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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

US Airways, Inc., a Delaware Corporation, Plaintiff, v. Don Addington, an individual; John Bostic, an individual; Mark Burman, an individual; Afshin Iranpour, an individual; Roger Velez, an individual; and Steve Wargocki, an individual, on behalf of themselves and all other similarly-situated individuals, and US Airline Pilots Association, an unincorporated association, Defendants.	Case No.: 2:10-cv-01570-ROS **US AIRLINE PILOTS ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT** **(Oral Argument Requested)**

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Defendant US Airline Pilots Association ("USAPA") hereby moves for summary judgment in accordance with Fed. R. Civ. P. 56. This motion is supported by USAPA's 56.1 Statement ("USAPA 56.1"), the declarations and exhibits thereto, and the record before this Court.

INTRODUCTION

This case presents the issue of whether an employer in the midst of contract negotiations can ask a court to intervene in those negotiations by ruling on the legality of a given proposal before its is adopted and ratified by the membership and, in effect, force the certified bargaining representative to adopt a bargaining proposal that is contrary to the union's mission and constitution and has been repudiated by the majority of its members. USAPA submits that such an extraordinary request is directly contrary to the letter and spirit of the Railway Labor Act ("RLA") and federal labor policy as construed by the courts.

US Airways pilots have not had a raise in 10 years and will not have one until there is an agreement between the parties that is ratified by the membership. Rather than complying with its duty to bargain in good faith, US Airways seeks to use this litigation to take advantage of a division between some members of the West Pilot Class (the pre-merger America West pilots) and USAPA, the duly certified bargaining representative for all US Airways pilots, regarding seniority. Under the guise of "seeking clarity", US Airways seeks further delay and asks this Court to force USAPA to adopt a bargaining proposal that is the antithesis of USAPA's objectives knowing full well that such a result will not only be rejected by the members, and therefore never be ratified, but will also cause further division amongst the pilots, thus weakening USAPA.

Continued delay in reaching a unified agreement benefits US Airways and its ongoing effort to preserve its profit margin through substandard wages and benefits, imposed as a result of the bankruptcy concessions extracted from the East pilots (pre-merger US Airways pilots) almost ten years ago.

US Airways' untimely attempt to force USAPA to accept the Nicolau Award

interferes with the pilots' majority choice of USAPA as their bargaining representative in violation of the RLA. As the newly certified bargaining representative, USAPA has the absolute right to bargain its own terms for a single integrated collective bargaining agreement, and is not bound in any way by proposals or even agreements made by ALPA, the former representative. As to the ALPA Merger Policy, it was an internal ALPA policy that has no binding effect on USAPA. To hold otherwise denies USAPA its full bargaining rights as mandated by the RLA to negotiate new terms to agreements. US Airways' effort to persuade the Court to substitute its own view of what constitutes a proper seniority proposal for that reached by USAPA, the certified bargaining representative, is incompatible with long standing and well established law giving unions deference, wide latitude, and a wide range of reasonableness in negotiating on behalf of its members. USAPA respectfully submits the Court should reject US Airways' efforts to hijack the bargaining process and in effect force or prohibit a particular bargaining proposal by USAPA.

USAPA fundamentally disagrees with the focus of the West Pilot Class and US Airways on the duty of fair representation. As required by the decision of the Ninth Circuit in *Addington I*, 606 F.3d 1174 (9th Cir. 2010), and confirmed in this Court's dismissal of the cross-claim asserted by the West Pilot Class, the duty of fair representation issue is not ripe. In any event, a seniority system based on length of service is a legitimate union objective and in no way violates USAPA's duty to represent *all* the pilots in the merged pilot craft. Indeed, employee preference based on length of service is a recognized and inherent feature of any bona fide seniority system as evidenced by the fact that all of the other US Airways' collective bargaining groups employ a date of hire seniority system.

