scope of the 'final and binding' assertion is a fact dispute about what the ALPA policy meant. Defendant is entitled to have its overwhelming evidence that ALPA itself understood that final and binding was limited to the MEC representatives but in no way curtailed the pilots from voting in (separate) ratification votes to reject it, or even curtailed ALPA from revisiting seniority on any terms, including casting aside Nicolau, once it was no longer reasonable to attempt to defend it, after having passed to the company. In short, there was never a vested right to implement Nicolau in any CBA as a matter of law. ALPA was free under longstanding RLA law to revisit the seniority terms and so is USAPA, even in the case of an arbitration award. *Associated Transport, Inc.,* 185 NLRB 631 (1970) (union revocation of arbitration proceeding over seniority); *See Also*, string of cases cited in Doc. # 348 at page 44 for proposition that seniority does not vest and unions can revisit.
- Second paragraph: The 'in part' is added because political expediency must be the *sole* motive. *See*, *Barton Brands* 529 at 798: "... such decisions may not be made solely for the benefit of a stronger, more politically favored group over a minority group."
- Lastly, we observe and suggest that the Court **stop at Instruction No. 8**, i., 1 through 8 only. In the event the Court does not, we suggest the remaining edits that follow.

Instruction # 9

~~A contract is a bargained-for agreement between two or more persons or entities. It is undisputed that a contract relating to the Nicolau Arbitration existed in this case. A contract may provide that a dispute is to be resolved by arbitration, and that the parties will be contractually bound to the results of the arbitration.~~

~~In this case, I have determined that the Transition Agreement was a contract that required ALPA, as a party to the contract, to formulate an single, integrated seniority list for the two pilot groups according to ALPA Merger Policy. The Nicolau Arbitration and Award took place pursuant to that policy, and the policy provided that they would be treated as final and binding and not subject to any ratification vote.~~

Defendant USAPA is ~~bound by~~ the successor to the ~~contractual obligations~~ contract of the union that had previously represented the pilots, the Air Line Pilots Association, also known as ALPA.

The Transition Agreement references the ALPA Merger Policy. The Nicolau Arbitration was conducted under the ALPA Merger Policy. The plaintiffs and the defendant have stipulated that the parties to the Nicolau arbitration were the West ALPA MEC Merger Representatives and the East ALPA Merger Representatives. The Transition Agreement also specifically references the right of the parties right of the parties (the union and the company) to modify its terms. You may consider all the evidence to determine the meaning of applicable union policies.

Explanation:

- The Court should not deprive Defendant of a fair trial by taking from the jury a liability fact issue that the jury should decide. How ALPA Merger Policy and constitutional rules relating to ratification were understood and applied by ALPA at the time is very much a disputed issue of fact going to liability. USAPA has submitted overwhelming evidence that ALPA interpreted and applied its Merger Policy and its Constitution to mean that the Nicolau Arbitration was final and binding *only on the MEC Merger Representative* for the limited purpose of making ALPA's proposal to the company – without *that proposal* being subject to ratification vote, yes, but at all times preserving the right of the pilots in the bargaining unit to vote up or down any final contract, with or without Nicolau, and in separate ratification votes. And, the Plaintiffs and Defendant have stipulated as to who the parties were long ago. (Stipulation as to the parties to the Nicolau arbitration at Doc. # 77 at ¶ 24-29).
- USAPA is entitled to have the jury weigh its defense on the evidence already in, i.e. that USAPA had a rational and good faith objective, and proceeded according to it, to break the impasse in a way that would in the short run provide benefits to the

West in the form of 10 year fences and in the long run benefit the West when at the end of 10 years they would go to the 'head of the line' – while getting a contract that the East could also ratify, thus clearing the way for other non-seniority benefits. For the Court to dictate this finding would at once deprive the Defendant and the jury and, respectfully, result in reversible error.

