

Marty Harper (#003416)
mharper@polsinelli.com
Kelly J. Flood (#019772)
kflood@polsinelli.com
Andrew S. Jacob (#22516)
ajacob@polsinelli.com
POLSINELLI SHUGHART, P.C.
Security Title Plaza
3636 N. Central Ave., Suite 1200
Phoenix, AZ 85012
Phone: (602) 650-2000
Fax: (602) 264-7033
Attorneys for Plaintiffs

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

Don ADDINGTON, et al.,
Plaintiffs,

vs.

US AIRLINE PILOTS ASSN., and
US AIRWAYS, INC.,
Defendants.

CONSOLIDATED CASES NO.
2:08-CV-1633-PHX-NVW;
2:08-CV-1728-PHX-NVW

**PLAINTIFFS' CONTROVERTING
STATEMENT OF FACTS IN SUPPORT
OF:**

***PLAINTIFFS' RESPONSE IN
OPPOSITION TO DEFENDANT'S
RULE 56 SUMMARY JUDGMENT
MOTION ON PLAINTIFFS'
DAMAGES CLAIMS***

Don ADDINGTON, et al.,
Plaintiffs,

vs.

Steven H. BRADFORD, *et al.*,
Defendants.

Plaintiffs' submit their Controverting Statement of Facts.

I. Responses to Defendant's Statement of Facts

(1) Plaintiffs are pilots who, prior to the merger between US Airways and America West Airlines, were employed by America West Airlines, and who are now employed by US Airways.

Plaintiffs do not dispute ¶ 1.

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(2) Defendant, US Airline Pilots Association (“USAPA”) is an unincorporated association with a principal place of business in Charlotte, North Carolina.

Plaintiffs do not dispute ¶ 2.

(3) The National Mediation Board (“NMB”) certified USAPA as the exclusive collective bargaining representative of the pilots employed by US Airways on April 18, 2008.

Plaintiffs do not dispute ¶ 3.

(4) US Airways is a Delaware corporation with its principal place of business in Tempe, Arizona. At all times relevant to this action, US Airways has engaged in interstate commerce in the industry of air transportation, and has been an employer in an industry affecting interstate commerce.

Plaintiffs do not dispute ¶ 4.

(5) In May 2005, two air carriers, America West Airlines, Inc. and US Airways, Inc. agreed to merge by combining all or substantially all of their assets. The surviving entity is known as US Airways.

Plaintiffs do not dispute ¶ 5.

(6) On September 23, 2005, US Airways, America West, and ALPA entered into a “Transition Agreement” for the purpose of governing the process of the two airlines’ operational merger as it related to the airlines’ pilots.

Plaintiffs dispute ¶ 6. The language used here is ambiguous. It should not be read to have a different meaning than the actual language of the

1 Transition Agreement, which states that it is an agreement between the
2 airline entities and “the PILOTS in the service of AMERICA WEST
3 AIRLINES, INC. AND US AIRWAYS, INC. as represented by THE AIR
4 LINE PILOTS ASSOCIATION.” *Trans. Agmt.*, 1. (Trial Ex. 21.)

5
6 (7) The Transition Agreement states that the parties shall maintain
7 “Separate Operations” until the implementation of a single collective
8 bargaining agreement covering both pilot groups, and all parties interpreted
9 and applied the Transition agreement to mean the same.

10 Plaintiffs dispute ¶ 7, in part. The phrase “all parties interpreted and
11 applied the Transition agreement to mean the same” is ambiguous.

12
13 (8) Both the Transition Agreement and ALPA Merger Policy state that
14 the Airline may not use the single seniority list until an agreement is reached
15 on a single collective bargaining agreement covering both pilot groups, unless
16 otherwise agreed to by all of the parties, and all parties interpreted and
17 applied the Transition agreement to mean the same.

18 Plaintiffs dispute ¶ 8, in part. The phrase “all parties interpreted and
19 applied the Transition agreement to mean the same” is ambiguous.

20
21 (9) Neither the Transition Agreement nor ALPA Merger Policy
22 contains a timetable, or deadline, to complete a new, single collective
23 bargaining agreement.

24 Plaintiffs do not dispute ¶ 9.

25
26 (10) The Transition Agreement contains no provisions limiting the
27 Company from engaging in pilot furloughs except for the minimum aircraft
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1 and utilization requirements set forth in Section II of the Transition
2 Agreement.

3 **Plaintiffs dispute ¶ 10, in part.** Adding the word “express” to this
4 proposition clarifies the accurate meaning, which is that the “Transition
5 Agreement contains no express provisions limiting the Company from
6 engaging in pilot furloughs ...”

7
8 **(11)** Since the date of its certification, USAPA’s collective bargaining
9 objective has been to obtain agreement with the Company on a single
10 collective bargaining agreement that would enhance wages, benefits, and
11 working conditions and implement a date-of-hire seniority list with conditions
12 and restrictions designed to protect each pilot’s unmerged career
13 expectations.

14 **Plaintiffs dispute ¶ 11.** USAPA conflates “actual” collective bargaining
15 objective with “stated” collective bargaining objective. There is pretext where
16 these are the same. The jury implicitly found that there is pretext here
17 because USAPA’s actual collective bargaining objective was to implement a
18 date-of-hire seniority list “only to enhance the rights of East Pilots at the
19 expense of West Pilots.” *Final Jury Instr.*, 8 (May 13, 2009). (Doc. 459.)
20 There is no evidence that its bargaining objective has changed.

21
22 **(12)** USAPA has not engaged in any delay in negotiating a single
23 collective bargaining agreement, but rather is pursuing the bargaining
24 objective of obtaining a single collective bargaining agreement with an
25 integrated seniority list.

