Marty Harper (#003416)
mharper@polsinelli.com
Kelly J. Flood (#019772)
kflood@polsinelli.com
Andrew S. Jacob (#22516)
ajacob@polsinelli.com
Katherine V. Brown (#26546)
kvbrown@polsinelli.com
POLSINELLI SHUGHART, P.C.
CityScape
One East Washington St., Suite 1200
Phoenix, AZ 85004
Phone: (602) 650-2000
Fax: (602) 264-7033
Attorneys for Addington Pilots

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

US AIRWAYS, INC., a Delaware corporation, *et al.*, *Plaintiff*, vs. Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; Steve WARGOCKI; Michael J. SOHA; Rodney Albert BRACKIN; and George MALIGA, on behalf of themselves and the certified WEST PILOT CLASS, and US AIRLINE PILOTS ASS'N, an unincorporated association, *Defendants*.	CASE NO. 2:10-cv-01570-PHX-ROS **WEST PILOTS' MOTION FOR SUMMARY JUDGMENT** (Oral argument requested)

Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin IRANPOUR, Roger VELEZ, Steve WARGOCKI, Michael J. SOHA, Rodney Albert BRACKIN, and George MALIGA, on behalf of themselves and the certified WEST PILOT CLASS (collectively, the "West Pilots"), move this Court for summary judgment, pursuant to Fed. R. Civ. P. 56(a) and (c). Plaintiffs base this motion on the *Memorandum of Points and Authorities* that follows, a *Separate Statement of Uncontroverted Facts*, and an appendix of supporting documents and

deposition transcripts. In the event that USAPA challenges the authenticity of any exhibits, the West Pilots are prepared to submit affidavits establishing authenticity and, where needed, foundation.

Dated this 27th day of January, 2012.

POLSINELLI SHUGHART, PC

/s/ Andrew S. Jacob
By _____
Marty Harper
Kelly J. Flood
Andrew S. Jacob
Katherine V. Brown
CityScape
One East Washington St., Ste. 1200
Phoenix, AZ 85004
Attorneys for Addington Pilots

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Memorandum of Points and Authorities

I. Issues

This litigation can be resolved by summary judgment on these five issues:

1. A bargaining unit cannot elect a successor union to avoid an existing union's duty of fair representation. The duty of fair representation bound ALPA (the original union) to honor the Nicolau arbitration as final and binding. Is USAPA (ALPA's successor) also duty-bound to honor the arbitration?

2. A union must have an objectively legitimate purpose to justify dishonoring a final resolution of a seniority integration dispute. The Nicolau arbitration was a final resolution of a seniority integration dispute. Must USAPA have an objectively legitimate purpose to justify implementing a collective bargaining agreement that would dishonor that arbitration?

3. An objectively legitimate union purpose benefits the bargaining unit as a whole in the context of wages, working conditions, or negotiating leverage. Dishonoring the Nicolau arbitration would not accomplish any of these legitimate ends. Would USAPA breach its duty of fair representation if it implements a collective bargaining agreement that dishonors that arbitration?

4. Federal policy favors enforcing valid arbitrations. The validity of the Nicolau arbitration is *res judicata*. Would dishonoring the Nicolau arbitration offend federal policy?

5. A carrier may not implement a contract with terms that violate a union's duty of fair representation. After this litigation, the Airline would know that a collective bargaining agreement that would dishonor the Nicolau arbitration would violate USAPA's duty of fair representation. May the Airline implement such a contract?

II. Factual Background

This litigation concerns a dispute about pilot seniority integration following the 2005 merger of two airlines. SOF, ¶ 1. In May 2005, US Airways

was in Chapter 11 bankruptcy for the second time in two years. *Id.* at ¶ 2. Its reorganization plan called for it to merge with America West to form a new airline that would also be known as US Airways (hereinafter called the "Airline"), pursuant to a contract referred to as the Transition Agreement. *Id.* at ¶¶ 1, 3. The pilots who came from America West are known as West Pilots. *Id. at* ¶ 4. And those from US Airways are known as East Pilots. *Id. at* ¶ 5. At the time of the merger, the Air Line Pilots Association ("ALPA") represented both pilot groups. *Id.* at ¶ 6. Under ALPA governance, each pilot group was represented by a Master Executive Council ("MEC"). *Id.* at ¶¶ 7, 8.

