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

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

Case Nos.:  
2:08-CV-1633-PHX-NVW  
2:08-CV-1728-PHX-NVW  
(Consolidated)

**PLAINTIFFS TRIAL BRIEF ON REMEDY**

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

20 **PLAINTIFFS' TRIAL BRIEF ON REMEDY**

21 **I. OVERVIEW**

22 This brief is predicated on the jury finding USAPA is in violation of the  
23 duty of fair representation. Additional findings relevant to liability and  
24 supported by largely uncontroverted evidence include that—(1) USAPA’s  
25 seniority proposal is substantially less favorable to West Pilots than the  
26 Nicolau Award; (2) ALPA could have used a trustee to complete negotiation  
27 of a tentative single CBA incorporating the Nicolau Award and to present  
28

1 that tentative CBA for ratification; (3) USAPA did not intend to (or expect  
2 to) benefit the bargaining unit as a whole when it revisited the seniority  
3 dispute; and (4) USAPA's asserted reasons for revisiting the seniority  
4 dispute were pretexts.

5 Findings relevant to remedy and supported by uncontroverted evidence  
6 include that—(1) Plaintiffs were furloughed, lost captain positions or lost  
7 opportunities for promotion to captain when the Airline reduced service  
8 starting in October 2008; (2) Plaintiffs would not have suffered these losses  
9 if the Airline had been operating according to the Nicolau Award in October  
10 2008; (3) the Transition Agreement intent was that no pilot actively flying  
11 at the time of the merger would be furloughed three years into the merger  
12 unless all pilots recalled from furlough after the merger had first been re-  
13 furloughed.

14 Plaintiffs demonstrate below that the Court has authority and  
15 discretion to provide the following four forms of relief:

- 16 (1) Declaration that the Airline and its pilots, as represented by  
17 USAPA, are contractually bound to incorporate the Nicolau  
18 Award, unmodified by added conditions or restrictions, into § 22 of  
19 the single CBA;
- 20 (2) Order directing USAPA (with equal West Pilot representation) to  
21 negotiate a complete single CBA that incorporates the Nicolau  
22 Award, and to then present that CBA for a single ratification vote  
23 by all USAPA members;
- 24 (3) Order directing the Airline to begin using the Nicolau Award for  
25 promotions and furloughs by a date certain, even if a single CBA is  
26 not yet finalized; and
- 27 (4) Order enjoining USAPA and East Pilots, until the single CBA  
28 implementing the Nicolau Award is in effect, from filing or  
asserting grievances related to recalling furloughed West Pilots or  
assigning West Pilots to East aircraft.

1 **II. LEGAL ARGUMENT**

2 **A. The Court has authority and discretion to declare that the Airline**  
3 **and its pilots, as represented by USAPA, are contractually**  
4 **bound to incorporate the Nicolau Award, unmodified by**  
5 **additional conditions or restrictions, into § 22 of the single CBA.**

6 The Nicolau Award settled the dispute over merger of pilot seniority  
7 lists. As it would for other arbitration awards, the Court has jurisdiction to  
8 enforce the Award. *See Castaneda v. Dura-Vent Corp.*, 648 F.2d 612, 619  
9 (9th Cir. 1981) (“The parties selected arbitration, through their collective  
10 bargaining agreement, as the means by which contract disputes would be  
11 settled and courts should not disrupt such awards.”). *See also Hines v.*  
12 *Anchor Motor Freight, Inc.*, 424 U.S. 554, 563 (1976); *cf. Edelman v.*  
13 *Western Airlines, Inc.*, 892 F.2d 839, 842 (9th Cir. 1989) (in context of  
14 System Board, an arbitration award “may not be retried on the merits in an  
15 independent judicial proceeding.”).

16 A court must interpret an arbitration provision to the extent needed to  
17 determine how the parties agreed to be bound by an arbitration award.  
18 Hence, the Court must interpret the Transition Agreement to determine  
19 how it intended to enforce the Nicolau Award. That interpretation and  
20 analysis would be expressed as a declaratory judgment—in this case stating  
21 that the Transition Agreement requires that § 22 (the seniority provisions of  
22 the single CBA) incorporates the Nicolau Award.