- Also noting that the Court cannot but take a "peek" at the merits of the TA because that is part of an RLA CBA over which the RLA grants the System Board of Adjustment the exclusive jurisdiction to interpret and apply. *See*, *Union Pacific R.R. v. Sheehan, 439 U.S. 89, 94, 58 L. Ed. 2d 354, 99 S. Ct. 399 (1978); Air Line Pilots Assoc., Int'l v. Eastern Air Lines, Inc*., 869 F.2d 1518, 1521 (D.C. Cir. 1989); *Railway Labor Exec. Ass'n v. Norfolk & W. Ry. Co., 833 F.2d 700, 704 (7th Cir. 1987)*; *Independent Union of Flight Attendants v. Pan American World Airways, Inc*., 789 F.2d 139, 141 (2d Cir. 1986); *Brotherhood of Locomotive Engineers Division 269 v. Long Island Rail Road Co*., 85 F.3d 35, 37 (2d Cir. 1996).
- The "bound by" language is struck because this is not technically correct. USAPA is simply a successor to a contract that is enforceable by USAPA against the company.
- A collective bargaining agreement may be re-negotiated by a company and a union at any time. No person, other than the union or the company has any standing to assert an express or implied contractual obligation to bargain in good faith. The company and the union are the only parties to the TA and are legally and contractually entitled to its terms.

- **Instruction # 10**

~~The Nicolau Award was a final and binding resolution of the conflicting interests of the two pilot groups with respect to seniority rights. Revisiting that issue, in itself, was not a legitimate union objective for USAPA.~~ It has been stipulated that the Nicolau Award was final and binding on the respective ALPA MEC Merger Representatives at the time. However, USAPA was entitled to revisit the issue of seniority rights if it was actually motivated to further legitimate union objectives. ~~[*See Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269, 276-77, 283-84 (2d Cir. 2004).]~~

Plaintiffs contend that USAPA was not actually motivated by a legitimate union objective in revisiting the issue and did so only to enhance to rights of East Pilots at the expense of West Pilots. USAPA denies this claim, contending that it acted to further the interests of the whole bargaining unit as a whole. ~~negotiations between the union and the employer~~. You must decide whether USAPA was actually motivated by legitimate union objectives in the adoption and promotion of its ~~seniority proposal~~ constitutional objective to maintain uniform principles of seniority based on date of hire and the perpetuation thereof, with reasonable conditions and restrictions to preserve each pilots unmerged career expectations.

Plaintiffs have introduced evidence that USAPA's articulated reason for its actions is a pretext for breaching the duty of fair representation. When you consider Plaintiffs' evidence of pretext, remember that the relevant question is whether USAPA's reason was not the real reason for USAPA's actions. You are not to consider whether USAPA's reason showed poor or erroneous judgment. You are not to consider USAPA's wisdom. However, you may consider whether USAPA's stated reason is the true reason. ~~merely a cover-up for another reason~~. Plaintiffs have the burden to persuade you by a preponderance of the evidence that USAPA took action against Plaintiffs for ~~improper reasons~~ in a manner that was both unreasonable and in bad faith.

~~[Source: Federal Jury Practice and Instructions § 169.102 Pretext; *see also Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269, 284 (2d Cir. 2004) (placing burden of proof on plaintiff in DFR case to show that union's asserted motivation is pretextual).]~~

Explanation:

- First paragraph. The "two groups" language is misleading as is "final and binding." The individual pilots were not bound nor can they individually or collective *ever* violate the Duty because they *owe no* duty of fair representation. The only bodies bound by the Merger process were two subordinate ALPA bodies. Even then only ALPA (national) could bargain with the company. As the court in *Air Wisconsin* 909 F.2d at 215 observed: "ALPA does not have locals, but at each airline that it represents there is a committee, called the Master Executive Council, elected by the

pilots of that airline. These committees are subordinate bodies of ALPA. Their powers are defined in ALPA's constitution and by-laws, ... But their powers do not include the power to act as collective bargaining representative – ALPA itself is the bargaining representative of the pilots employed by ALPA-organized airlines. And the councils are forbidden to "initiate any action that is inconsistent with the Constitution and By-Laws or with the best interests of the Association or the general membership."”