At the time of the merger, there were significant differences between the two airlines and their pilot groups. *E.g.*, *id.* at ¶¶ 9-11. US Airways was a larger airline and, including pilots on furlough, East Pilots outnumbered West Pilots, 5,100 to 1,900. *Id.* at ¶ 9. All of the West Pilots were active (had flying jobs). *Id.* at ¶ 10. In contrast, approximately 1700 of the East Pilots were on furlough. *Id.* at ¶ 11.

As a condition of US Airways exiting bankruptcy, the bankruptcy court plan confirmation order directed America West, US Airways, and ALPA to enter into the Transition Agreement. *Id.* at ¶ 3. They did so with the chairmen of each ALPA MEC signing on behalf of the pilots. *Id.* at ¶¶ 12-13. The Transition Agreement provided, among other things, that the pilot groups would integrate their seniority lists according to defined procedures set out in detail in the ALPA constitution and called "ALPA Merger Policy." *Id.* at ¶ 14. Pursuant to ALPA Merger Policy, the single integrated seniority list would be created by two Merger Committees, appointed by each MEC and representing one of the two pilot groups. *Id.* at ¶ 15. Under ALPA Merger Policy, if the Merger Committees cannot negotiate seniority integration they may hire "outside legal counsel" unaffiliated with ALPA and proceed to arbitration. *Id.* at ¶¶ 16-17. The purpose

of such arbitration is to determine a "final and binding," "fair and equitable" seniority integration. *Id.* at ¶¶ 18-19.

And that is what happened here. *Id.* at ¶¶ 20-21. The two groups hired lawyers and eventually proceeded to arbitration. *Id.* at ¶ 22. The lawyers made arguments and submitted extensive briefs to a nationally recognized arbitrator, George Nicolau. *Id.* at ¶¶ 23-24. In the arbitration, the East Merger Committee argued, *inter alia,* that the East Pilots on furlough at the time of the merger were entitled to seniority rights based upon their dates of hire at US Airways, without regard their furloughs. *Id.* at ¶ 25. And the West Merger Committee argued, *inter alia*, that active West Pilots should be placed ahead of East Pilots who were on furlough at the time of the merger. *Id.* at ¶¶ 26-27.

The Airline played no part in the arbitration. *Id.* at ¶ 28. But, subject to predefined conditions that protected its economic interests, the Airline agreed in advance to accept the outcome of the arbitration as the final resolution of this seniority integration dispute. *Id.* at ¶ 29.

Mr. Nicolau issued his decision on May 1, 2007, in a document referred to as the Nicolau Award. *Id.* at ¶ 30. The Nicolau Award created an integrated seniority list that placed approximately 500 of the most senior East Pilots at the top of the list because they flew wide-body aircraft and no West Pilot flew such aircraft. *Id.* at ¶ 31. At the other end, the Nicolau Award placed all East Pilots who were on furlough when the airlines merged at the bottom of the list because they did not bring jobs to the merger. *Id.* at ¶ 32. It then blended the remainder of the two pilot lists. *Id.* at ¶ 33.

On December 20, 2007, the Airline accepted the integrated seniority list created by Mr. Nicolau. *Id.* at ¶ 34. And that should have been the end of it.

But it wasn't.

Soon after Mr. Nicolau announced his decision, the East MEC appealed to ALPA's Executive Committee to overturn the Nicolau arbitration. *Id.* at ¶ 35.

But, after considering the issue, ALPA did just the opposite and ordered the East Pilots to implement the arbitration. *Id.* at ¶¶ 36-38. The East MEC also challenged the validity of the Nicolau arbitration in a lawsuit that ended up in the D.C. district court. *Id.* at ¶ 39. That claim was later dismissed. *Id.* at ¶ 40.

