

1 Marty Harper (#003416)
mharper@polsinelli.com
2 Kelly J. Flood (#019772)
kflood@polsinelli.com
Andrew S. Jacob (#022516)
3 ajacob@polsinelli.com
POLSINELLI SHUGHART PC
Security Title Plaza
4 3636 N. Central Ave., Suite 1200
Phoenix, AZ 85012
5 Phone: (602) 650-2000
Fax: (602) 264-7033

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

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

CASE NOS.
2:08-CV-1633-PHX-NVW
2:08-CV-1728-PHX-NVW

(Consolidated)

PLAINTIFFS' RESPONSE TO:

11 Don ADDINGTON, *et al.*,
Plaintiffs,
12 vs.
13 Steven H. BRADFORD, *et al.*,
14 Defendants.

**USAPA'S COMMENT ON THE
COURT'S PROPOSED
SUBSTANTIVE JURY
INSTRUCTIONS AND SPECIAL
INTERROGATORIES ON "DRAFT
5/4/09**

16 Plaintiffs Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin
17 IRANPOUR, Roger VELEZ, and Steve WARGOCKI, on behalf of the West
18 Pilot Class file *Plaintiffs' Response To USAPA's Comment on the Court's*
Proposed Substantive Jury Instructions & Special Interrogatories on "Draft
19 *5/4/09* (doc. 438). Plaintiffs adds their comments immediately after the
20 comments and explanations submitted by USAPA. for the ease of the Court's
21 review.

1 **Instruction # 1**

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

6 Explanation:

7 o No change.

8 Plaintiffs’ Response:

9 Plaintiffs have no objection to Instruction #1.

10 **Instruction # 2**

11 Once it becomes the representative, a union owes a duty of fair
12 representation to every employee within the bargaining unit that it
13 represents. Not every employee within a bargaining unit must be a member
14 of that union. However, the union must represent the interests of every
15 employee within the bargaining unit, whether or not a given employee is a
16 member of the union.

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

21 Explanation:

o No change.

Plaintiffs’ Response:

Plaintiffs have no objection to Instruction #2.

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

1 granted, but those determinations will be made in a later phase of the case by
2 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.

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

4 Explanation:

5 o No change.

6 Plaintiffs' Response:

Plaintiffs have no objection to Instruction #3.

7 **Instruction # 4**

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

10 Unions owe their members a contractual obligation to follow their
11 constitutions. Unions have a right to interpret their own constitutions and
12 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.

13 Explanation:

14 o Adding "policies" is necessary because there is concrete evidence in the
15 form of ALPA resolutions and letters and testimony which the jury must
16 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.

17 Plaintiffs' Response:

18 As written by the Court, this instruction explains that a union cannot
19 use language in its constitution to relieve itself of its duty of fair
20 representation. USAPA seeks to add language to this instruction that it
would use for a different purpose—to invite the jury to apply parol evidence
to interpret unambiguous contract language. Plaintiffs understand that the
Court intends to instruct the jury as to the unambiguous meaning of ALPA

1 Merger Policy. USAPA admits it would use its version of this instruction to
2 invite the jury to nullify the Court's instructions and make its own
interpretation of what ALPA Merger Policy means!

3 The Court, therefore, should reject this proposed addition of language to
Instruction #4.

4
5 **Instruction # 5**

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

9 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
10 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~~
11 ~~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~~
12 USAPA's motive for its actions after that date.

13 Explanation:

14 ○ The struck sentence creates confusion with the previous sentence and
risks tempting the jury to base a liability finding on conduct that pre-dates
15 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
16 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
17 the implication of collective guilt of East pilots, which the Court indicated,
"was not what I had in mind" (Tr. 1064: 23).

18 Plaintiffs' Response:

19 In matters of bad faith representation, the central issue is "the
subjective motivation of the Union officials." *Simo v. Union of Needletrades,*
20 *Indus. & Textile Employees, Southwest Dist. Council*, 322 F.3d 602, 618 (9th
Cir. 2003). Pre-April 18 statements, conduct and other related
21 circumstances, are relevant to determine such motives for post-April 18,
2008, actions. Defendant proposes an instruction that would discourage the

1 jury's use of such evidence. As written, this instruction properly invites the
2 jury to consider all relevant evidence of motive while cautioning the jury to
not consider any pre-April 18, 2008, acts as evidence of direct liability.