26 **Plaintiffs dispute ¶ 12.** The evidence cited by USAPA does not support
27 the proposition. That USAPA is negotiating or has been negotiating does not
28

1 prove that USAPA “has not engaged in any delay.” That in April 2009
2 USAPA was “working hard to finalize negotiations and approval of a date of
3 hire collective bargaining agreement,” does not address whether USAPA
4 delayed prior to April 2009. That Plaintiffs did not allege delay during the
5 liability trial shows only that they did not use evidence of delay to infer bad
6 faith motive. That Plaintiffs themselves did not know of delay when deposed
7 has little significance because they did not claim to have investigated the
8 issue.

9
10 (13) The USAPA Merger Committee presented its seniority integration
11 proposal to US Airways on September 30, 2008.

12 **Plaintiffs do not dispute ¶ 13.**

13
14 (14) The Company has not yet responded to the USAPA seniority
15 integration proposal.

16 **Plaintiffs do not dispute ¶ 14.**

17
18 (15) Plaintiffs have either waived any right to assert claims for damages
19 in uncontradicted pretrial deposition testimony by disclaiming any damages
20 or by admitting that all they could do was speculate.

21 **Plaintiffs dispute ¶ 15.** None of the materials cited by USAPA constitute
22 judicial admissions or waiver. *See Victory Carriers, Inc. v. Stockton*
23 *Stevedoring Co.*, 388 F.2d 955, 959 (9th Cir. 1968) (holding that “answers ...
24 given in deposition testimony ... must often be supplied before investigation
25 is completed and can rest only upon knowledge which is available at the
26 time”). There was no reason to expect that the deponents would have been
27 prepared to address damages because the depositions were intended to
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1 discover material relevant to liability, not damages. Moreover, the
2 calculation of damages and the legal nature of claims are issues for experts,
3 not laypersons. Finally, the cited evidence is misleading. There is little
4 significance, for example, that Mr. Wargocki gave a negative answer to the
5 question “Are you currently seeking any monetary compensation from
6 USAPA for yourself pursuant to this lawsuit, other than compensation
7 related to dues, agency fees, and attorney’s fees?” Within a few moments,
8 when asked whether he had abandoned a claim that “sought from USAPA
9 sufficient damages to compensate you for the value of lost wages and
10 benefits?” he answered, “No, it’s not abandoned.” Wargocki Depo. *Tr.*, 57:16-
11 58:8 (Jan. 29, 2009). (A. Jacob, *Decl.*, ¶ 1 (Jun. 1, 2009) (hereinafter “*Decl.*”).)
12

13 (16) After this Court dismissed Counts I and II for lack of jurisdiction
14 (Doc. # 84), the Plaintiffs pursued those claims before the parties’ (company
15 and union) System Board Of Adjustment.

16 **Plaintiffs dispute ¶ 16, in part.** The System Board is not properly
17 referred to as “the parties’ System Board.”
18

19 (17) The parties provided Plaintiffs with unhindered access to the
20 Board, and with Plaintiffs’ participation and consent scheduled a hearing on
21 their Count I and II grievances for May 28-29, which remains pending.

22 **Plaintiffs dispute ¶ 17, in part.** USAPA fails to define or provide
23 evidence of “unhindered access.”
24

25 (18) The Board retains full authority to provide make-whole remedies
26 for breaches of contract.
27
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1 **Plaintiffs generally do not dispute ¶ 18 as it pertains to grievances**
2 **against the Company.** This proposition, however, has no relevance to their
3 damages claims against USAPA, which are based on breach of the duty of fair
4 representation and over which the Board has no authority.

5
6 **(19)** Since USAPA started negotiating a single CBA, USAPA has
7 exercised its right to reopen several sections that had previously been
8 tentatively agreed to between the company and ALPA.

9 **Plaintiffs dispute ¶ 19, in part.** The jury found USAPA lacked a
10 legitimate union objective for reopening the seniority section of the CBA.
11 USAPA, therefore, does not have a right to reopen the seniority section.

12
13 **(20)** US Airways and USAPA remain a substantial distance apart in
14 negotiating a single CBA, not including negotiations on integrated seniority.

15 **Plaintiffs dispute ¶ 20.** The phrase, “substantial distance,” is ambiguous
16 and is not amenable to factual proof.

17
18 **(21)** The company’s “Kirby proposal” was described by the West MEC as
19 “woefully inadequate” but it is the proposal that remains “on the table.”

20 **Plaintiffs dispute ¶ 21, in part.** Paragraph 21 quotes inadmissible
21 hearsay. This cannot be used to prove the truth of the matter asserted—that,
22 in fact, the Kirby proposal was inadequate.

23
24 **II. Plaintiffs’ Statement of Additional Material Facts**

25 **(22)** The Transition Agreement and ALPA Merger Policy governed the
26 integration of pilot operations.

27 “The combining of the America West and US Airways
28 MECs will be governed by the Association’s Constitution

1 and By-Laws and its Merger and Fragmentation Policy
2 (“ALPA Merger Policy”).”

3 *Trans. Agmt.* § III(C). (Trial Ex. 21)

4 “[T]he airline operations of America West and US Airways,
5 with respect to pilots, shall be merged no later than twelve
6 (12) months following the later of (i) completion of the
7 integrated pilot seniority list and (ii) negotiation of the
8 Single Agreement...”

9 *Id.* § VI(A).

10 (23) The Transition Agreement provided a reasonable basis for Plaintiffs
11 to expect integration of pilot operations within three years.

12 “[T]he Transition Agreement, was executed on September
13 23rd, 2005 approximately. At that point in time, ... the
14 company’s expectation was that it would take two to three
15 years to fully integrate the carriers in terms of FAA
16 operating certificates, all the background procedures, and
17 all the single agreements, all of the technological issues,
18 two to three years.”

19 A. Hemenway, *Trial Tr.*, 884:8-19 (May 1, 2009). (*Decl.* ¶ 2.)

20 “As discussed in prior communications, the interval from
21 the transaction date to operational integration could be two
22 or three years, depending on many variables.”

23 M. Cleary, R. Mowrey, et al., “Merger Update” *US Airwaves*, 30, 31
24 (May 2001) (re. possible merger with United Airlines) (*Decl.* ¶ 3.)