Beginning in May 2007, East Pilot Stephen Bradford formed a plan to create a new union (USAPA) to oust ALPA in the misguided hope that this would allow them to legally dishonor the arbitration. *Id.* at ¶¶ 41-44. Mr. Bradford envisioned that East Pilots would control this union because they were in the majority. *Id.* at ¶¶ 43-44. If they controlled the union, he reasoned, it would "protect" East Pilot interests over those of the West Pilots. *Id.*

Mr. Bradford and other East Pilots formed a committee that sought legal advice about starting this new union. *Id.* at ¶¶ 45-47. Lawyers cautioned them to take care with "the language [they] use in setting up [their] new union" does not "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, that in the opinions of most judges, should be allowed to stand due to no gross negligence or fraud." *Id.* at ¶ 46.

In August 2007, Bradford circulated a legal opinion asserting that, unlike ALPA, USAPA "would be free to negotiate with US Airways concerning the terms of any seniority integration." *Id.* at ¶ 48; *see also id.* at ¶¶ 46-47. USAPA's campaign materials equated its election with opposition to the Nicolau arbitration. *Id.* at ¶¶ 49-51. In those materials, USAPA stated it would "re-negotiate" seniority. *Id.* at ¶ 52. In contrast, USAPA admitted that ALPA was "bound to defend" the Nicolau arbitration. *Id.* at ¶ 53.

While Mr. Bradford was forming USAPA and collecting support to hold an election to challenge ALPA, ALPA was in contract negotiations with the Airline. *Id.* at ¶¶ 54-56. On August 10, 2007, USAPA stated that seniority would no longer be "an open question" once and if ALPA completed such contract

negotiations. *Id.* at ¶ 57. Five days later, the East MEC stopped participating in the joint contract negotiations. *Id.* at ¶¶ 58-61.

A representation election between USAPA and ALPA was held in early 2008. *Id.* at ¶ 62. USAPA won and began to represent a bargaining unit comprised of both pilot groups on April 18, 2008. *Id.* at ¶¶ 63-64. Later in 2008, USAPA presented, and to this day has not withdrawn, a date-of-hire seniority proposal to the Airline—a proposal that would put hundreds of West Pilots at risk of furlough before any of the East pilots who were on furlough at the time of the merger. *Id.* at ¶¶ 65-70. USAPA has repeatedly made it clear that it has no intention to ever consider honoring the Nicolau arbitration. *Id.* at ¶¶ 71-73.

III. Legal Argument

The West Pilots' argument is summarized as follows: USAPA's successor status does not allow it to disregard its predecessor's statutory duties. ALPA's statutory duty of fair representation required an objectively legitimate union purpose to justify dishonoring the Nicolau arbitration. Because USAPA has no such purpose, it would breach its duty of fair representation if it dishonors the Nicolau arbitration. And in so doing, USAPA would also offend federal policy favoring the finality of valid arbitrations. Finally, because it cannot take the benefit of an illegal contract, the Airline may not implement a contract that would breach USAPA's duty of fair representation.[1]

A. USAPA's successor status does not allow it to disregard its predecessor's statutory duties.

A bargaining unit cannot elect a successor union to avoid an existing union's duty of fair representation. The duty of fair representation bound ALPA

[1] Because the same duty of fair representation applies under both the RLA and the NLRA, *Vaca v. Sipes*, 386 U. S. 171, 177 (1967), courts cite authority from both contexts and we do so here.

to honor the Nicolau arbitration as final and binding. USAPA, therefore, is equally bound to honor the arbitration.