23 In other words, the Court’s authority to enforce arbitration awards  
24 provides it authority and discretion to declare that the Airline and its pilots,  
25 as represented by USAPA, must incorporate the Nicolau Award into § 22 of  
26 the single CBA.  
27  
28

1           **B. The Court has authority and discretion to order USAPA (with full**  
2           **West Pilot participation) to negotiate a complete single CBA**  
3           **that incorporates the Nicolau Award, and to then present that**  
4           **CBA for a single ratification vote by all USAPA members.**

5           Under the terms of the ALPA Constitution, ALPA National had the  
6           power to appoint a trustee to act in place of the East MEC if the MEC  
7           refused to support and defend the Nicolau Award.<sup>1</sup> A trustee that replaced  
8           the East MEC could negotiate the single CBA and could present it to East  
9           Pilots for ratification. The pilots, therefore, understood that the duty to  
10          support and defend the Nicolau Award could be enforced.

11          In effect, therefore, the pilots agreed that they could be compelled to  
12          negotiate a single CBA implementing the Nicolau Award and they could be  
13          compelled to hold a ratification vote on such CBA. Just as the Court has  
14          jurisdiction to interpret a contract to the extent needed to determine what  
15          the parties agreed would be arbitrated, it has jurisdiction to determine how  
16          the parties agreed an arbitration award would be enforced. The Court,  
17          therefore, has jurisdiction both to enforce the Nicolau Award and to  
18          determine the means by which the Transition Agreement envisioned it could  
19          be enforced.

20          The Court, therefore, has the authority and discretion to determine  
21          that the Transition Agreement intended to make any union representing the  
22          pilots subject to a duty to support and defend the Nicolau Award. The Court

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23          <sup>1</sup> Douglas Dotter testified that when the East Pilots refused to participate in joint  
24          CBA negotiations ALPA National was considering “appointing ... a trustee, .... we  
25          were advised to prepare for negotiations to do just that.” He explained that ALPA’s  
26          “Constitution and Bylaws has a provision ... to put either an individual local counsel or  
27          the entire MEC of an airline into what is called receivership, meaning they would take  
28          away their authority to act on behalf of the pilots for the airline that they represent. In  
        that scenario, the president, or the executive board, can then appoint either a trustee or a  
        group of individuals that act as a trustee to conduct the affairs of that airline and act on  
        behalf of that pilot group.” (Tr. 372:7-20; see also id. at 373:4-14; 342:11-17; 342:23-  
        343:4.).

1 has discretion then to order USAPA to complete joint negotiations with  
2 representatives from both East and West sides and to present the tentative  
3 single CBA resulting from such negotiations to its membership for a  
4 ratification vote.

5 Because under USAPA governance all pilots vote to ratify any CBA,  
6 USAPA must use that procedure here. In addition, the Court should direct  
7 USAPA to provide the West Pilots opportunity to become members in good  
8 standing before any vote is taken.

9 **C. The Court has authority and discretion to order the Airline to**  
10 **begin using the Nicolau Award for promotions and furloughs by**  
11 **a date certain, even if a single CBA is not yet finalized.**

12 The Ninth Circuit allows a district court to impose an interim scheme  
13 for furlough order and promotion order while the union complies with the  
14 court's remedy of unfair representation in the context of a seniority merger.  
15 *See Bernard v. Air Line Pilots Assn., Intl.*, 873 F.2d 213, 215 (9th Cir. 1989).  
16 The judgment approved in *Bernard* "vacated and set aside [an existing]  
17 seniority integration agreement ... and ... **specified the basis by which pilots**  
18 **would be furloughed, promoted and given flying assignments in the interim**  
19 **period until a new agreement could be reached."** *Id.* (emphasis added).  
20 Following *Bernard*, this Court has authority and discretion to direct the  
21 Airline to begin using the Nicolau Award for promotions, furloughs, and  
22 giving flying assignments before a single CBA is finalized. Plaintiffs  
23 concede, however, that prior to doing so, the Court should afford the Airline  
24 opportunity to be heard. (See doc 439).

1 D. The Court has authority and discretion to enjoin USAPA and its  
2 pilots, until the single CBA implementing the Nicolau Award is in  
3 effect, from filing or asserting grievances related to recalling  
furloughed West Pilots or assigning West Pilots to East aircraft.

4 1. The Court has authority to enjoin USAPA from filing  
5 grievances contrary to its orders.