25 Even USAPA’s attorneys from Seham, Seham, Meltz &
26 Peterson have admitted that the parties did not expect to
27 still be in Separate Operations. They have stated that “the
28 parties admittedly may not have anticipated the Separate
Operations to last as long as it has...”

Post-Hearing Brief of the US Airline Pilots Association for Transition
Agreement Dispute No. 9 (February 17, 2009) at 30.

(24) Operational pilot integration is governed by ALPA Merger Policy.

“(1) if the Company is the surviving carrier, the Company
will integrate the two Pilot groups in accordance with
Association Merger Policy if both groups are represented by
the Association and (2) if the Company is not the
surviving carrier, the Company will make reasonable
efforts to have the surviving carrier integrate the two pilot

1 groups in the same manner as stated in (1) of this
paragraph.”

2 *Am. West 2004 CBA* § 1(F) (addressing possible future mergers). (*Decl.*
3 ¶ 4.)

4 “The seniority lists of America West pilots and US Airways
pilots will be integrated in accordance with ALPA Merger
5 Policy and submitted to the Airline Parties for acceptance.”

6 *Trans. Agmt.* § IV(A).

7 (25) The East Pilots are obligated to cooperate with negotiation and
8 implementation of a single CBA using a seniority list that would be created
9 according to ALPA Merger Policy.

10 “The Award of the Arbitration Board shall be final and
11 binding on all parties to the arbitration and shall be
defended by ALPA.”

12 *ALPA Merger Policy*, Pt. 1 § H(5)(b). (Trial Ex. 3.)

13 “One of the unique aspects of ALPA merger policy is that it
14 gives MEC merger committees complete and full authority
to arrive at the merged list. An agreement on the merged
15 list reached by the merger representatives is final and
binding on both the MEC and the pilot group at large and
16 is not subject to ratification.” ALPA, “What Every Pilot
Needs to Know About Mergers...”

17 “What Every Pilot Needs to Know About Mergers,” *Air Line Pilot*, 14,
18 15 (May 2006). (*Decl.* ¶ 5.)

19 “The Award of the Arbitration Board shall be final and
binding on all parties to the arbitration and shall be
20 defended by ALPA.”

21 “Merger Update,” *US Airwaves*, 23, 25 (Summer 2005) (East MEC
22 Merger Committee). (*Decl.* ¶ 6.)

23 “No ALPA seniority integration arbitration result has ever
been set aside by the courts, although some dissatisfied
24 pilots have challenged the award before administrative
agencies and the courts.”

25 *Id.*

26 “The only certainty in seniority integration is that the
outcome is never certain until the merger representatives
27 reach an agreement or, failing a negotiated solution, the
arbitrator issues an award.”

28

1 “Seniority Rights of Furlougees,” *US Airwaves*, 35, 35 (Jan./Feb./ Mar.
2002) (authors included M. Cleary and R. Mowrey). (*Decl.* ¶ 7.)

2
3 (26) Prior to announcement of the Nicolau Award, the East Pilots were
4 cooperating with negotiation and implementation of a single CBA that would
5 employ the seniority list that was being created according to ALPA Merger
6 Policy.

7 “As the seniority integration is now in the hands of the
8 Arbitration Board, it is time for us all to focus on the
9 contract. The merged list is now on the horizon and the
10 company is certainly aware of this. Your Merger Committee
11 would like to ask all US Airways pilots to unite with our
12 brothers and sisters to the west in support of the JNC and
13 our leadership’s efforts to get us the best contract possible.
14 Remember, participation is key!”

15 East MEC Merger Comm., *Update* (Mar 23, 2007). (Trial Ex. 83.)

16 “Help your MEC and JNC deliver our message to
17 management. We’ve had enough, and we are united in our
18 fight for a fair, single contract.”

19 J. Stephan, *MEC Chairman’s Msg.* (May 1, 2007). (*Decl.* ¶ 8.)

20
21 (27) Up until May 2007, the Airline and the pilot’s Joint Negotiating
22 Committee (“JNC”) were making good progress negotiating a single CBA.

23 “Q. ...How far along in the negotiating process did the JNC
24 get during the calendar year 2006?”

25 A. On a percentage basis, we were probably, as far as
26 looking at a total Collective Bargaining Agreement, we
27 were probably in the 60 to 70 percent complete range. We
28 had reached a mature stage of negotiation in many of the
operational sections....

Q. What plans for negotiations did the JNC have coming
out of 2006 and moving into 2007?

A. Well, our desire in the fall of 2006 was one of jointly
pushing the company hard to complete an agreement in the
spring of 2007. We had attempted, on multiple occasions in
October, November, and December, to secure dates which
would provide for what we call a closeout, where the parties
would go --... normally at an undisclosed location. Both
parties bring everyone that they need to complete an
agreement. And the idea is it’s kind of like a siege. You

1 don't go there until you come away with a complete
2 agreement.”

3 D. Dotter, *Tr.* 309:21-310:18 (April 29, 2009). (*Decl.* ¶ 9.)

4 “Q. Let’s move in to the first half of 2007...

5 A. Well, the industry conditions were if you were ripe for a
6 contract, the airline had—when I say the airline, US
7 Airways Post-Merger Agreement had seen success in terms
8 of its stock performance. The company was profitable and
9 reported profits, you know, coming out of the merger. And
10 as a result, certainly the members of the association or
11 pilots though thought it was an appropriate time to achieve
12 an agreement during what was a positive economic period.
13 * * * So we certainly had a desire to try to get an
14 agreement done as soon as possible, ...

15 Q. What was management’s reaction to that

16 A. Initially, there was not a lot of agreement. They knew
17 we were interested in an agreement. They indicated a
18 desire to get an agreement. But they felt there were too
19 many open issues in the sections that were being
20 negotiated to really, what we call, frame a closeout. As a
21 result of that, we, you know, challenged them to get busy
22 and start presenting proposals that were more
23 comprehensive and more detailed ... “

24 *Id.* at 313:20-314:21.

