

1 LEE SEHAM, Esq. *pro hac vice*
LUCAS K. MIDDLEBROOK, Esq. *pro hac vice*
2 NICHOLAS P. GRANATH, Esq., *pro hac vice*
STANLEY J. SILVERSTONE, Esq., *pro hac vice*
3 SEHAM, SEHAM, MELTZ & PETERSEN, LLP
445 Hamilton Avenue, Suite 1204
4 White Plains, NY 10601
Tel: 914 997-1346; Fax: 914 997-7125

5 NICHOLAS J. ENOCH, Esq., State Bar No. 016473
LUBIN & ENOCH, P.C.
6 349 North 4th Avenue
7 Phoenix, AZ 85003-1505
Tel: 602 234-0008; Fax: 602 626 3586

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

10 Don ADDINGTON; John BOSTIC; Mark
BURMAN; Afshin IRANPOUR; Roger
11 VELEZ; and Steve WARGOCKI,

12 Plaintiffs,

13 vs.

14 US AIRLINE PILOTS ASSOCIATION,
US AIRWAYS, INC.,

15 Defendants,

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

**DEFENDANT USAPA’S MOTION FOR
LEAVE TO SUPPLEMENT THE
RECORD IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT
ON PLAINTIFFS’ DAMAGE CLAIMS**

16 Don ADDINGTON; John BOSTIC; Mark
BURMAN; Afshin IRANPOUR; Roger
17 VELEZ; and Steve WARGOCKI,

18 Plaintiffs,

19 vs.

20 Steven H. BRADFORD, Paul J. DIORIO,
Robert A. FREAR, Mark. W. KING, Douglas
L. MOWERY, and John A. STEPHAN,

21 Defendants.
22

Case No. 2:08-cv-1728-PHX-NVW

1 TO : Plaintiffs, all parties, and their attorneys of record.

2 **NOTICE.**

3 PLEASE TAKE NOTICE that Defendant US Airline Pilots Association
4 (“USAPA”) will move this Court, to be heard without oral argument, for an order
5 granting USAPA leave to supplement the record in support of its motion for summary
6 judgment on plaintiffs’ damage claims (Doc. # 487) based on new evidence not
7 previously available.

8 **MOTION.**

9 COMES NOW Defendant to move this Court for an order granting USAPA leave
10 to supplement the record in support of its motion for summary judgment on plaintiffs’
11 damage claims (Doc. # 487) based on **new evidence not previously available.**
12 Specifically, USAPA seeks leave to submit in support of its motion for summary
13 judgment the June 19, 2009 letter from plaintiffs’ counsel to Arbitrator Richard Bloch,
14 in which plaintiffs withdrew their Counts I and II grievance against US Airways.
15 (Attached as “Exhibit A”).¹ USAPA submits that the withdrawal of this grievance
16 constitutes a voluntary abandonment of plaintiffs’ damage claims and unfairly
17 prejudices USAPA by exposing it to damages that the Company, in whole or in part,
18

19 ¹ A court possesses the discretion to allow parties to supplement the record of the case.
20 See e.g. *United States of America v. Organon, Inc.*, 2009 U.S. Dist. LEXIS 30093, at *8
21 (D.N.J. Apr. 7, 2009); *Pepper v. JC Penny Corp., Inc.*, 2008 U.S. Dist. LEXIS 88494, at
22 *8 (W.D. Wash. Oct. 16, 2008) (granting defendant’s motion to supplement summary
judgment record with evidence obtained after filing of reply brief but before ruling on
motion); *Marsh v. Johnson*, 263 F. Supp. 2d 49, 53 (D.D.C. 2003) (collecting cases).

1 should pay.

2 This Motion is supported by the following points and authorities.

3
4 **POINTS & AUTHORITIES.**

5 The plaintiffs originally commenced this action against US Airways, Inc. (“US
6 Airways”) and USAPA alleging a hybrid breach of CBA and DFR action. Count I of
7 their complaint alleged that US Airways “breached its collective bargaining agreement
8 by furloughing West Pilots ahead of New Hires and failing to furlough West Pilots and
9 East Pilots according to the Nicolau Award.” *Addington v. US Airline Pilots Ass’n*, 588
10 F. Supp. 2d 1051, 1058 (D. Ariz. 2008). Count II of plaintiffs’ complaint alleged that
11 “US Airways has been in breach of the West CBA terms found in the Transition
12 Agreement because it has not been negotiating with USAPA in good faith to institute
13 Integrated Operations by adopting a single collective bargaining agreement that would
14 implement the Nicolau List.” (Doc. # 86, FAC, ¶ 101). “On this theory, if reasonable
15 negotiating efforts had been made, operations would have been consolidated and the
16 Nicolau Award would protect the West Pilots.” 588 F. Supp. 2d at 1058. Counts I and
17 II of plaintiffs’ complaint against US Airways were dismissed by this Court for lack of
18 subject matter jurisdiction because as “minor disputes” a Railway Labor Act Board of
19 Adjustment provided the exclusive remedy. *Id.* at 1063-1064.