- Second paragraph: its is more accurate to say that USAPA contends it is benefiting the whole unit because that is the evidence it has offered and the position it takes. Indeed, the benefits of seniority fall equally on all except where the conditions and restriction favor the West in the short term, and in the long term the West ends up ‘on top.’ Moreover, date of hire is not ‘just another method.’ It is the gold standard for which no court has ever found DFR liability. (*Truck Drivers*, 379 F.2d at 143 (“... a dovetailing standard, as experience has demonstrated it generally to be an equitable and feasible solution in other situations”; *See also* cases at Doc. # 348 at 96; *Laturner* 501 F.2d at 599: “It has long been recognized that the use of such a method to integrate seniority rosters is an equitable arrangement for resolving inevitable conflicts which arise whenever a merger occurs.”). For the same reason, USAPA’s constitutional objective, which encompasses its proposal, should be used rather than ‘negotiations’ with the employer, which is more limiting. Finally, the last clause is added to clarify the proper standard under the long line of US Supreme Court decisions defining DFR when a union engages in collective bargaining (*Huffman 345 US at 338*, *Humphrey* 335 at 349 and *O’Neill* 499 US at 78).
- Third paragraph: as the Court indicated on the record in Day 5 (Tr. 1080:23), the “word cover” can be improved upon and indeed its highly suggestive and the replacement language stays true to the sentence.

Instruction # 11

~~Plaintiffs contend that USAPA's seniority proposal is substantially less favorable to West Pilots than the Nicolau Award. USAPA denies this claim, contending that its proposal includes conditions and restrictions that offset the lower positions afforded to West Pilots on USAPA's list. You must decide whether the terms of USAPA's proposal are substantially less favorable to West Pilots than the terms of the Nicolau Award.~~

Plaintiffs contend that it was bad faith for USAPA not to pursue the implementation of the Nicolau award and instead pursue its constitutional objective (to maintain uniform principles of seniority based on date of hire and the perpetuation thereof, with reasonable conditions and restrictions to preserve each pilots unmerged career expectations), and that to do so was at their expense while only the majority of East pilots benefited.

Defendant contends that it considered the plaintiffs' and the West pilots' interest by proposing conditions and restrictions designed to protect them in their positions and protecting the concept of seniority which, in the long term, benefits all unionized employees. USAPA also contends that it benefited the unit as a whole by working to resolve a political impasse that prevented further negotiations towards improved wages and benefits for all pilots.

You must decide if Defendant had a good faith belief that its actions benefited the entire bargaining unit.

Explanation:

- The 'substantially less favorable' language invites the jury to depart from the legal standard and issue in this case much in the same manner that relitigating Nicolau would. This case is not about what is a better or worse proposal or seniority integration. It is only about a bad faith DFR claim in the context of USAPA's post certification collective bargaining. The legal standard has oft been repeated. The US Supreme Court articulated it very clearly in *Huffman* 345 US at 338 and reiterated it again *O'Neill* 499 US at 78: "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." Anything else would depart from long standing case law and turn established labor law on its head. *Bautista v. Pan Am. World Airlines, Inc*, 828 F.2d 546, 549 (9th Cir. 1987) ("In the context of representing its members **at the bargaining table**, a union must be allowed 'a wide degree of reasonableness' because it must be able to focus on the needs of its membership as a whole without undue fear of lawsuits from individuals disgruntled by the result of the collective process.").

Instruction # 12

The parties have strong differences of opinion on which method of seniority integration or proposal is to be preferred. But ~~Y~~you are not asked to decide whether the Nicolau Award or the Defendant's seniority proposal is to be preferred. You are not asked to decide whether Mr. Nicolau properly conducted the arbitration or reached a proper result. ~~A date-of-hire seniority policy is often consistent with a union's duty of fair representation, but it can be part of a violation depending on the facts, circumstances, and agreements in a particular case. You must decide whether, under the specific circumstances of this case, Defendant violated the duty of fair representation that it owed to the West Pilots.~~ Date of hire is generally a fair and equitable method of integrating two employee groups provided it is done in good faith.

Explanation:

- This change reflects that fact that date of hire is not only lawful, it is the 'gold standard' and the jury should not be tempted in the least to find liability based on that, rather it should focus only on the actual allegations of bad faith. *Laturner* 501 F.2d at 599: "It has long been recognized that the use of such a method to integrate seniority rosters is an equitable arrangement for resolving inevitable conflicts which arise whenever a merger occurs." Indeed, we know of no case, nor have Plaintiffs' cited any, where the use of date-of-hire for seniority integration was found to violate DFR standards.