25 (28) On May 8, 2007, Airline President Kirby made a proposal to the
26 Joint Negotiating Committee that for the first time covered all sections of the
27 CBA.

28 “First of all, the fact that President Kirby came out to
present this showed us, first off, that the company was
serious about moving the process along which is something
we had been looking for. To that end, he took great effort or
went to great efforts to take us through each one of the
sections, all 30 sections, including those that were TAs, just
to reaffirm the position of those sections and to briefly
discuss the issues that they were attempting to address
within this proposal, and also to provide a reasoning as to
why they either could not advance a position or, you know,
introduce new information in all these sections. What was
significant about that is that at the end of the day, we now
had what in terms of negotiating jargon was a framework
for agreement. We finally had all the positions of all the
sections on the table. So from the standpoint of a
negotiating committee and also from the standpoint of the
company’s management team, we—each of us knew where
the other party stood relative to these issues which

1 provided us, at least the anchors by which we would have
2 to start moving toward one another to complete an
agreement. That's a very significant milestone in the
negotiations, and it was a significant point on that day.”

3 *Id.* at 325:10-326:6; *see also* “Company Comprehensive Proposal” (May
4 8, 2007). (Trial Ex. 98.)

5 (29) The Kirby Proposal offered to increase East Pilot pay and benefits
6 on average \$32,000 per pilot per year.

7 Q. Could you describe generally the scope of the Kirby
8 proposal?

9 A. We have been in negotiations with the representatives,
10 at that time ALPA, approximately beginning December '05
11 through that date. We had made a fair amount of progress,
12 and in the company's view it was time to offer a
13 comprehensive proposal which really, instead of just
addressing one section or one part of one section that was
open, attempted on a comprehensive basis to put on the
table a proposal that dealt with all of the open areas in all
of the open sections.

* * *

14 “Q. ... Could you describe the economic component of the
15 Kirby proposal starting with wage or pay rates?”

16 A. ... [I]t took the West rates and increased them by 3
17 percent and then applied similar relations to the larger
18 fleets which America West did fly. The proposal ...
increased the company's cost from then current costs of
operating the two groups separately to operating under this
Kirby comprehensive proposal about \$122 million a year. ...

19 Q. In terms of wages, would that part of the proposal have
20 granted pay increases to all working pilots both in the East
operations and the West operations?

21 A. As a general statement, I think that's true, yes.”

22 A. Hemenway, *Tr.* at 859:13-860:19 (May 1, 2009). (*Decl.* ¶ 2.)

23 (30) Mr. Bradford and other East Pilots were very dissatisfied with the
24 Nicolau Award and encouraged others to be dissatisfied.

25 “The pilots of US Airways cannot go into another round of
26 seniority negotiations with this award as the starting point
27 in our negotiations.”

28 S. Bradford, *Email* (May 16, 2007). (Trial Ex. 107.)

1 “thousands of US Airways pilots have reached out to their
2 elected union officials, at the local and national level, to
3 express their outrage at ... the Nicolau Award.”

4 East MEC, *Resolution* (July 25, 2007). (Trial Ex. 11.)

5 (31) Mr. Bradford and other East Pilots participated in organized group
6 protests of the Nicolau Award.

7 “[H]undreds of US Airways pilots appeared in person at the
8 Executive Council meeting May 21st, 2007 ... to express
9 their outrage at ... the Nicolau Award.”

10 East MEC, *Resolution* (July 25, 2007).

11 (32) Mr. Bradford and other East Pilots vowed with others that they
12 would never accept the Nicolau Award.

13 “[A] majority of the US Airways pilots have contacted their
14 elected representatives and have made it abundantly clear
15 that no Negotiated Single Agreement that allows these
16 windfalls [Nicolau Award] to take effect will ever be ratified
17 by the US Airways pilots...”

18 East MEC, *Resolution* (July 25, 2007).

19 (33) Soon after the announcement of the Nicolau Award, the East Pilots
20 refused to participate any further in the JNC negotiation of a new CBA.

21 “[T]he resolution passed by the East MEC yesterday ...
22 states that East ALPA is withdrawing from joint contract
23 negotiations (JNC) and does not intend to return unless the
24 company immediately increases East pilot pay to West pilot
25 rates (actually their proposal goes above West pilot rates in
26 many cases).”

27 D. Parker, *Letter* (Aug. 16, 2007). (Trial Ex. 5.)

28 “BE IT FURTHER RESOLVED that our members of the
JNC will not reengage in Joint Contract Negotiations ...”

East MEC, *Resolution* (Aug. 15, 2007). (*Decl.* ¶¶ 10, 11.)

(34) East MEC representatives to the JNC failed to appear at joint
negotiation sessions scheduled for September 24-26, 2007.

1 “The west members of the Joint Negotiating Committee
2 traveled to Washington. The company management team
3 traveled to Washington. The national president, John
4 Prater, and his staff were present. And unfortunately, the
5 east members of the JNC did not show up”

6 D. Dotter, *Tr.* at 338:17-339:1. (*Decl.* ¶ 9.)

7 (35) The Airline cooperated with implementation of the Nicolau Award.

8 “The company, along with the East and West ALPA MECs,
9 agreed in the September 2005 merger Transition
10 Agreement that the integrated seniority list would be
11 accomplished under the ALPA Merger Policy and would be
12 accepted by the company, provided it met [certain]
13 criteria.... We have determined that the list submitted
14 meets these criteria, so the company will accept the
15 submitted list. We have notified ALPA of our acceptance.
16 Of course, the list cannot be implemented without a single
17 labor agreement covering all of our pilots. We are hopeful
18 that negotiations toward a single contract can resume in
19 the near future.”

20 D. Parker, *Letter* (Dec. 20, 2007). (Trial Ex. 9.) *See Trans. Agrmt.*
21 § IV(A) (“The Airline Panics will accept such integrated seniority list,
22 including conditions and restrictions....”)

