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

Case No. 2:08-CV-1633-PHX-NVW  
Case No. 2:08-CV-1728-PHX-NVW  
(Consolidated)

**PLAINTIFFS RESPONSE IN OPPOSITION  
TO DEFENDANT USAPA'S  
MEMORANDUM ADDRESSING THE  
FORMULATION OF AN APPROPRIATE  
INJUNCTIVE REMEDY (DOC. 504)**

20 Plaintiffs respond in opposition to *Defendant USAPA's Memorandum*  
21 *Addressing the Formulation of an Appropriate Injunctive Remedy* (doc. 504).  
22 USAPA proposes remedies that are plainly calculated to deny meaningful  
23 relief. One of these remedies would require dual-ratification of a system-  
24 wide CBA. The other would allow USAPA to negotiate a date-of-hire CBA if  
25 its members decline their first opportunity to ratify a CBA employing the  
26 Nicolau Award.<sup>1</sup> Both remedies would ensure that the Nicolau Award is  
27 never implemented. Both must, therefore, be rejected.

28 <sup>1</sup> "Nicolau Award" refers to the Combined Seniority List and to all eight paragraphs of Conditions and Restrictions.

1 **I. USAPA Must Submit a System-Wide CBA to Single Ratification.**

2 The West Pilots seek a system-wide CBA using the Nicolau Award (a  
3 “Nicolau CBA”).<sup>2</sup> They are entitled to a fair opportunity to get such a CBA  
4 ratified. A fair opportunity is one that is no more difficult than what they  
5 would have had if the East Pilots had not obstructed joint negotiations.

6 The entire process of integrating pilot operations was expected to take  
7 two to three years. (*Plts.’ Controverting Sep. State. Facts*, ¶ 23 (Jun. 1,  
8 2009) (doc. 508).) Joint negotiations ought to have concluded and a Nicolau  
9 CBA reasonably ought to have come to ratification sooner than that,  
10 perhaps by the end of 2007 (or early 2008). In fairness, the Court’s remedy  
11 should make it no more difficult to ratify a Nicolau CBA now than it would  
12 have been at the end of 2007. USAPA’s first proposed remedy would make  
13 it far more difficult.

14 In 2007, ALPA had mandatory dual-ratification if a Nicolau CBA had  
15 come to ratification. That would have empowered the East Pilots to prevent  
16 adoption of a Nicolau CBA. USAPA—showing it is interested in furthering  
17 only the interests of East Pilots—argues that the East Pilots are entitled to  
18 mandatory dual-ratification under its representation because they have a  
19 right to prevent adoption of a Nicolau CBA. Plaintiffs disagree.

20 First, USAPA overstates the situation in 2007. It was difficult but not  
21 impossible, in 2007, to get dual ratification of a Nicolau CBA. In contrast, it  
22 would be practically impossible now. Plaintiffs explain why.

23 Second, USAPA fails to consider that the pilots will act rationally. A  
24 rational pilot would have weighed the alternatives in 2007 and would weigh  
25 the alternatives now. Even if the ratification procedures and the proposed  
26 CBA are the same, the alternative to the CBA now would be different than

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27 <sup>2</sup> “Nicolau CBA” refers to a system-wide CBA that fully implements  
28 the Nicolau Award without adding to or modifying the Conditions and  
Restrictions.

1 the alternative in 2007. A rational pilot, therefore, does not have the same  
2 choice.

3 In 2007, ratification would have been a choice between a Nicolau CBA  
4 and years more of working under LOA 93.<sup>3</sup> Of the two, a Nicolau CBA  
5 would have had substantially better wages and benefits. (*Plts.’*  
6 *Controverting Sep. State. Facts*, ¶¶ 26-28 (Jun. 1, 2009) (doc. 508).) This  
7 gave many East Pilots strong economic incentive to ratify a Nicolau CBA.  
8 Indeed, in 2007, the economic incentives to ratify a Nicolau CBA were so  
9 strong that USAPA feared a majority of East Pilots would vote to ratify. It  
10 denigrated making that choice—putting economic interest ahead of seniority  
11 interest—by labeling it “selling seniority.” (*Id.* ¶ 39.)<sup>4</sup>

12 The landscape now is far different from 2007. USAPA no longer  
13 denigrates “selling seniority.” Rather, USAPA tells the East Pilots that they  
14 no longer need a new CBA to get better wages and benefits. It tells the East  
15 Pilots that LOA 93 expires at the end of this year and tells them that when  
16

17  
18  
19 <sup>3</sup> “LOA 93” was a pre-merger modification to the East Pilot CBA that  
20 substantially reduced East Pilot wages and benefits.