6 “A district court has inherent power to order the parties to the  
7 litigation to act in a manner that will enforce its judgment.” *Abbott*  
8 *Laboratories v. Novopharm Ltd.*, 104 F.3d 1305, 1309 (Fed. Cir. 1997); *see*  
9 *also Shillitani v. United States*, 384 U.S. 364, 370 (1966). Hence, the Eighth  
10 Circuit upheld a district court that issued “an injunction ... permanently  
11 restraining [union members] from interfering with or in any manner  
12 disturbing plaintiff’s seniority status, including the processing or advocating  
13 of all grievances that are in opposition to the plaintiff’s said seniority  
14 status.” *Butler v. Local Union 823, Intern. Broth. of Teamsters, Chauffeurs,*  
15 *Warehousemen & Helpers of America*, 514 F.2d 442, 455 (8th Cir. 1975)  
(alteration marks omitted, reversed on unrelated basis).

16 The *Butler* court dismissed the contention that union members so  
17 affected were denied due process, explaining as follows:

18 The appellants’ contention that the adversely affected employees  
19 were not represented in the District Court action is without merit.  
20 It was the task of the Local to represent their interests, and the  
21 record indicates that it has done so vigorously, even to the point of  
22 prosecuting this appeal. It is not for the Local to decide in post-  
23 trial grievance proceedings that its own actions have been unfair  
24 to the other Yellow drivers, thus giving it the right to defy the  
25 court order. Merely to state the theory is to expose it as frivolous.

26 *Id.* at 455-56.

27 2. The Court should use this authority here.

28 “Equity regards that as done which ought to be done.” 30A *C.J.S.*  
*Equity* § 131. “The broad meaning or effect of this maxim is that where an  
obligation rests on a person to perform an act equity will treat the person in

1 whose favor the act should be performed as clothed with the same interest  
2 and entitled to the same rights as though the act were actually performed.”

3 *Id.*

4 Mr. Hemenway testified as follows:

5 [T]he Transition Agreement, was executed on September 23rd,  
6 2005 approximately. At that point in time, ... the company's  
7 expectation was that it would take two to three years to fully  
8 integrate the carriers in terms of FAA operating certificates, all  
the background procedures, and all the single agreements, all of  
the technological issues, two to three years.

9 (Tr. 884:8-19.) The uncontroverted evidence, therefore, is that absent the  
10 entirety of the inequitable conduct (including inequitable conduct that  
11 preceded the certification of USAPA) the Airline would have been in  
12 integrated pilot operations by September 2008.

13 In other words, had there not been inequitable conduct, the Airline  
14 would have been furloughing by the Nicolau List, not by the separate  
15 seniority lists when it reduced service in October 2008. If that had been so,  
16 it would not have furloughed any West Pilots. Under principles of equity,  
17 therefore, West Pilots should be not be on furlough. The equitable remedy is  
18 to order the Airline to recall the West Pilots and to furlough East Pilots in  
19 their place.

20 If the Court is hesitant to exercise equitable jurisdiction over the  
21 Airline, it can at least relieve the Airline of contractual impediments to  
22 recalling West Pilots and furloughing East Pilots. One such impediment is  
23 the risk of an East Pilot grievance should the Airline violate a Transition  
24 Agreement provision. Based on *Butler*, this Court has authority to enjoin  
25 USAPA and the East Pilots from filing such grievances because it would  
26 defeat the Court's intention to relieve the Airline of impediments to  
27 recalling West Pilots.

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1 The Court, therefore, can and should enjoin USAPA (and East Pilots on  
2 their own) from filing a grievance arising from the Airline recalling a  
3 currently furloughed West Pilot or assigning West Pilots to operate East  
4 aircraft, until such time that a single CBA implementing the Nicolau Award  
5 is put into effect.

6 **III. CONCLUSION**

7 The Court has considerable discretion and authority to provide  
8 Plaintiffs and the West Pilot class meaningful equitable relief, as detailed  
9 above.

10 Dated this 7th day of May, 2009.

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

18 I hereby certify that on May 7, 2009, I electronically transmitted the  
19 foregoing document to the U.S. District Court Clerk's Office by using the  
20 CM/ECF System for filing and transmittal of a Notice of Electronic Filing to  
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Andrew S. Jacob