23 (36) By the fall of 2007, ALPA National supported the validity of the
24 Nicolau Award and defended it against East MEC opposition.

25 “ALPA National has dictated to the MEC that it must
26 abandon its struggle to rectify the inequities of the
27 seniority integration list ALPA National has passed to the
28 Company.

“USAPA will file with NMB this month Independent Labor Union seeks
to Unseat Incumbent,” *USAPA Press Release*, (Oct. 4, 2007)
(admission). (*Decl.* ¶ 12.)

“[I]t is time for the [East] MEC to comply with its
representational and legal obligations under the
Constitution & By-Laws, ALPA Merger Policy, the
Transition Agreement, and implementing resolutions of the
Executive Council. The MEC, at this meeting, should
adopt a resolution (or resolutions) reversing all prior efforts
to bar or precondition the continuation of joint negotiations.
The MEC should also direct the US Airways members of
the Joint Negotiating Committee to resume their full
participation in the negotiation of a single agreement
covering the merged operation of US Airways and America
West Since the Executive Council has determined that

1 there is no ground under ALPA Merger Policy to set aside
 2 the seniority award, the MEC should also adopt a
 3 resolution recognizing that the award is to be included in
 4 the single agreement to be negotiated under the Transition
 5 Agreement and Merger Policy, provided only that the
 6 Association and all MECs will comply with valid court
 7 orders, if any, affecting the terms of the award.”

8 J. Prater, *Letter* (Oct. 1, 2007) (emphasis added). (Trial Ex. 19.)

9 (37) Both USAPA and the East MEC were taking actions intended to
 10 achieve the same end—prevent implementation of operational pilot
 11 integration using the Nicolau Award.

12 “The [East] MEC and I have told you from the very first
 13 day we received the Nicolau award, that your seniority, and
 14 vacating the award, will be our main focus. Since that
 15 infamous day, my Chairman’s Messages and Code-a-
 16 Phones have been replete with reports of our strategy
 17 sessions and meetings.”

18 J. Stephan, *Chairman’s Msg.* (Aug. 1, 2007). (*Decl.* ¶ 13.)

19 Let me say it again—separate operations is real and
 20 separate operations is working for us. It not only keeps the
 21 Nicolau Award on the shelf, it also gives us the opportunity
 22 to enter into our own full-blown Section 6 negotiations with
 23 US Airways management, just as America West is doing.
 24 Not only would we be able to open up our entire contract
 25 and work towards improvements in pay, benefits, and work
 26 rules, ALPA Section 6 negotiations also allows our pilots to
 27 engage in self help. That’s a position we haven’t been in for
 28 a long time. Your MEC promised you that they’d protect
 you from the Nicolau Award, that they would turn over every stone in their efforts and they have done just that. They continue to make sure that their plan stays firmly in place.

29 J. Stephan, *Chairman’s Msg.* (Apr. 15, 2008). (*Decl.* ¶ 14.)

30 “[T]he east US Airways pilots will not participate in the
 31 “implementation” of this deeply flawed ‘award’ in any way
 32 shape or form. * * * USAPA has determined that seniority
 33 is a self-defining term. Accordingly, the USAPA
 34 Constitution requires the merging of seniority lists by
 35 ‘date-of-hire’ and no other methodology.”

36 “ALPA National to East US Airways Pilots—‘Buzz Off’; National
 37 Association Abandons East Pilots, Seniority,” USAPA Press Release,
 38 (Sep. 11, 2007). (*Decl.* ¶ 15.)

1 (38) The concerted design of Mr. Bradford and other East Pilots was to
2 be in full control of their union before it negotiated or ratified the new CBA.

3 “We will write our own merger policy into our bylaws and
4 defend it in civil court if we have to, even if we are out-
voted by ALPA in another election as a result of a merger.”

5 S. Bradford, *Email* (May 16, 2007). (Trial Ex. 107.)

6 USAPA’s collective has been “only to enhance the rights of
7 East Pilots at the expense of West Pilots.”

8 *Final Jury Instr.*, 8 (May 13, 2009) (defining the meaning of plaintiffs’
9 verdict) (doc. 459).

10 “[T]he sole reason for the new union is to abrogate an
11 arbitration, the Nicolau award....”

12 S. Bradford, “Conversation with Attorney,” (circa, June 9, 2007) (stated
13 in a context that implied this is a true statement). (Trial Ex. 14.)

14 “[T]his statement infers that Nicolau is the only reason for
15 USAPA’s existence.”

16 S. Bradford “Dear Fellow US Airways Pilots,” Letter, 5 (Feb 2, 2008)
17 (comment on draft of letter that fails to clarify that this would be a
18 false inference). (Trial Ex. 315.)

19 “Separate Operations’ is not possible if we stick with
20 ALPA. If we vote ALPA in, we will be forced to eat the
21 Nicolau award in the not too distant future.
22 ALPA=Nicolau. If you stay in ALPA you will be eating the
23 ‘Nic,’ and not cake, in short order.”

24 D. Mowery, *Letter* (Mar. 6, 2008). (Trial Ex. 20.)

25 (39) The concerted design of Mr. Bradford and other East Pilots required
26 delaying CBA negotiations and keeping the contract open to allow sufficient
27 time for USAPA to challenge and oust ALPA in an NMB election.

28 On August 10, 2007, USAPA sent a letter to pilots stating
that “There is no implementation of the Nicolau award
until it is codified in the contract. **As long as the contract is
open**, any issue including seniority can be revisited.

USAPA, *Letter* (Aug. 10, 2007) (emphasis added). (Trial Ex. 44.)

Five days later the East MEC passed a Resolution to
withdraw from joint negotiations.