1. A bargaining unit cannot elect a successor union to avoid an existing union's duty of fair representation.

A bargaining unit can no more avoid its obligations by changing its union than by changing its attorney. *See Matter of Triboro Coach Corp. v. State Labor Relations Bd.*, 36 N.E. 2d 315, 318 (N.Y. 1941) ("[T]here is nothing in this right of union members to select a new bargaining representative which would impair the sanctity of the obligations of the existing contract while that contract was still in force."); *Barbein v. Superior Meter Co.*, 90 N.Y.S. 2d 615, 617-618 (N.Y. Sup. 1949) ("When the plaintiffs made the union their bargaining representative and through that representative contract with their employer, they cannot avoid that contract by resigning from the union and joining another."). "[S]uccessor labor organizations," for example, are "held liable for the discriminatory acts of their predecessors, according to the same factors used to determine successor liability of corporations." *Parker v. Metro. Transp. Auth.*, 97 F. Supp. 2d 437, 451 (S.D.N.Y. 2000); see also *NLRB v. Laborers' Int'l Union*, 882 F.2d 949, 951-52 (5th Cir. 1989) (discussing doctrine and collecting cases).

USAPA will argue (wrongly) that as a successor union it is free to contract on a clean slate. It is true that unions and employers have the legal power to amend their collective bargaining contracts. *See Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 427 F.2d 476, 489 (7th Cir. 1970) ("parties to a labor contract are always free to amend their agreements"). But a union must exercise such power in good faith. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 513 (9th Cir. 1978) (a collective bargaining "agreement cannot be altered in a manner which would violate public policy."). The power to contract is a given. Yet it provides USAPA no support.

USAPA also gets no support from *AFA v. USAir, Inc.*, 24 F.3d 1432 (D.C. Cir. 1994), which held that a successor union has the same *status quo* obligation as its predecessor. *Id.* at 1438. To explain, the *AFA* court quoted a 1935 NMB position statement:

> When there is an agreement in effect between a carrier and its employees signed by one set of representatives and the employees choose new representatives who are certified by the Board, the Board has taken the position that a change in representation does not alter or cancel any existing agreement made in behalf of the employees by their previous representatives.

First Ann. Report of the Nat'l Med. Bd., 23-24 (1935).

The Transition Agreement is a collective bargaining agreement because it is "an agreement in effect between a carrier and its employees." *Id.*; *see also* SOF at ¶ 3. As such, it was neither altered nor canceled when the bargaining unit voted ALPA out and USAPA in. Consequently, all its provisions remain in effect until changed, not just those provisions agreeable to the East Pilot majority. And any efforts by USAPA to make a new contract changing such provisions are constrained by its duty of fair representation.

It is true that, in *AFA*, the D.C. District Court stated that a successor union is not "in any way limited by the [predecessor's] contract in [its] pursuit of new terms of employment." 24 F.3d at 1440. But when read in context, that language merely recognized the general principle of freedom of contracting. The court did not hold (and had no reason or basis to hold) that a successor union can contract without regard to the duty of fair representation.

As a matter of law, therefore, a bargaining unit cannot evade its union's duty of fair representation by electing another in its place. USAPA's successor status, therefore, does not allow it to avoid duties that constrained ALPA. If the statutory duty of fair representation bound ALPA to honor the Nicolau arbitration, it binds USAPA no less now.

2. The duty of fair representation bound ALPA to honor the Nicolau arbitration as final and binding.

The duty of fair representation "arises from a union's statutory role as the exclusive bargaining representative for a unit of employees." *McNamara-Blad v. Ass'n of Prof'l Flight Attendants*, 275 F.3d 1165, 1169-71 (9th Cir. 2002). It requires a union "to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca*, 386 U.S. at 177. Because it constrains a union's contracting power, "[a]n amendment to a collective bargaining agreement" is not "valid" if it conflicts with the duty. *Voccio v. General Signal Corp.*, 732 F. Supp. 292, 296 n.4 (D.R.I. 1990).

A line of decisions establishes that the duty of fair representation binds ALPA to follow its merger policy when integrating seniority lists after an airline merger. In one instance, ALPA failed to do this and directly implemented a seniority integration that favored the majority group. *Bernard v. Air Line Pilots Ass'n, Int'l*, 873 F.2d 213, 216-17 (9th Cir. 1989). The District Court held that this breached ALPA's duty of fair representation. *Id.* at 217. The Ninth Circuit affirmed, explaining that "the district court acted within its discretion in issuing an order to set the tainted agreement aside, compel the parties to reach a new one according to ALPA's own internal procedures, and submit to a stipulated system for promotions and furloughs in the meantime." *Id.* at 218.