20 Plaintiffs’ remaining Count III DFR claim against USAPA was, as this Court
21 recognized, “basically an injunction count against USAPA . . .” (Dec. 15, 2008 Tr. at
22

1 18:19-20). The monetary damages that plaintiffs did allege against USAPA were, as
2 expressly pled by plaintiffs, always tied to the alleged breach of the collective
3 bargaining agreements by US Airways.

4 Because USAPA failed to give due consideration to West Pilot interests, it
5 has a seniority policy that caused Defendant US Airways to breach its
6 collective bargaining agreement with West Pilots. Because USAPA is
7 causing Defendant US Airways to breach its collective bargaining
8 agreement with West Pilots, it has caused Plaintiffs and other West Pilots
9 the injuries alleged in Counts One and Two. (Doc. # 86, FAC, ¶¶ 111-
10 112).

11 By acting arbitrarily, for improper purpose and/or in bad faith, USAPA
12 caused Defendant US Airways to breach its collective bargaining
13 agreement with West Pilots. Because USAPA caused Defendant US
14 Airways to breach its collective bargaining agreement with West Pilots, it
15 caused Plaintiffs and other West Pilots the injuries alleged in Counts One
16 and Two. (Doc. # 86, FAC, ¶¶ 118-119).

17 As a direct and foreseeable result of actionable conduct alleged herein,
18 USAPA has caused and contributed to Defendant US Airways being in
19 breach of the West CBA as modified by the Transition Agreement. (Doc.
20 # 86, FAC, ¶ 77).

21 When this Court denied USAPA's motion to dismiss and retained jurisdiction to
22 adjudicate plaintiffs' Count III DFR claim, it decided to "bifurcate this dispute into
separate arbitration proceedings against the airline and judicial proceedings against the
union." 588 F. Supp. 2d at 1067. The System Board, chaired by a single neutral
arbitrator, Richard Bloch, would decide whether or not a breach of the applicable
collective bargaining agreements had occurred, and therefore under the theory pled by
plaintiffs, whether they were entitled to monetary damages for "lost improvements in
wages, benefits and working conditions." (Doc. # 86, FAC, ¶ 77-82).

1 On December 2, 2008, Plaintiffs filed their grievance based on the dismissed
2 Counts I and II of their Complaint. Plaintiffs were given the opportunity to present their
3 Counts I and II grievance to Arbitrator Bloch at the beginning of January 2009, but
4 turned down the proposed date. Thereafter, plaintiffs' Counts I and II grievance was
5 scheduled to be arbitrated on May 27-28 of this year. Solely at the request of plaintiffs,
6 those scheduled dates were cancelled, and Arbitrator Bloch imposed a deadline of June
7 19, 2009 for plaintiffs to decide if and when they desired to reschedule the Counts I and
8 II arbitration dates. On June 19, 2009, by letter signed by plaintiffs' counsel Kelly
9 Flood, plaintiffs informed Arbitrator Bloch that they had decided to "withdraw their
10 grievance" in its entirety. (Exhibit A at p. 5). Arbitrator Bloch accepted plaintiffs'
11 withdrawal by e-mail the same day. (Exhibit B).

12 Plaintiffs' damage claims against USAPA were always based on their theory that
13 USAPA's conduct *caused* US Airways to breach the Transition Agreement and the
14 West CBA, thereby *causing* plaintiffs to incur lost improvements in wages, benefits and
15 working conditions. (Doc. # 86, FAC, ¶ 77-82). Therefore, there can be no finding that
16 USAPA caused any damages without a finding that the applicable contracts were in fact
17 breached. Moreover, abandonment of Counts I and II unfairly prejudices USAPA by
18 effectively denying apportionment. The decision as to whether those agreements were
19 breached was to be decided by the System Board as part of a "bifurcated" proceeding
20 with this Court. *See* 588 F. Supp. 2d at 1067.

21 This dispute is no longer "bifurcated" with the System Board due to plaintiffs'
22

1 recent decision to unilaterally withdraw their Counts I and II grievance from
2 consideration by Arbitrator Bloch. This decision to withdraw constitutes plaintiffs'
3 waiver of their damage claims altogether.² Because the System Board was the exclusive
4 forum with jurisdiction to determine whether any breach had occurred that would
5 support a finding that USAPA's conduct actually *caused* plaintiffs' alleged damages,
6 and plaintiffs have voluntarily decided to forego that determination, there will now be
7 no decision from the appropriate forum as to whether or not a breach occurred that
8 would support a causation of damage finding against USAPA.