D. Parker, *Letter* (Aug. 16, 2007). (Trial Ex. 5.)

1 USAPA campaigned that attorneys had informed them that
2 the contract must remain open in order to abrogate the
3 Nicolau Award, “Mr. Katzenbach said that if we could
4 replace ALPA as the bargaining agent we could prevail in
5 achieving a Date-of-Hire seniority integration. **The
6 qualifications were that the contract must remain open.**”

7 S. Bradford, “Dear Fellow US Airways Pilots,” *Letter* (02/10/08).

8 “Separate Operations’ is not possible if we stick with
9 ALPA. If we vote ALPA in, we will be forced to eat the
10 Nicolau award in the not too distant future.
11 ALPA=Nicolau. If you stay in ALPA you will be eating the
12 ‘Nic,’ and not cake, in short order.”

13 D. Mowery, *Letter* (Mar. 6, 2008).

14
15 (40) ALPA could have replaced the East MEC with a trustee who could
16 immediately resume JNC negotiations.

17 On March 3rd, 2008, the Executive Council of ALPA “found
18 that the officers of Local Council 41 had engaged in conduct
19 that warranted emergency corrective action” and “the
20 officers of Local Council 41 were removed and the
21 President appointed trustees...”

22 Transcript of Air Line Pilots Association 101st Executive Board
23 Meeting (Special) held March 28, 2008 at 365-366. (*Decl.* ¶ 16.)

24 ALPA held a special meeting of the Executive Board on
25 March 28, 2008 to determine whether the emergency
26 trusteeship of Local Council 41 would continue, amid
27 allegations that these East MEC officers domiciled in
28 Philadelphia, Eric Rowe, Dave Ciabattini and Mr. Jim
Portale, were supporting USAPA while serving on the East
MEC,

Id.

The pilots domiciled in Philadelphia and represented by
Local Council 41 account for 43% of the East Pilots.

Id. at 274, 284.

At the ALPA Special Meeting, First Vice President of
ALPA, Paul Rice, stated that these East MEC members in
Philadelphia were “active open supporters of the U.S.
Airline Pilots Association, which is the union challenging
ALPA” and are actively “trying to undermine and replace
our union.”

Id. at 25-26.

1 At this Special Meeting, Paul Rice also stated that the
2 actions by these members to support USAPA while serving
3 as East MEC members was “equivalent to treason.” He also
4 stated that “these former Council 41 officers are traitors to
5 our union.”

6 *Id.* at 27.

7 Paul Rice, when discussing the standard for putting the
8 Council in trusteeship, stated that “[t]here is no more
9 substantial failure to perform the duties of an ALPA
10 representative than to fail to support ALPA during a
11 representational election.”

12 *Id.* at 29.

13 Dave Ciabattone, when testifying for himself during the
14 Special Meeting, noted that even ALPA officers were using
15 USAPA as a way to gain leverage over the West Pilots,
16 specifically, he stated,

17 “Everyone was aware that USAPA was being used through
18 Captain Prater, everyone knew, everyone knew they were
19 using USAPA to lever our position against America West in
20 negotiations in trying to mitigate this award...”

21 *Id.* at 182.

22 “...we were using USAPA for a leverage, every member of
23 our MEC used USAPA for leverage. And you know, can you
24 blame us?”

25 *Id.* at 183.

26 John Prater testified at the Special Meeting that one of the
27 reasons that Local Council 41 was placed into emergency
28 trusteeship was for “distributing anti-ALPA
communications through ALPA channels.”

Id. at 232.

John Prater knew that East Pilots in officer positions at
ALPA were supporting USAPA. He testified at the Special
Meeting that if the ALPA officers did not declare their
support for ALPA over USAPA he “would place the entire
MEC into Trusteeship.”

Id. at 236.

John Prater testified that he contacted all East MEC
members to determine if they were loyal to ALPA in the
representational election.

Id. at 236-37.

Eric Rowe, former Chairman of Council 41 testified that
“USAPA...was the best tool that the US Airways MEC had

1 to extract any help or any mitigation to this [Nicolau]
award.”

2 *Id.* at 332.

3 The Executive Board acknowledged that both East MEC
4 officers Tracy Parella and Mike Cleary had agreed while
5 serving in ALPA positions to accept USAPA positions if
USAPA was elected, and represented the Local Council 41
officers in their Trusteeship hearing.

6 *Id.* at 333.

7 The Executive Board at the Special Meeting found:

8 “Former Local Council 41 Chairman and Captain
9 Representative Eric A. Rowe, former Local Council 41 Vice
10 Chairman and First Officer Representative David E.
Ciabattoni and former Local Council 41
11 Secretary/Treasurer James P. Portale have been charged
with supporting USAPA and not supporting ALPA.”

12 *Id.* at 367.

13 The Resolution that determined that the Trusteeship of
Local Council 41 would continue was passed unanimously
by the Executive Board.

14 *Id.* at 387.

15
16 (41) Mr. Bradford and other East Pilots knew that ALPA would, in fact,
17 replace the East MEC with a trustee if necessary to resume JNC negotiations
18 and to put a negotiated CBA to a ratification vote.

19 Dave Ciabbatoni, current USAPA Vice President, stated in
the ALPA Special Executive Board Meeting relating to the
20 Council 41 trusteeship that:

21 “it sounded like if we did not accomplish those desires by
the National, by Captain Prater, this Trusteeship was
going to be a very real possibility for our MEC,..”

22 “...it was anticipated that it was coming, but it was, really
23 brought the MEC in to focus that Trusteeship was a real
possibility for us.”

24 *Id.* at 110-11.

25 John Prater testified that he warned the East MEC that
26 trusteeship of the East MEC was possible, he testified,
“...in late fall and early winter, I let the US Airways MEC
27 know that if they did not do several things that they were
in danger of me placing the entire MEC in Trusteeship.”

1 *Id.* at 244.

2 (42) The concerted design of Mr. Bradford and other East Pilots included
3 a plan to get the East Pilots to vote against ratifying a new CBA if ALPA was
4 able to force completion of JNC negotiations.