As discussed in Point I, US Airways is required to negotiate with USAPA on all mandatory subjects of bargaining, including seniority. In Point II we show that nothing in the RLA, ALPA Merger Policy or the Transition Agreement requires USAPA to adhere to the Nicolau Award. In Point IV we show why the statutory scheme entitles

USAPA to a "wide degree of reasonableness" to enable it to negotiate a new agreement that will be acceptable to a majority of the merged pilot craft. For these reasons, and other reasons set forth in full below, including that this action is untimely and barred by the doctrine of laches, the Court should grant summary judgment dismissing Count I, and enter judgment on Count II declaring that USAPA does not violate its duty to bargain under Section 2, First of the RLA, by proposing and pursuing a seniority system that differs from the Nicolau Award.

Finally, USAPA submits the Court should reject the remarkable and unprecedented claim by US Airways that it is entitled to prospective immunity for its actions in collective bargaining and should therefore enter judgment dismissing Count III.

Statement of Facts

The facts underlying USAPA's entitlement to judgment in its favor are straight forward and indisputable. In May 2005, US Airways Group and America West Holdings Corporation[1] entered into an Agreement and Plan of Merger (hereafter referred to as "Merger Policy"), which among other things, resulted in US Airways Group owning and controlling both America West and US Airways, and combining the two airlines into a single carrier operating under the name US Airways. (USAPA 56.1, ¶1) At the time of the merger, the Airline Pilots Association ("ALPA") was the bargaining representative for both airlines. The US Airways and America West pilots were represented by ALPA through subordinate bodies known as the US Airways Master Executive Council ("US Airways MEC") and the America West Master Executive Council ("America West MEC"), respectively. (USAPA 56.1, ¶¶5 and 6)

Pilots at ALPA-represented airlines maintain system seniority lists that rank pilots according to their date of hire. Seniority is important in that, among other things, pilots bid periodically for available positions on particular aircraft at a designated "domicile" and bid monthly for what flights/routes and aircraft they will fly, which also affects

[1] The Company entities are collectively known as "the Airline Parties".

pilots' pay. (USAPA 56.1, ¶7)

At the time of the merger, there were significant differences between the two airlines. US Airways had a much larger and older pilot force with 5,098 pilots, of which 1,691 were then on furlough. US Airways pilots had dates of hire ranging from April 20, 1966, through June 19, 2000. (USAPA 56.1, ¶8) America West was a significantly smaller airline with 1,894 pilots, and none of whom were on furlough. Their dates of hire were considerably more recent, ranging from June 1, 1983, through April 4, 2005. (USAPA 56.1, ¶9)

After the merger was announced, the Airline Parties, the US Airways MEC and the America West MEC entered into a "Transition Agreement" (USAPA Ex. 3) that established how various terms and conditions of employment would be affected by the merger. Among other things, the Airline Parties agreed that the pilot workforces of the pre-merger airlines would remain separate and covered by their respective collective bargaining agreements ("CBAs") until "Operational Pilot Integration", which would occur only after completion of an integrated pilot seniority list and negotiation of a single CBA. (Ex. 3; §VI.A; USAPA 56.1, ¶12) The Transition Agreement also continued to recognize each of the America West and US Airways MECs as to their authority and responsibility with respect to their respective CBAs until the merger of the two MECs." (Ex. 2, §I.)

The Transition Agreement further provided that the combining of the America West and US Airways MECs would be governed by ALPA's Constitution and By-Laws and its Merger Policy. (Ex. 3, Transition Agreement, Sections III.C and IV.A)

Because both the pre-merger US Airways and America West pilots were represented by ALPA, they were governed by the ALPA Merger Policy, which set forth procedures in the event of a merger. However, the Merger Committees for the America West and US Airways pilots were unable to agree on a merged seniority list, and the two MECs proceeded to arbitration before a Board of Arbitration consisting of neutral arbitrator George Nicolau and pilot neutrals Stephen Gillen and James Brucia. Hearings

were conducted in December 2006 and January and February 2007. The Board of Arbitration, with Member Brucia dissenting, issued its opinion and award (known as the "Nicolau Award") dated May 1, 2007 (Ex. 5; USAPA 56.1, ¶¶14, 15,17)