In another instance, *Air Wisconsin Pilots Protection Committee v. Sanderson*, 909 F.2d 213 (7th Cir. 1990), ALPA was sued by a majority faction because it followed its merger policy rather than yield to majority pressure as it did in *Bernard*. This time ALPA was in the right. *Id.* at 215. The Seventh Circuit explained that ALPA was bound to honor an arbitrated seniority list integration because "[i]f ALPA were free to ignore the merged seniority list, the employees of the post-merger airline would have very little job security" and "disputes over seniority would fester—as they have done in this case." *Id.* at 217.

The rule could not be clearer. Where two pilot groups merge under ALPA governance, ALPA is duty-bound to implement an integrated seniority list created through neutral arbitration pursuant to ALPA Merger Policy. If ALPA had remained the union here, therefore, it would have violated its duty of fair representation if it had not fully honored the Nicolau arbitration.

ALPA's duty to honor the Nicolau arbitration was even more compelling here than it was in *Bernard* and *Air Wisconsin*. This is because the Bankruptcy Court made the Transition Agreement (which adopts ALPA Merger Policy by reference) a condition of US Airways exiting bankruptcy. In so doing, it effectively ordered ALPA to comply with ALPA Merger Policy. SOF at ¶ 3. Indeed, USAPA admits that USAPA had was "bound to defend" the Nicolau arbitration. SOF at ¶ 53. As a matter of law, therefore, both a final court order and the duty of fair representation bound ALPA to honor the Nicolau arbitration as final and binding.

3. Because USAPA is ALPA's successor, it is duty-bound to honor the Nicolau arbitration.

Because USAPA replaced ALPA as the representative of the identical bargaining unit, it succeeded to the legal constraints that bound ALPA. Those constraints unquestionably bound ALPA to honor the Nicolau arbitration as final and binding. They, therefore, bind USAPA no less.

B. The statutory duty of fair representation required ALPA (and now USAPA) to have an objectively legitimate union purpose to justify dishonoring the Nicolau arbitration.

A union must have an objectively legitimate purpose to justify dishonoring a valid final resolution of a seniority integration dispute. The Nicolau arbitration was a valid final resolution of a seniority integration dispute. USAPA, therefore, must have a legitimate purpose to justify implementing a collective bargaining agreement that would dishonor the arbitration.

1. A union must have an objectively legitimate purpose to justify dishonoring a valid final resolution of a seniority integration dispute.

A union has a right to "alter seniority rights by agreement with the employer," but only where it does so "in the exercise of 'good faith and honesty of purpose.'" *Johnson v. Archer-Daniels-Midland Co.*, 203 F. Supp. 636, 638 (D.C. Mich. 1962). Unions are particularly constrained in this regard because altering seniority rights inherently "favor[s] some members at the expense of others." *Laborers & Hod Carriers Loc. No. 341 v. NLRB*, 564 F.2d 834, 840 (9th Cir. 1977). In that respect, bargaining for seniority differs from bargaining for wages, hours, or working conditions, or other items that can benefit the bargaining unit as a whole. Consequently, when a union bargains to reorder seniority it must show it has a "legitimate purpose." *Id.*

A line of cases supports the foregoing propositions and demonstrates that USAPA does not have an objectively legitimate union purpose to alter the existing agreement to honor the Nicolau arbitration. The Seventh Circuit, in *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 798-99 (7th Cir. 1976), held that a union's "seniority decisions may not be made solely for the benefit of a stronger, more politically favored group over a minority group." The workers in *Barton Brands* agreed to a final resolution of a seniority dispute that arose in the context of a merger. *Id.* at 796. But, when layoffs began, the majority group insisted on reopening the seniority issue. *Id.* The union complied and re-formulated seniority, putting the minority group first in line for layoffs. *Id.* The Court strongly disapproved and required the union to "show some objective justification for its conduct." *Id.* at 800.