3 The Court, therefore, should reject USAPA's proposed changes to
Instruction #5.

4
5 **Instruction # 6**

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
7 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
8 this case, the union violated its duty if it intentionally and substantially
harmd the interests of the West Pilots for reasons unrelated to any
9 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~~
10 ~~duty of fair representation if its actions shown to lack good faith and honesty~~
~~of purpose.~~

11 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
12 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
13 "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
14 some ulterior motive or intent to harm.

15 In order to establish that a union has engaged in bad faith conduct,
there must be substantial evidence of fraud, deceitful action or dishonest
16 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
17 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
18 violated its duty of fair representation.

19 Explanation:

20 o 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-

1 objection of the Court's 5/4/09 draft, Tr. 1054:17).

2 ○ The wide range of reasonableness is fundamental labor law. *Bautista v.*
3 *Pan Am. World Airlines, Inc*, 828 F.2d 546, 549 (9th Cir. 1987) ("In the
4 context of representing its members **at the bargaining table**, a union
5 must be allowed 'a wide degree of reasonableness' because it must be able
6 to focus on the needs of its membership as a whole without undue fear of
7 lawsuits from individuals disgruntled by the result of the collective
8 process."). And, "Any substantive examination of a union's performance,
9 therefore, must be highly deferential, recognizing the wide latitude that
10 negotiators need for the effective performance of their bargaining
11 responsibilities ... For that reason, the final product of the bargaining
12 process may constitute evidence of a breach of duty only if it can be fairly
13 characterized as so far outside a "wide range of reasonableness," *Ford*
14 *Motor Co. v. Huffman*, 345 U.S., at 338, that it is wholly "irrational" or
15 "arbitrary." *O'Neill* 499 US at 78. *See also*,

9 ○ The sentence removed is struck as inconsistent with *Rakestraw*.

10 ○ The added language defining bad faith is exactly as previously written by
11 the Court in its old Instruction # 7. Because the only prong advanced by
12 Plaintiffs is bad faith, it is critical that the jury get a defining instruction.

11 Plaintiffs' Response:

12 Defendant seeks an instruction that would remove "arbitrariness" and
13 "discrimination" from the definition of unfair representation but would bring
14 these concepts back to define what is *not* unfair representation. This implies
15 that lack of arbitrariness or lack of discrimination is an affirmative defense to
16 bad faith—which they are not. Plaintiffs prefer to leave "arbitrariness" and
17 "discrimination" in the instruction because they are part of the standard
18 definition of DFR.

16 Plaintiffs, therefore, propose the following language for Instruction #6:

17 A union breaches or violates its duty of fair representation
18 when, in the course of negotiating a collective bargaining
19 agreement, the union's conduct toward a member of the
20 bargaining unit it represents is arbitrary, discriminatory, or in bad
21 faith. 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.

1
2 **Instruction # 7**

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

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

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

19 Explanation:

20 ○ First paragraph: "Equally" is deleted because it may mislead the jurors
21 about the law. While in a non-discrimination sense there is a duty to treat
22 equally, there is in a very real sense no such obligation because in proper
23 exercise of its discretion to act in wide range of reasonableness (i.e. not
24 wholly irrational) the union is free to treat unequally. *eg. Alvey* 622 F.2d
25 at 1287 ("the mere fact that such [change in long standing contract
26 practice] ... may benefit some or all of a majority group to the
27 disadvantage of the smaller group would not constitute a breach of the
28 duty ..."); *Rakestraw*, 981 F.2d at 1530-31 (7th Cir. 1992) ("bargaining has
29 winners and losers ... *Huffman* and *O'Neill* show that a conflict among
30 workers does not undercut the union's ability to choose"). The other
31 changes made accurately reflect the scope that the Duty runs to.