The Integrated System Seniority List contained within the Nicolau Award has never gone into effect because under the terms of the Transition Agreement, an integrated seniority list does not go into effect until a consolidated CBA is negotiated and ratified. (Ex. 3, §VI.A; USAPA 56.1, ¶18)

In June 2007, the US Airways MEC commenced an action to set aside the Nicolau Award, because, in part, it gave "windfalls (unwarranted and unexpected benefits) to the pilots of America West at the expense of US Airways pilots, thereby permanently depriving US Airways pilots of their career expectations, while affording gains in career promotion to America West pilots which they could not have achieved absent the Award." (USAPA 56.1, ¶20)

In mid-2007, several pilots, dissatisfied with ALPA, and the impact of the Nicolau Award, formed a new organization known as the US Airline Pilots Association ("USAPA"). USAPA's objectives included maintaining "uniform principles of seniority based on date of hire and the perpetuation thereof, with reasonable conditions and restrictions to preserve each pilot's un-merged career expectations." (Ex. 2; USAPA 56.1, ¶¶25 and 26)

In late 2007, while the litigation by the US Airways MEC was still pending, and despite the demand by the US Airways MEC not to release the Nicolau seniority list to US Airways, and the formation of USAPA, ALPA presented the Nicolau Award to US Airways for acceptance under the terms of the Transition Agreement. (Ex.3, §IV.A; USAPA 56.1, ¶27)

The US Airways MEC's litigation seeking to vacate the Nicolau Award became moot on April 18, 2008 when, after an election, the National Mediation Board ("NMB") certified USAPA as the new bargaining representative of the combined pilot group on April 18, 2008. Accordingly, that action was dismissed. (USAPA 56.1, ¶34)

Once certified, USAPA took over direct negotiations with US Airways for a single integrated CBA. On September 30, 2008, USAPA submitted its seniority proposal to US Airways. The proposal placed West pilots on the merged seniority list according to their date of hire and included extensive conditions and restrictions that prevented East pilots from displacing them from their customary West assignments. To date, US Airways has not responded to the proposal. (USAPA 56.1, ¶38)

Direct negotiations and private mediation between USAPA and US Airways failed, and since January, 2010, US Airways and USAPA have been in mediation under the supervision of the NMB. (USAPA 56.1, ¶43)

I. US AIRWAYS IS REQUIRED TO BARGAIN WITH USAPA ON ALL MANDATORY SUBJECTS OF BARGAINING INCLUDING SENIORITY WITHOUT REGARD TO ANY AGREEMENTS MADE BY ALPA

Section 2, Ninth, of the RLA provides that, "[u]pon receipt of . . . a certification" issued by the NMB, "the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter." 45 U.S.C. § 152, Ninth. "To treat is to bargain." *Order of Ry. Conductors & Brakemen v. Switchmen's Union*, 269 F.2d 726, 732 (5th Cir. 1959). Section 2, Ninth "imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other." *Virginian Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515, 546, 548 (1937); *see also Order of Ry. Conductors & Brakemen*, 269 F.2d at 732. To the same effect is Section 2, Second, which provides that "[a]ll disputes between a carrier . . . and its . . . employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer . . . ." 45 U.S.C. § 152, Second.

Once the NMB certified USAPA as the exclusive representative of the merged pilot craft replacing ALPA, US Airways became obligated to treat and bargain with USAPA, and only with USAPA, over "rates of pay, rules, and working conditions." 45 U.S.C. § 152, Ninth (once the NMB certifies a representative, a "carrier shall treat with

the representative so certified as the representative of the craft or class for the purposes of this Chapter"); *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 575 (1971) ("the duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union," quoting *NLRB v. Insurance Agents' Int'l*, 361 U.S. 477, 484-85 (1960)). US Airways is required to treat with USAPA on all "mandatory" subjects of bargaining, including seniority. *Rakestraw v. United Airlines*, 981 F.2d 1524, 1535 (7th Cir. 1992) ("Like wages and fringe benefits, seniority is a legitimate subject of discussion and compromise in collective bargaining.").