Contrary to USAPA's arguments, *Barton Brands* is still good law in the Seventh Circuit. For example, *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524 (7th Cir. 1992), affirmed *Barton Brands'* holding, stating that "a union may not

juggle the seniority roster for no reason other than to advance one group of employees over another." *Id.* at 1537. In *Rakestraw*, however, ALPA had an objectively legitimate purpose to reopen a final resolution of a seniority dispute. ALPA made seniority changes that objectively strengthened its power to call a legal strike. *Id.* at 1532. These changes rewarded pilots who had honored ALPA's picket lines in the past and punished those who had not. *Id.* Because strengthening a union's power to call a strike strengthens its negotiation leverage, this was a legitimate purpose.

The Ninth Circuit also applies *Barton Brands* doctrine. It holds, for example, that union conduct "unrelated to legitimate union interests" is wrongful. *Robesky v. Oantas Empire Airways Ltd.*, 573 F.2d 1082, 1090 (9th Cir. 1978). And it requires that a union have a "legitimate purpose" to reorder seniority. *Laborers & Hod Carriers*, 564 F.2d at 840. As a matter of law, therefore, a union (such as USAPA) must have an objectively legitimate purpose—something other than a desire to satisfy the majority—to dishonor a final resolution of a seniority dispute (such as the Nicolau arbitration).

2. The validity of the Nicolau arbitration is *res judicata*.

The East Pilots had a full opportunity to challenge the validity of the Nicolau Award. They did so within ALPA's governance and lost. SOF at ¶¶ 35-38. They also did so in the D.C. district court but abandoned their claim. *Id.* at ¶¶ 39-40. That should be the end of it. *Federal Bank, F.S.B. v. Durga Ma Corp.*, 386 F.3d 1306, 1313 (9th Cir. 2004) (recognizing the federal "policy favoring the finality of arbitration awards"); *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1321 (9th Cir. 1992) ("An arbitration decision can have *res judicata* . . . effect."). The validity of the Nicolau arbitration, therefore, is *res judicata*.

3. USAPA must have an objectively legitimate union purpose to justify implementing a collective bargaining agreement that would dishonor the Nicolau arbitration.

Under *Barton Brands* and its progeny, a union must have an objectively legitimate purpose—something other than a desire to satisfy the majority—to justify dishonoring a valid arbitrated final resolution of a seniority integration dispute. Because the validity of the Nicolau arbitration is *res judicata*, USAPA must have an objectively legitimate union purpose to justify implementing a collective bargaining agreement that would dishonor that arbitration.

C. Because USAPA would not have an objectively legitimate union purpose, it would breach its duty of fair representation if it dishonors the Nicolau arbitration.

An objectively legitimate union purpose benefits the bargaining unit as a whole in the context of wages, working conditions, or negotiating leverage. Dishonoring the Nicolau arbitration would not accomplish any of those ends. USAPA, therefore, would breach its duty of fair representation if it implements a collective bargaining agreement that dishonors that arbitration.

1. An objectively legitimate union purpose benefits the bargaining unit as a whole in the context of wages, working conditions, or negotiating leverage.

A union's purpose is to represent workers when it bargains with their employer. An objectively legitimate union purpose, logically, must further that function. It would be a legitimate purpose, for example, to get the workers better wages and/or benefits. And it would be a legitimate purpose to enhance its bargaining leverage. See *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 742 (1981) (observing that it is a legitimate goal in collective bargaining to seek "increased benefits for workers in the bargaining unit as a whole.").

Absent unusual circumstances, reordering seniority among workers cannot have a legitimate purpose because it provides no net benefit to the bargaining unit as a whole. This is because seniority is a zero-sum situation where reordering merely shifts a benefit from one worker to another. One worker's gain is necessarily another's loss. In a sense, reordering seniority is akin to redistributing an insolvent debtor's funds among creditors—there is no net benefit. *In re El Toro Materials Co., Inc.*, 504 F.3d 978, 979 (9th Cir. 2007) ("Distributing money to satisfy claims is, in most cases, a zero-sum game: Every dollar given to one creditor is a dollar unavailable to satisfy the debt owed to others. For Paul to be paid in full, Peter must be short-changed."). Hence, there must be an unusual circumstance, such as was present in *Rakestraw*, to justify reordering seniority—particularly where the reordering favors the majority. 981 F.2d at 1537.