32 ○ Second paragraph: the change is to avoid the implication that there is
33 something inherently wrong with "benefit" to one group but not another.
34 That is not the law. Bargaining unions are like legislatures, they do in fact
35 get to pick 'winners' and 'losers' as long as there is a rationale reason
36 related to the unit as a whole and the union is not acting in bad faith
37 (*Rakestraw* 981 F.2d at 1532). Also, the concept of different groups is

1 addressed in Instruction No. 8.

2 o Third paragraph: the change conforms to the law (“all the member” means
3 the bargaining “unit it represents” as a whole; *Huffman* 345 US at 338)
and makes the last two paragraphs consistent.

4 **Plaintiffs’ Response:**

5 This instruction addresses procedure not result. Although the duty of
6 fair representation does not require equal results, it does impose a “duty to
7 give due consideration to all members of the bargaining unit.” USAPA
8 would eliminate all reference to any intention to benefit “one group of
9 workers over another.” This language functions to invite the jury to compare
10 possible motives. The instruction, as written, indicates that the “intent to
benefit to the bargaining unit as a whole” must outweigh the intent to benefit
one group over another. This is lost is “one group over another” language is
omitted. An alternative would be to directly instruct that a union’s
“predominant intent must be to benefit to the bargaining unit as a whole.”
Finally, USAPA proposes an unhelpful circular explanation. The language
suggested by Plaintiffs below avoids this.

11 Plaintiffs, therefore, propose the following language for Instruction #7:

12 A union has a duty to give due consideration to the interests of
13 ~~protect all its members equally~~ of the bargaining unit. This duty
14 includes the requirement that the union's actions must be taken in
15 good faith and with an honest purpose.

16 The fact that one group of workers is adversely affected by an
17 action taken by the union is not enough, in and of itself, to establish
18 that the union breached the duty of fair representation. In general,
19 a union complies with its duty of fair representation if its decisions
20 and actions were intended to promote the interests of the
21 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 predominantly intended ~~are not~~
~~taken to benefit one group of workers over another but rather with~~
~~an 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.

1 **Instruction # 8**

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

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

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

30 Explanation:

- 31 o 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.
- o Second paragraph: the substitution is to make the instruction comport
 with the law. The language tracks with this statement in *Barton Brands*

1 529 at 798: "... such decisions may not be made *solely* for the benefit of a
2 stronger, more politically favored group over a minority group." In
3 addition, the method of date of hire is Ninth Circuit approved. *Laturner*
4 501 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).

5 ○ Third paragraph: the deletion of the "already resolved" language is
6 necessary in order to avoid directing the jury how to find a disputed fact
7 issue, as well as to avoid misstating the law in a fundamental way. The
8 issue of the scope of the 'final and binding' assertion is a fact dispute about
9 what the ALPA policy meant. Defendant is entitled to have its
10 overwhelming evidence that ALPA itself understood that final and binding
11 was limited to the MEC representatives but in no way curtailed the pilots
12 from voting in (separate) ratification votes to reject it, or even curtailed
13 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.

14 ○ Second paragraph: The 'in part' is added because political expediency must
15 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."

16 ○ Lastly, we observe and suggest that the Court **stop at Instruction No.**
17 **8**, i., 1 through 8 only. In the event the Court does not, we suggest the
remaining edits that follow.

Plaintiffs' Response:

18 There is no reason to delete "members" from the first sentence because
19 these instructions use the phrase "members of the bargaining unit"
elsewhere.

20 USAPA's remaining proposed changes to Instruction #8 go to the heart
of this litigation. USAPA's instruction would far too readily excuse a union

1 majority reneging on a contractual agreement with the minority. USAPA has
2 put too much irrelevant matters into evidence hoping that the jury will be
3 confused into thinking this evidence, if believed, excuses USAPA's conduct.
The proposed instruction mitigates the prejudice that would otherwise flow
4 from having such matters in evidence.

5 Plaintiffs, therefore, ask the Court to give Instruction #8 as written
(absent the case law citation).

6 **Instruction # 9**

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

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

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

21 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.