21 <sup>4</sup> A letter as posted on USAPA’s website states, in relevant part, as  
22 follows:

23 To defend your seniority you need to be current on your ALPA  
24 dues. You need to be able to VOTE NO on any contract offer that  
25 has the Nicolau award intact. You need to be dues current to  
26 defend your seniority and you need to sign a card and make sure  
27 everyone you meet and fly with does the same. Please consider  
28 carefully, the fine print and negative snap backs that are sure to  
part of any contract that is produced in the near future. IS YOUR  
SENIORITY FOR SALE? The negotiations over the seniority  
issue are over as far as ALPA is concerned. Have you sent in your  
card? There is no longer any reason to delay.

(*Id.* (capitalization as in original).)

1 it expires they will revert to better pay rates. (USAPA, *Charlotte Domicile*  
2 *Update* (May 20, 2009) (copy attached as “Exhibit A”).)<sup>5</sup>

3 In 2007, East Pilots also would have understood that they could delay  
4 but probably not prevent implementation of the Nicolau Award. They knew  
5 that “[n]o ALPA seniority integration arbitration result has ever been set  
6 aside by the courts.” (*Id.* ¶ 25; see also *id.* ¶ 43.) They also knew that ALPA  
7 was pressuring the East MEC to support the Nicolau Award. (*Id.* ¶ 36.) In  
8 contrast, influenced by two years of USAPA propaganda, many East Pilots  
9 now believe that USAPA can prevent implementation of the Nicolau Award.

10 Because East Pilots have less financial incentive to ratify a system-  
11 wide CBA and because they have been led to believe they can prevent  
12 implementation of a Nicolau CBA, they are less likely now to vote to ratify a  
13 Nicolau CBA than they were in 2007. If the Court Orders dual-ratification,  
14 therefore, the West Pilots will have a far worse chance for ratification than  
15 they had in 2007. That is precisely why USAPA wants dual-ratification.

16 USAPA needs the Court to order dual-ratification because its  
17 Constitution requires a single ratification vote. USAPA wants the Court to  
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19 <sup>5</sup> The relevant part of the Update states as follows:

20 As we have stated, the pay freeze and reduction language in LOA  
21 93 clearly expires on December 31, 2009. This date ends the  
22 concessionary pay rates provision of LOA 93 and returns the pay  
23 rates back to the underlying LOA 84 rates, plus the included pay  
24 raises in LOA 84. By the expiration date defined internally in our  
25 agreement, these rates of pay will be in effect at midnight on Jan  
26 1, 2010, and when we revert to the terms of LOA 84, these are the  
27 rates that are to be paid to the pilots subject the signing of our  
28 next contract. Since LOA 84 contains language and revisions that  
provide for pay rate increases, with the last raise noted on May 1,  
2009, the adjusted rates of LOA 84 will be applied to our original  
rates prior to the initial activation of the LOA 93 freeze and  
reductions.

(*Id.*)

1 Order an exception just for a Nicolau CBA. Why? Probably because it fears  
2 that a majority of the pilots taken together would ratify a Nicolau CBA. A  
3 union cognizant of its duty of fair representation would not make such a  
4 request.

5 To sum up, Plaintiffs ask the Court to reject USAPA's first proposed  
6 remedy that would require dual-ratification. Dual-ratification would make  
7 ratification more difficult than it was in 2007 and more difficult than is  
8 required by USAPA's Constitution. If and when a Nicolau CBA is  
9 negotiated, it should be put to a single ratification vote.

10 **II. USAPA Must Not Bargain for Anything But a Nicolau CBA, no Matter**  
11 **How Many Times Its Members Decline Ratification.**

12 The Transition Agreement established that the Nicolau Award would  
13 be final and binding. (*Id.* at ¶¶ 25, 35.) In other words, the pilots would not  
14 get to ratify the Award. Any CBA that would integrate pilot operations had  
15 to use the Nicolau Award. The Transition Agreement made no provision for  
16 any other seniority scheme. It made no exception if a Nicolau CBA failed  
17 ratification. "Final and binding" meant that integrated pilot operations  
18 could occur only using a Nicolau CBA.