5 East Pilots were told: “ ‘Separate Operations’ is not possible
6 if we stick with ALPA. If we vote ALPA in, we will be forced
7 to eat the Nicolau award in the not too distant future.
ALPA=Nicolau. If you stay in ALPA you will be eating the
‘Nic,’ and not cake, in short order.”

8 D. Mowery, *Letter* (Mar. 6, 2008).

9
10 (43) The concerted design of Mr. Bradford and other East Pilots was to
11 obtain East Pilot support for USAPA by promulgating the misinformation
12 that USAPA (unlike ALPA) could ignore the Nicolau Award, while creating a
13 pretext to hide that they were trying to benefit from unrestrained majority
14 rule. Mr. Bradford and other East Pilots understood that to avoid DFR
15 liability they had to leave little to no evidence of their true intent.

16 “You need to stress the positives of the new union and not
17 dwell on the award. Don’t give the other side a large body
18 of evidence that the sole reason for the new union is to
abrogate an arbitration, the Nicolau award, that in the
opinions of most judges, should be allowed to stand due to
no gross negligence or fraud.”

19 S. Bradford, “Conversation with Attorney,” (circa. Jun. 9, 2007).

20 “If any one of them has said this is not possible or very
21 dangerous and likely to fail then USAPA would not exist.”

22 S. Bradford “Dear Fellow US Airways Pilots,” *Letter* (Feb. 10, 2008).

23 “If we vote ALPA in, we will be forced to eat the Nicolau
24 award in the not too distant future. ALPA=Nicolau. If you
stay in ALPA you will be eating the ‘Nic,’ and not cake, in
short order.”

25 D. Mowery, *Letter* (Mar. 6, 2008).

26 “16. Will electing a new bargaining agent enhance our
ability to redress the inequities of the Nicolau award?

27 Yes. The Nicolau is the product of an ALPA-mandated
28 process and ALPA is bound to defend that process. The

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ALPA-US Airways MEC cannot prevail in its current litigation because it voluntarily submitted to the ALPA-mandated process.

USAPA, however, is not bound by ALPA's Constitution and cannot be subjected to ALPA's political control. USAPA will assert its right under the Railway Labor Act to negotiate over the terms of any seniority integration. Under the RLA, seniority is a mandatory subject of bargaining."

USAPA, Web Site FAQ's as of Dec. 8, 2007 (FAQ #16, providing misleading legal opinion). (Trial Ex. 104.)

(44) The concerted design of Mr. Bradford and other East Pilots included plans to leave little to no evidence of their true intent.

"Make no mistake, we don't not (sic) want to leave ALPA, but we will just to ensure we can have some say in the next merger. We will write our own merger policy into our bylaws and defend it in civil court if we have to, even if we are out-voted by ALPA in another election as a result of a merger."

S. Bradford, *Email* (May 16, 2007).

The jury's verdict, taken in light of the final jury instructions, establishes that USAPA's collective bargaining objective has been to implement a date-of-hire seniority list "only to enhance the rights of East Pilots at the expense of West Pilots."

Final Jury Instr., 8.

"You need to stress the positives of the new union and not dwell on the award. Don't give the other side a large body of evidence that the sole reason for the new union is to abrogate an arbitration, the Nicolau award...."

S. Bradford, "Conversation with Attorney," (circa June 9, 2007).

"this statement infers that Nicolau is the only reason for USAPA's existence."

S. Bradford "Dear Fellow US Airways Pilots," Letter, 5 (Feb. 10, 2008).

(45) Many East Pilots were ALPA members and, indeed, many were ALPA East MEC officers and representatives, while they were acting in concert with Mr. Bradford and USAPA. This is called "dual unionism."

1 On March 3, 2008, Eric Rowe, Dave Ciabattoni and Jim
2 Portale, “officers of [ALPA] Local Council 41[,] were
3 removed and the President appointed trustees,” for actively
4 supporting USAPA’s efforts to oust ALPA while serving on
5 the East MEC.

6 ALPA Executive Board Meeting (Special), Tr. at 366-76.

7 Eric Rowe, Dave Ciabattoni and Jim Portale were “active
8 open supporters of the U.S. Airline Pilots Association,
9 which is the union challenging ALPA” and were actively
10 “trying to undermine and replace [ALPA].”

11 *Id.* at 25-26 (quoting ALPA First Vice-President Paul Rice).

12 While serving as East MEC officers and representing
13 Council 41, Tracy Parella and Mike Cleary accepted
14 USAPA positions if USAPA was elected.

15 *Id.* at 333.

16 (46) Officers and representatives of Council 41 admitted that the East
17 Pilots were using USAPA as a “tool” to prevent the Airline from integrating
18 pilot operations using the Nicolau Award.

19 “Everyone was aware that USAPA was being used ...,
20 everyone knew, everyone knew they were using USAPA to
21 lever our position against America West in negotiations in
22 trying to mitigate this award..”

23 *Id.* at 182 (quoting Dave Ciabattoni, East Merger Representative).

24 “[W]e were using USAPA for a leverage, every member of
25 our MEC used USAPA for leverage. And you know, can
26 you blame us?”

27 *Id.* at 183.

28 “USAPA was the best tool that the US Airways MEC had to
extract any help or any mitigation to this [Nicolau] award.”

Id. at 332 (quoting Eric Rowe, former Chairman of Council 41).

(47) The concerted actions taken by Mr. Bradford and the other East
Pilots were contrary to the provisions of the Transition Agreement, ALPA
Merger Policy, and direct orders from ALPA National.

“Any attempt by a member or members of ALPA to obtain
an agreement which would operate to frustrate the

1 objectives of this policy shall be considered an act contrary
2 to the best interests of ALPA and its members.”

3 *ALPA Merger Policy, Pt. 3 § C.*

4 “With respect to the ... merger, it is time for the MEC to
5 comply with its representational and legal obligations
6 under the Constitution & By-Laws, ALPA Merger Policy,
7 the Transition Agreement, and implementing resolutions of
8 the Executive Council. The MEC, at this meeting, should
9 adopt a resolution (or resolutions) reversing all prior efforts
10 to bar or precondition the continuation of joint
11 negotiations.”