9 If plaintiffs' damage claims against USAPA survive the current motion for
10 summary judgment, the plaintiffs' abandonment of the System Board proceeding has
11 the effect of deeply prejudicing USAPA. Indeed, as reflected in plaintiffs' own
12 pleadings, it is hard to perceive how USAPA could have inflicted damages as a result of
13 its negotiating conduct without the cooperation or acquiescence of the Company. As
14 recognized by the Court early in this litigation, "Count 2 [against US Airways] is
15 inseparable from Count 3 [against USAPA]," and "[y]ou can't decide one and not the
16 other, whether it's an arbitrator or me." (Oct. 29, 2008 Tr. at 43). This is especially so

17 _____
18 ² Plaintiffs' decision to withdraw from the System Board's consideration whether a
19 breach of the applicable CBA's occurred sheds light on their misguided attempt to
20 amend their complaint, through their summary judgment response brief, to allege a new
21 theory of joint and several liability against USAPA and individual East Pilots. In
22 obvious recognition that there could be no damage finding without a determination that
a breach occurred, plaintiffs decided to toss a hail mary by jettisoning their joint and
several liability theory against US Airways and USAPA (Doc. # 86, FAC, ¶123(C)),
and instead replaced it with a brand new joint and several liability theory, never pled,
against USAPA and individual East Pilots.

1 in the context of plaintiffs' current damage claims.

2 Therefore, in the absence of an order granting USAPA summary judgment and
3 dismissing the plaintiffs' damage claims, USAPA anticipates that it may be necessary to
4 seek leave to amend its Answer to include a cross-claim against or to implead US
5 Airways for indemnification, contribution and, or apportionment. Plaintiffs' decision to
6 withdraw from arbitration requires that the Company be brought back into this
7 proceeding, because this Court is now the *only* venue in which USAPA can protect
8 itself against exclusive liability for the damage claims alleged by plaintiffs.

9
10 **REQUESTED REMEDY.**

11 In consideration of the foregoing, USAPA respectfully requests that the Court
12 grant leave and allow USAPA to supplement the record in support of its motion for
13 summary judgment on plaintiffs' damage claims (Doc. # 487) with plaintiffs' voluntary
14 withdrawal of their Counts I and II grievance from consideration by the System Board
15 (Exhibit A).

16 Respectfully Submitted,

17 Dated: June 25, 2009

18 By: /s/ Lucas K. Middlebrook, Esq.

19 Nicholas P. Granath, Esq. (*pro hac vice*)
ngranath@ssmplaw.com
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
2915 Wayzata Blvd.
Minneapolis, MN 55405

20 Lee Seham, Esq. (*pro hac vice*)
21 Lucas K. Middlebrook, Esq. (*pro hac vice*)
Stanley J. Silverstone, Esq. (*pro hac vice*)
22 Theresa Murphy, Esq. (*pro hac vice*)

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SEHAM, SEHAM, MELTZ & PETERSEN, LLP
445 Hamilton Avenue, Suite 1204
White Plains, NY 10601

Nicholas Enoch, Esq. State Bar No. 016473
stan@lubinandenoach.com
LUBIN & ENOCH, PC
349 North 4th Avenue
Phoenix, AZ 85003-1505

*Attorneys for Defendant
US Airline Pilots Association*

1
2 **CERTIFICATE OF SERVICE**

3 This is to certify that on the date indicated herein below true and accurate copies
4 of the foregoing documents and their attachments, *to wit*,

- 5 • Defendant USAPA’s Motion For Leave To Supplement The Evidentiary Record
6 In Support Of Its Motion For Summary Judgment On Plaintiffs’ Damage Claims
7 (with Exhibits A & B).
- 8 • Certificate of Service

9 were electronically filed with the Clerk of Court using the CM/ECF system, which
10 will send notification of such filing to all admitted counsel who have registered with
11 the ECF system, including but not limited, to:

| | | |
|------------------------|-------------------------------|-----------------------|
| 12 Marty Harper | Don Stevens | Andrew S. Jacob |
| MHarper@Polsinelli.com | DStevens@Polsinelli.com | AJacob@Polsinelli.com |
| 13 Kelly J. Flood | Katie Brown | |
| KFlood@Polsinelli.com | <u>KVBrown@Polsinelli.com</u> | |

14 Who are admitted counsel for the Plaintiffs in this matter, and,

| | |
|------------------------|------------------------|
| 15 Robert A. Siegel | Rachel S. Janger |
| <u>rsiegel@omm.com</u> | <u>rjanger@omm.com</u> |

16 O’Melveny & Meyers LLP
17 400 S. Hope St.
18 Ste 177
19 Los Angeles, CA 90071-2899, and,

| | |
|---------------------------------|-----------------------------------|
| 20 Sarah A. Asta | Karen Gillen |
| <u>Sarah.Asta@USAirways.com</u> | <u>Karen.gillen@USAirways.com</u> |

21 who are admitted counsel for US Airways, Inc. in this matter.

22 Further, I certify that paper hard copies shall be provided to The Honorable Neil
V. Wake, District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.

On June 25, 2009, by:

/s/ Lucas K. Middlebrook, Esq.