19 Under ALPA, the only way East Pilots could get better wages and  
20 benefits was to ratify a Nicolau CBA. In 2007, therefore, an East Pilot who  
21 wanted better pay and benefits would have felt pressure to vote for  
22 ratification. Indeed, because of this pressure, USAPA was concerned that a  
23 majority of East Pilots might ratify a Nicolau CBA before USAPA could  
24 complete its ouster of ALPA. Hence, leading up to the NMB election,  
25 USAPA argued that East Pilots should not yield to that pressure because  
26 USAPA will be able to ignore the Nicolau Award and integrate operations  
27 using date-of-hire. (*Id.* at ¶ 38.)  
28

1 The Transition Agreement set a balance. The East Pilots had to ratify  
2 a Nicolau CBA if they were to get improved pay and benefits. USAPA's  
3 second proposed remedy would disrupt this balance. It would allow the East  
4 Pilots to get improved pay and benefits without the Nicolau Award.<sup>6</sup>

5 USAPA's second proposal tells the East Pilots that, once they reject a  
6 Nicolau CBA, they will be allowed to negotiate and ratify a date-of-hire  
7 CBA. Indeed, USAPA's second proposed remedy would allow a second vote  
8 on a CBA, if it fails ratification, changed by substituting a date-of-hire  
9 seniority list for the Nicolau Award. In that context, ratification of a  
10 Nicolau CBA is *de facto* ratification of the Nicolau Award. That is plainly  
11 proscribed by ALPA Merger Policy and the Transition Agreement.

12 The Court must, therefore, reject USAPA's second proposed remedy.

### 13 **III. Plaintiffs Do Not Propose an Intrusive Remedy.**

14 Plaintiffs propose an Order enjoining USAPA from negotiating any  
15 CBA other than a Nicolau CBA. This Order would enjoin: (1) negotiating a  
16 non system-wide CBA; (2) negotiating a CBA that does not use the Nicolau  
17 Award; and (3) using dual-ratification procedures. Plaintiffs' proposed  
18 Order would prevent implementation of a system-wide date-of-hire seniority  
19 list. It would not compel integration of pilot operations.

20 Plaintiffs' proposed remedy is non-intrusive. Economic forces and  
21 established federal law, not the Court, will determine when and how  
22 USAPA and the Airline bargain. Unless USAPA violates this Order or some  
23 federal law such as the duty of fair representation, the Court will have no  
24 need to intrude.

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25  
26 <sup>6</sup> USAPA proposes an "Order directing USAPA to incorporate the  
27 Nicolau Award into any tentatively agreed to single CBA, and to then  
28 present that CBA for a single ratification vote by all USAPA members;  
provided that, in event of a failed ratification vote, this injunction will be  
dissolved." *USAPA Memo* at 3:4-6.

1 Plaintiffs’ proposed remedy will not be an undue or unjust burden. The  
2 proposed remedy properly limits USAPA and the Airline to system-wide  
3 collective bargaining. Indeed, the NMB has “expressed a preference for—or,  
4 in its words, a ‘commitment to’—system-wide collective bargaining.” *Ass’n*  
5 *of Flight Attendants, AFL-CIO v. USAir, Inc.*, 24 F.3d 1432, 1438 (C.A.D.C.  
6 1994) (citing *Atchison, Topeka & Santa Fe Ry. Co.*, 12 N.M.B. 95, 110  
7 (1985). There is no injustice to requiring that USAPA use the Nicolau  
8 Award in system-wide collective bargaining. Requiring use of the Nicolau  
9 Award is a central element of the bargain made in the Transition  
10 Agreement. Indeed, the Airline has already agreed to integrate pilot  
11 operations using the Nicolau Award. (*Plts.’ Controverting Sep. State. Facts*,  
12 ¶ 35.)

13 **IV. CONCLUSION**

14 USAPA persists in trying to abrogate the Transition Agreement. It  
15 proposes two remedies, both of which would effectively foreclose  
16 implementation of the Nicolau Award. In contrast, Plaintiffs propose a  
17 minimally intrusive remedy that would allow economic forces to determine if  
18 and when the Nicolau Award will be put into effect. The Court, therefore,  
19 should reject USAPA’s proposal.

20 Dated this 14th day of June, 2009.

21 **POLSINELLI SHUGHART, PC**

22  
23 By /s/ Andrew S. Jacob

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**CERTIFICATE OF SERVICE**

1 I hereby certify that on this 14th day of June 2009, I electronically  
2 transmitted the foregoing document to the U.S. District Court Clerk's Office  
3 by using the ECF System for filing and transmittal.

4 By /s/ Andrew S. Jacob

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