12 J. Prater, *Letter* (Oct. 01, 2007).

13 “[T]he MEC should also adopt a resolution recognizing that
14 the award is to be included in the single agreement to be
15 negotiated under the Transition Agreement and Merger
16 Policy, provided only that the Association and all MECs
17 will comply with valid court orders, if any, affecting the
18 terms of the award.”

19 *Id.*

20 (48) Many pilots with positions of leadership in the ALPA East MEC,
21 pilots who were part of the deign to prevent implementation of the Nicolau
22 Award, now have leadership positions in USAPA.

23 (a) Dennis Brennan

24 Dennis Brennan is a Member, USAPA Grievance
25 Committee. *USAPA Directory*. (Decl. ¶ 17.)

26 He was a Representative, ALPA Boston LEC. Executive
27 Board Meeting (Special), *Tr.* at 22.

28 (b) Dave Ciabattoni

Dave Ciabattoni is USAPA Executive Vice-President and
Chairman of USAPA Administration Oversight Committee.
USAPA Directory.

He was a Member, East MEC Merger Committee in 2007.
Merger Committee Update (Mar. 23, 2007). (Trial Ex. 83.)

(c) Mike Cleary

Mike Cleary is USAPA President and formerly was USAPA
Vice-President. *USAPA Directory*.

1 He was Vice Chairman, East MEC Merger Committee. *US*
2 *Airwaves*, 30, 30 (May 2001); ALPA Executive Board
3 Meeting (Special), *Tr.* at 22.

4 (d) Dean Colello

5 Dean Colello is the note-taker for the USAPA Negotiating
6 Advisory (sub-committee). *USAPA Directory*.

7 He was Chairman, East MEC Membership Services
8 Committee. *US Airwaves*, 26, 26 (Winter/Spring 2007)
9 (Trial Ex. 15).

10 He was the note-taker for the ALPA Joint Negotiating
11 Committee. Doug Dotter, *Tr.* at 308:16-309:7.

12 (e) Mark King

13 Mark King is USAPA's Past Secretary Treasurer.
14 "USAPA Leaders & Volunteers." (*Decl.* ¶ 18)

15 He was the Secretary/Treasurer and First Officer
16 Representative for the ALPA PIT Council 94. *Id.*

17 (f) Tracy Parella

18 Tracy Parella is the USAPA Grievance Chairman. *USAPA*
19 *Directory*.

20 While she was the ALPA Grievance Chairman, Tracy
21 Parella agreed to work for USAPA if it were successful in
22 the NMB election. Executive Board Meeting (Special), *Tr.*
23 at 22 & 344.

24 She was removed as ALPA Grievance Chairman as a result
25 of the MEC meeting in Charlotte. *Id.* at 287.

26 She was asked by an ALPA Executive Board member at the
27 Special Meeting to remove the ALPA lanyard from around
28 her neck due to the allegation that she supported USAPA
while holding an official ALPA position. *Id.* at 301.

While she was the ALPA Grievance Chairman she agreed
to work for USAPA if they were successful in the
representational election. *Id.* at 344.

She testified that if the ALPA officers treated all the East
MEC representatives the same that "Boston should have
been in Trusteeship, Pittsburgh should have been in
Trusteeship, all three Councils should have been put in
Trusteeship, not just the Philadelphia pilots." *Id.* at 352-
353.

1 (g) Doug Mowery

2 Doug Mowery is a Consultant to the USAPA Negotiating
3 Advisory (sub-committee). *USAPA Directory*.

4 He was former Chairman, East MEC Grievance
5 Committee. *US Airwaves*, 25, 25 (May 2001). (Decl. ¶ 19.)

6 He was Chairman, East MEC Joint Negotiating
7 Committee. Doug Dotter, *Tr.* at 340:17-18.

8 While Chairman, Doug Mowery donated to USAPA, filled
9 out a card for the National Mediation Board for USAPA,
10 and wore a USAPA lanyard. D. Mowery, *Depo. Tr.* 69:15-
11 70:19, 23:25-24:24 (Jan. 19, 2009). (Decl. ¶ 20.)

12 He resigned from the position as Chairman, East MEC
13 JNC in March 2008 and immediately pledged public
14 support for USAPA. *Id.* at 85.20-24, see also D. Mowery,
15 *Letter* (Mar 6, 2008).

16 He signed the Transition Agreement on behalf of East
17 MEC. *Trans. Agmt.* at 17.

18 (h) Randy Mowrey

19 Randy Mowrey is USAPA Vice-President and formerly was
20 Chairman, USAPA Merger Committee. *USAPA Directory*.

21 He was a Member, East MEC Merger Committee in 2001.
22 *US Airwaves*, 30, 30 (May 2001).

23 (i) Scott Theuer

24 Scott Theuer is USAPA Chairman Communications
25 Committee and Electronic Communications (sub-
26 committee). *USAPA Directory*.

27 He was a Member, East MEC Council 94 Grievance
28 Committee and a Member, East MEC Communications
Committee. *Id.*

(j) Mark Thorpe

Mark Thorpe is USAPA Past Vice-President. "USAPA
Leaders & Volunteers."

He was a Member, East MEC Communications and Strike
Prep Committee. *Id.*

1 Dated this 1st day of June, 2009.

2 **Polsinelli Shughart, P.C.**

3 */s/ Andrew S. Jacob*

4 By: _____

5 Marty Harper
6 Kelly Flood
7 Andrew S. Jacob
8 Security Title Plaza
9 3636 N. Central Ave., Suite 1200
10 Phoenix, AZ 85012
11 *Attorneys for Plaintiffs*

12 **CERTIFICATE OF SERVICE**

13 I hereby certify that on June 1, 2009, I electronically transmitted the
14 foregoing document to the U.S. District Court Clerk's Office by using the
15 CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

16 *s/ Andrew S. Jacob*