2. Dishonoring the Nicolau arbitration would not benefit the bargaining unit as a whole.

USAPA has two objective purposes for dishonoring the Nicolau arbitration: (1) to abide by strong East Pilot preference for date-of-hire seniority integration; and (2) to abide by its self-imposed date-of-hire constitutional mandate. Arguably, because USAPA's constitutional mandate was imposed by the majority, these come to the same thing. As demonstrated below, neither of these purposes is objectively legitimate. USAPA's objective purpose for dishonoring the Nicolau arbitration, therefore, is not legitimate.

a. USAPA's objective purpose to abide by strong East Pilot preference for date-of-hire seniority integration is not legitimate.

The evidence objectively demonstrates that USAPA would dishonor the Nicolau arbitration to abide by strong East Pilot preference for date-of-hire seniority integration. Leading up to the election, for example,

USAPA pandered to the East Pilots' preference for date-or-hire seniority integration by repeatedly promising that it would only negotiate for date-of-hire seniority integration. SOF at ¶¶ 48-53. It continued to do so after the election. And USAPA continues to state its unwavering intention to insist on date-of-hire seniority integration. *Id.* at ¶¶ 71-73.

Satisfying the desires of the East Pilot majority in this context is not objectively legitimate because it can't provide an overall benefit to the bargaining unit. It won't strengthen USAPA's negotiating leverage with the Airline. All it would do is curry favor with the a politically powerful faction—a purpose that was rejected as illegitimate in *Bernard*, *Barton Brands*, and *Air Wisconsin*. This also falls far short of the legitimate purpose recognized in *Rakestraw*. No matter how strongly the East Pilots prefer date-of-hire seniority integration, abiding by their preference is not a legitimate union purpose. East Pilot preference, therefore, cannot justify USAPA dishonoring the Nicolau arbitration.

b. USAPA's objective purpose to abide by a date-of-hire constitutional mandate is not legitimate.

The evidence also objectively demonstrates that USAPA would dishonor the Nicolau arbitration to abide by its self-imposed date-of-hire constitutional mandate. SOF at ¶ 115. But that is no more legitimate than abiding by the majority's preference. A constitutional mandate is merely another way for the majority to impose its will. Hence, courts hold that provisions in a union constitution that impact the terms of a collective bargaining agreement must comply with the union's duty of fair representation. *Retana v. Apartment, Motel, Hotel & Elevator Operators Union, Loc. No. 14*, 453 F.2d 1018, 1024-25 (9th Cir. 1972). In other words, a union cannot "immunize" itself from liability for illegitimate conduct by adopting a constitutional provision that requires such conduct.

USAPA's date of hire constitutional mandate plainly impacts the terms of a collective bargaining agreement. It, therefore, is subject to the duty of fair representation. Consequently, it cannot justify USAPA dishonoring the Nicolau arbitration.

3. USAPA would breach its duty of fair representation if it implements a collective bargaining agreement that dishonors the Nicolau arbitration.

Implementing a collective bargaining agreement that dishonors the Nicolau arbitration would reorder a final resolution of a seniority integration dispute in favor of the majority. As such, it must be justified by an objectively legitimate union purpose. Neither abiding by the majority's preference nor abiding by a union constitutional mandate is a legitimate purpose. Yet USAPA has no other objective purpose. USAPA, therefore, would breach its duty of fair representation if it implements a collective bargaining agreement that dishonors the Nicolau arbitration.

D. USAPA would offend federal policy favoring the finality of a valid arbitration if it dishonors the Nicolau arbitration.

Federal policy favors the finality of valid arbitrations. The validity of the Nicolau arbitration is *res judicata*. USAPA, therefore, would offend federal policy if it dishonors the Nicolau arbitration.