Instruction # 13

If you determine that on or after April 18, 2008, Defendant USAPA's adoption and promotion of its own seniority proposal instead of the Nicolau Award was not actually motivated by a desire on the part of USAPA officials to benefit the bargaining unit as a whole ~~further negotiations between the union and the employer~~, but was rather motivated solely by a desire to enhance the rights of East Pilots at the expense of West Pilots, and you determine ~~that the terms of USAPA's seniority proposal itself are substantially less favorable to West Pilots than the terms of the Nicolau Award~~, that USAPA acted in bad faith then you must find for Plaintiffs.

~~If you determine that on or after April 18, 2008, Defendant USAPA's adoption and promotion of its own seniority proposal instead of the Nicolau Award was actually motivated by a desire on the part of USAPA officials to further negotiations between the union and the employer, rather than by a desire to enhance the rights of East Pilots at the expense of West Pilots, or that USAPA's seniority proposal itself is not substantially less favorable than the Nicolau Award to West Pilots, then you must find for Defendants.~~

Explanation:

- Paragraph One: The changes are consistent with the explanations given herein previously. The language about "further negotiations" is not correct, the issue is rational benefit to the bargaining unit subject to good faith. The word "solely" is added because that is consistent with the law forbidding a union to solely act for political expediency. *See*, *Barton Brands* 529 at 798: "... such decisions may not be made solely for the benefit of a stronger, more politically favored group over a minority group." Thus, *any* motivation or *partial* motivation is not enough, e.g. *Rakestraw* 981 F.2d at 1524: "a 'bad' motive does not spoil a collective bargaining agreement that rationally serves the interests of the workers as a whole ..." To introduce such a concept would be an unauthorized deviation from settled labor law.
- Paragraph Two: this is struck as redundant to paragraph one; were it not struck it would be edited in the manner paragraph one was.

Special Interrogatories:

~~Did USAPA, through its officials, adopt and promote its own seniority proposal instead of the Nicolau Award because of an actual motivation to benefit East Pilots at the expense of West Pilots rather than an actual motivation to further negotiations between the union and the company?~~

~~Are the terms of USAPA's seniority proposal substantially less favorable to West Pilots than the terms of the Nicolau Award?~~

1) Did USAPA after April 18, 2008 fail to promote the interests of the entire bargaining unit by acting outside a wide range of reasonableness?

2) Did USAPA after April 18, 2008 act with bad faith towards Plaintiffs?

3) Did USAPA, after April 18, 2008, re-visit contractual terms of seniority integration for the sole purpose of promoting the interest of a majority over a disfavored minority?

4) Did USAPA, after April 18, 2008, have a good faith belief that ALPA Merger Policy had resulted in a political impasse which prevented implementation of the Nicolau award?

Explanation:

- As a threshold observation, Defendant believes that if individual questions are going to be posed to the jury then a Special Verdict form is appropriate to avoid an inconsistent verdict. The risk of an inconsistent verdict with a General Verdict with written questions could be very high in this case. This case is one that even the Court has found to be a fact circumstance of complexity (Doc. # 84 p. 9:27 – "The Ninth Circuit has not dealt directly with this fact situation"). Moreover, Plaintiffs are proceeding on a legal theory that is novel at best (no court has ever found date-of-hire a DFR merger violation). Finally, the Court, in our respectful but firm view, has seriously departed from applicable labor law and the legal issues of this matter are sure to be tested on appeal, at least once.
- The first two questions are posed because Plaintiffs' DFR claim (as this Court has allowed it to go forward notwithstanding Defendant's rule 50 ripeness motion) is a direct challenge to USAPA's performance in bargaining. Under law long ago laid down by the US Supreme Court, this claim necessarily implicates USAPA's wide range of reasonableness – but only the bad faith prong that Plaintiffs' chose.
- The last two questions arise from the fact issues the evidence has addressed.

Respectfully Submitted,

Dated: May 6, 2009

By: ***/s/ Nicholas P. Granath, Esq.***

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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 On "Draft 5/4/09"
- 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 6, 2009, by:

/s/ Nicholas Paul Granath, Esq.