22 Explanation:

23 o The Court should not deprive Defendant of a fair trial by taking from the
24 jury a liability fact issue that the jury should decide. How ALPA Merger
25 Policy and constitutional rules relating to ratification were understood and
26 applied by ALPA at the time is very much a disputed issue of fact going to

1 liability. USAPA has submitted overwhelming evidence that ALPA
2 interpreted and applied its Merger Policy and its Constitution to mean
3 that the Nicolau Arbitration was final and binding *only on the MEC*
4 *Merger Representative* for the limited purpose of making ALPA's proposal
5 to the company – without *that proposal* being subject to ratification vote,
6 yes, but at all times preserving the right of the pilots in the bargaining
7 unit to vote up or down any final contract, with or without Nicolau, and in
8 separate ratification votes. And, the Plaintiffs and Defendant have
9 stipulated as to who the parties were long ago. (Stipulation as to the
10 parties to the Nicolau arbitration at Doc. # 77 at ¶ 24-29).

11 ○ USAPA is entitled to have the jury weigh its defense on the evidence
12 already in, i.e. that USAPA had a rational and good faith objective, and
13 proceeded according to it, to break the impasse in a way that would in the
14 short run provide benefits to the West in the form of 10 year fences and in
15 the long run benefit the West when at the end of 10 years they would go to
16 the 'head of the line' – while getting a contract that the East could also
17 ratify, thus clearing the way for other non-seniority benefits. For the
18 Court to dictate this finding would at once deprive the Defendant and the
19 jury and, respectfully, result in reversible error.

20 ○ Also noting that the Court cannot but take a “peek” at the merits of the
21 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.

1 **Plaintiffs' Response:**

2 Plaintiffs disagree with USAPA's mischaracterization facts that ought to
3 be established as matters of law. As matters of law: (1) the seniority dispute
4 was settled by a contract (the Transition Agreement); (2) this contract
5 incorporated ALPA Merger Policy by reference (no different than an ordinary
6 commercial contract incorporating the dispute resolution procedures of the
7 American Arbitration Association by reference); and (3) USAPA is bound by
8 the Transition Agreement as a "condition" of becoming the bargaining agent.
9 This instruction is entirely proper and is warranted by the evidence.

10 Plaintiffs, therefore, ask the Court to give Instruction #9 as written.

11 **Instruction # 10**

12 ~~The Nicolau Award was a final and binding resolution of the conflicting
13 interests of the two pilot groups with respect to seniority rights. Revisiting
14 that issue, in itself, was not a legitimate union objective for USAPA. It has
15 been stipulated that the Nicolau Award was final and binding on the
16 respective ALPA MEC Merger Representatives at the time. However,
17 USAPA was entitled to revisit the issue of seniority rights if it was actually
18 motivated to further legitimate union objectives. [See *Ramey v. Dist. 141,
19 Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269, 276-77, 283-84
20 (2d Cir. 2004).]~~

21 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

1 may consider whether USAPA's stated reason is the true reason. ~~merely a~~
 2 ~~cover-up for another reason.~~ Plaintiffs have the burden to persuade you by a
 3 preponderance of the evidence that USAPA took action against Plaintiffs for
 4 improper reasons in a manner that was both unreasonable and in bad faith.

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

9 Explanation:

10 ○ First paragraph. The "two groups" language is misleading as is "final and
 11 binding." The individual pilots were not bound nor can they individually
 12 or collective *ever* violate the Duty because they *owe no* duty of fair
 13 representation. The only bodies bound by the Merger process were two
 14 subordinate ALPA bodies. Even then only ALPA (national) could bargain
 15 with the company. As the court in *Air Wisconsin* 909 F.2d at 215
 16 observed: "ALPA does not have locals, but at each airline that it
 17 represents there is a committee, called the Master Executive Council,
 18 elected by the pilots of that airline. These committees are subordinate
 19 bodies of ALPA. Their powers are defined in ALPA's constitution and by-
 20 laws, ... But their powers do not include the power to act as collective
 21 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,

1 which encompasses its proposal, should be used rather than ‘negotiations’
2 with the employer, which is more limiting. Finally, the last clause is
3 added to clarify the proper standard under the long line of US Supreme
4 Court decisions defining DFR when a union engages in collective
5 bargaining (*Huffman 345 US at 338, Humphrey 335 at 349 and O’Neill*
6 *499 US at 78*).