1. Federal policy favors enforcing a valid arbitration of an airline merger seniority dispute.

In the process of integration of a seniority list, it is "inevitability that some individual employees will be disadvantaged in comparison to others." *Herring v. Delta Air Lines, Inc.*, 894 F.2d 1020, 1023 (9th Cir. 1990). Rather than let the majority dictate the terms of seniority integration, airline unions commonly use neutral arbitration to create a list that is fair and equitable. See, *e.g.*, *Bernard*, 873 F.2d at 217; *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1107 (2d

Cir. 1991). And the McCaskill-Bond Amendment now provides the right to arbitrate seniority integration. *See Comm. of Concerned Midwest Flight Attendants for Fair & Equitable Seniority Integration v. Int'l Broth. of Teamsters Airline Div.*, ---F.3d ---, 2011 WL 5974288, *1 (7th Cir. Nov. 30, 2011). Finally, a well-recognized "federal policy . . . ensure[s] the enforceability" of arbitration agreements. *Volt Info. Sciences v. Board of Trustees*, 489 U.S. 468, 476 (1989). Federal policy, therefore, favors enforcing valid arbitrations that resolve airline merger seniority disputes.

2. The validity of the Nicolau arbitration is *res judicata*.

See § III(B)(2), *supra*.

3. The East Pilots' use of USAPA to dishonor the Nicolau arbitration offends federal policy.

Federal policy favors enforcing a valid arbitration of an airline merger seniority integration dispute. The validly of the Nicolau arbitration is *res judicata*. The East Pilots' use of USAPA to dishonor the Nicolau arbitration, therefore, offends federal policy.

E. The Airline may not implement a collective bargaining agreement that dishonors the Nicolau arbitration.

A carrier may not implement a contract with terms that violate a union's duty of fair representation. After this litigation, the Airline would know that a collective bargaining agreement that would dishonor the Nicolau arbitration would violate USAPA's duty of fair representation. Would the Airline be liable if it implemented such a contract?

1. A carrier may not implement a contract with terms that violate a union's duty of fair representation.

The Airline would violate the Railway Labor Act if it takes "the benefit of a contract which the bargaining representative is prohibited by the statute from making." *Steele v. Louisville & Nashville R. Co.*, 323 US 192, 203-04 (1944).

And it would be liable to the West Pilots if it knowingly did so. *See American Postal Workers Union, etc. v. American Postal Workers Union*, 665 F.2d 1096, 1104 n. 18 (D.C. Cir. 1981) (recognizing such liability). The Airline, therefore, would be liable to the West Pilots if it knowingly implements a contract that violates USAPA's duty of fair representation.

2. After this litigation, the Airline would know that a collective bargaining agreement that would dishonor the Nicolau arbitration would violate USAPA's duty of fair representation.

See § III(C)(3), *supra*.

3. The Airline would be liable if it implements a collective bargaining agreement that dishonors the Nicolau arbitration.

The Airline may not knowingly implement a contract that violates USAPA's duty of fair representation. This litigation provides the Airline ample notice that such a contract would violate USAPA's duty of fair representation. The Airline, therefore, would be liable if it implements such a contract.

IV. Conclusion

USAPA would breach its duty of fair representation if it implements a collective bargaining agreement that dishonored the Nicolau arbitration by using a date-of-hire seniority list. The Airline would be liable if it implements such a contract. On that basis, the West Pilots respectfully ask the Court to enter summary judgment in their favor on Count One and dismiss Count Two.

/ / /

Dated this 27th day of January, 2012.

POLSINELLI SHUGHART, PC

/s/ Andrew S. Jacob
By _____
Marty Harper
Kelly J. Flood
Andrew S. Jacob
Katherine V. Brown
CityScape
One East Washington St., Ste. 1200
Phoenix, AZ 85004
Attorneys for Addington Pilots

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January 2012, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the ECF System for filing and transmittal.

/s/Andrew S. Jacob
By _____