7 o Third paragraph: as the Court indicated on the record in Day 5 (Tr.
8 1080:23), the “word cover” can be improved upon and indeed its highly
9 suggestive and the replacement language stays true to the sentence.

6 **Plaintiffs’ Response:**

7 This instruction, as written, presents two alternative motivations for
8 USAPA’s conduct to the jury. The central question is whether USAPA’s
9 claimed actual motive is a pretext or not. That question is not material
10 unless, as a matter of law, USAPA’s goal would “further the interests of the
11 bargaining unit as a whole” or to serve a “legitimate union objective.”

12 During the trial USAPA presented a moving target. Was its actual
13 motive to replace ALPA? Was it to abrogate an inequitable arbitration
14 award? Was it to break an impasse preventing negotiations from proceeding
15 between union and employee? Was it to “maintain uniform principles of
16 seniority based on date of hire and the perpetuation thereof, with reasonable
17 conditions and restrictions to preserve each pilots unmerged career
18 expectations”?

19 USAPA must take a position—pick one of the foregoing—and the jury
20 must then decide whether this is a pretext or not. If a pretext, USAPA has no
21 excuse. If not a pretext, the jury must then decide whether USAPA’s actual
22 motive was to “further the interests of the bargaining unit as a whole” and/or
23 to serve a “legitimate union objective.”

24 Finally, Plaintiffs agree that the phrase “cover up” could be
25 inflammatory. If USAPA does not like “cover up,” the Court could define
26 “pretext.”

27 Plaintiffs, therefore, propose the following alternative for Instruction
28 #10:

29 The Nicolau Award was a final and binding resolution of the
30 conflicting interests of the two pilot groups with respect to
31 seniority rights. Revisiting that issue, in itself, was not a legitimate
32 union objective for USAPA. However, USAPA was entitled to

1 revisit the issue of seniority rights if it was actually motivated to
2 further legitimate union objectives.

3 Plaintiffs contend that USAPA was not actually motivated by
4 a legitimate union objective in revisiting the issue and did so only
5 to enhance to rights of East Pilots at the expense of West Pilots.
6 USAPA denies this claim, contending that it acted to further
7 uniform principles of seniority based on date of hire and the
8 perpetuation thereof, with reasonable conditions and restrictions
9 to preserve each pilots unmerged career expectations.
10 ~~negotiations between the union and the employer.~~ You must
11 decide whether USAPA was actually motivated by legitimate
12 union objectives in the adoption and promotion of its seniority
13 proposal.

14 Plaintiffs have introduced evidence that USAPA's articulated
15 reason for its actions is a pretext for breaching the duty of fair
16 representation. A "pretext" is a reason assigned to justify an act,
17 which is not the true reason for such act." When you consider
18 Plaintiffs' evidence of pretext, remember that the relevant
19 question is whether USAPA's reason was not the real reason for
20 USAPA's actions. You are not to consider whether USAPA's
21 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 or merely a pretext.
~~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.

16 **Instruction # 11**

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

20 Plaintiffs contend that it was bad faith for USAPA not to pursue the
21 implementation of the Nicolau award and instead pursue its constitutional
objective (to maintain uniform principles of seniority based on date of hire

1 and the perpetuation thereof, with reasonable conditions and restrictions to
2 preserve each pilots unmerged career expectations), and that to do so was at
3 their expense while only the majority of East pilots benefited.

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

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

12 Explanation:

13 o The 'substantially less favorable' language invites the jury to depart from
14 the legal standard and issue in this case much in the same manner that
15 relitigating Nicolau would. This case is not about what is a better or
16 worse proposal or seniority integration. It is only about a bad faith DFR
17 claim in the context of USAPA's post certification collective bargaining.
18 The legal standard has oft been repeated. The US Supreme Court
19 articulated it very clearly in *Huffman* 345 US at 338 and reiterated it
20 again *O'Neill* 499 US at 78: "A wide range of reasonableness must be
21 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.").

Plaintiffs' Response:

This instruction is intended to serve a narrow purpose—obtaining a
factual finding of whether the USAPA seniority proposal is substantially less
favorable to the West Pilots than is the Nicolau Award. USAPA's proposed
language does not address this issue; it puts an entirely different matter at
issue.

Plaintiffs, therefore, urge the Court to use Instruction #11 as written.

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:

o 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.

Plaintiffs' Response:

Plaintiffs agree that it is difficult to refer to make a neutral reference to date-of-hire seniority integration. This difficulty can be avoided because there is no need to categorize methods of seniority integration to make this instruction. The point of this instruction is to tell the jury that it will not decide the equities of seniority integration. That can be done without any reference to "date-of-hire."

Plaintiffs, therefore, suggest the following language for Instruction #12:

The parties have strong differences of opinion on which method of seniority integration or proposal is to be preferred. You are not asked to decide whether the Nicolau Award or the Defendant's seniority proposal is to be preferred. You are also not asked to decide whether Mr. Nicolau properly conducted the arbitration or reached a proper result.

1 **Instruction # 13**

2 If you determine that on or after April 18, 2008, Defendant USAPA's
3 adoption and promotion of its own seniority proposal instead of the Nicolau
4 Award was not actually motivated by a desire on the part of USAPA officials
5 to benefit the bargaining unit as a whole ~~further negotiations between the~~
6 ~~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.

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

14 Explanation:

15 o Paragraph One: The changes are consistent with the explanations given
16 herein previously. The language about "further negotiations" is not
17 correct, the issue is rational benefit to the bargaining unit subject to good
18 faith. The word "solely" is added because that is consistent with the law
19 forbidding a union to solely act for political expediency. *See, Barton*
20 *Brands* 529 at 798: "... such decisions may not be made solely for the
21 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.

o Paragraph Two: this is struck as redundant to paragraph one; were it not
struck it would be edited in the manner paragraph one was.

Plaintiffs' Response:

 Plaintiffs can agree to most of USAPA's proposed changes in Instruction
#13. Plaintiffs disagree, however, that liability attaches only where improper
motives are the sole motives for a union's conduct. *Rakestraw* neither says
that any degree of bad motive makes bad faith nor that any degree of proper

1 motive negates bad faith. In the related context of employment
 2 discrimination the jury is instructed to consider the predominante motivation
 3 for the adverse action. *See Texas Department of Community Affairs v.*
 4 *Burdine*, 450 U.S 248, 256 (1981) (An employee may persuade the jury “that
 5 a discriminatory reason more likely motivated the employer or indirectly by
 6 showing that the employer's proffered explanation is unworthy of credence.”);
 7 *see also Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1066 (9th Cir.
 8 2003). If USAPA does not want a balanced alternative telling the jury where
 9 it should find in USAPA’s favor, Plaintiffs do not object.

6 Plaintiffs, therefore, propose the following language for Instruction #13:

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

13 **Special Interrogatories:**

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

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

20 1) Did USAPA after April 18, 2008 fail to promote the interests of the
 21 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?

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

3 Explanation:

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

12 Plaintiffs’ Response:

13 USAPA’s interrogatories do not apply because: (1) Plaintiffs do not allege
14 that USAPA acted outside of a wide range of reasonableness; (2) asking
15 whether USAPA acted with bad faith requires a definition for the jury; (3)
16 “sole” motive is not an element of pretext analysis; and (4) “good faith belief”
17 merely means “actual belief,” which is a pretext inquiry. USAPA’s
18 interrogatories are plainly intended to invite an inconsistent confused
19 verdict—precisely what instructions are intended to avert.

17 Plaintiffs, therefore, ask the Court to use the special interrogatories as
18 drafted:

18 Did USAPA, through its officials, adopt and promote its
19 own seniority proposal instead of the Nicolau Award because
20 of an actual motivation to benefit East Pilots at the expense of
21 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

1 less favorable to West Pilots than the terms of the Nicolau
2 Award?

3 Dated this 6th day of May, 2009.

POLSINELLI SHUGHART PC

4 By: /s/

5

Andrew S. Jacob
6 Security Title Plaza
3636 N. Central Ave., Suite 1200
7 Phoenix, AZ 85012

8 **CERTIFICATE OF SERVICE**

9 I hereby certify that on May 6th, 2009, I electronically transmitted the
10 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 to
CM/ECF registrants.

11 s/ Andrew S. Jacob