Moreover, US Airways is required to bargain with USAPA over all mandatory subjects of bargaining without regard to any agreement that might have been made by ALPA. The central principle that governs this case and which inexplicably was never presented by previous counsel in *Addington I* either to Judge Wake or to the Ninth Circuit, is that, as the newly certified representative of the pilot craft, USAPA "has full bargaining rights" and is not "in any way limited by the [previous] contract in pursuit of new terms of employment." *Association of Flight Attendants (AFA) v. USAir*, 24 F.3d 1432, 1440 (D.C. Cir. 1994); *accord Order of Ry. Conductors & Brakeman*, 269 F.2d at 730 (successor bargaining agent can negotiate changes to agreements entered into by former bargaining agent).

To be sure, the actual objective working conditions established by the previous agreements constitute the status quo that must be maintained while the process of negotiation required by the RLA takes place. *Id.* at 1493; *Detroit & Toledo Shore Line R.R. v. United Transportation Union ("Shore Line")*, 396 U.S. 142, 150-53 (1969). But neither the status quo nor any agreement made by ALPA limits "in any way" USAPA's "pursuit of new terms of employment." *AFA v. US Air*, 24 F.3d at 1440.

Counts I and II of the Complaint (Dkt. No. 1, at 23), which allege that USAPA either violates (Count I) or does not violate (Count II) its duty under Section 2, First, of the RLA "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions", are directly based on whether USAPA

breaches (Count I) or does not breach (Count II) its "duty of fair representation to the West Pilots" by "demand[ing] that US Airways agree to an integrated seniority list other than as reflected in the Nicolau Award." (Complaint, Dkt. No. 1, pp. 15-19)[2] Thus, although couched in terms of USAPA's RLA duty to bargain, these claims raise exactly the same duty of fair representation ("DFR") claim that was dismissed by the Ninth Circuit in *Addington I* and by this Court in rejecting the West pilots' cross-claim. In dismissing the cross-claim, this Court stated:

> The West Pilots do not cite, and the Court is not aware of, any authority stating the filing of an action by another entity can convert an unripe case into a ripe case. Based on the Ninth Circuit's ruling on the exact issue, this Court is required to dismiss the West Pilots' Cross-Claim as not ripe. *See Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) ("If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect. Binding authority must be followed unless and until overruled by a body competent to do so.").

(Order dated May 31, 2011, Dkt. No. 85, p. 9)

The DFR against USAPA is not ripe just because it is incorporated into a request for a declaratory judgment by "another entity." Counts I and II therefore should be dismissed and US Airways should be directed to fulfill its duty to bargain with USAPA concerning a seniority system for the merged pilot craft without regard to any agreement made by the prior representative, including the Nicolau Award.

II. NOTHING IN THE RLA, ALPA MERGER POLICY, OR THE TRANSITION AGREEMENT REQUIRES USAPA TO ADHERE TO THE NICOLAU LIST

In order to justify judgment on Count I, the West Pilot Class must identify some definite legal duty or requirement, in contract or law, requiring USAPA to adhere to the ALPA Merger Policy, and therefore the Nicolau Award. There is none.

First, nothing in the RLA requires USAPA to adhere to either the ALPA Merger Policy or the Nicolau Award that is the product of that policy.[3] As shown in Point I, the

[2] The page numbers reference the ECF page numbers.

[3] It is worth noting that the Nicolau Award is not the normal arbitration award encountered in the context of labor management relations. It was not the product of any agreement between a bargaining representative and an employer to resolve a dispute concerning the application, interpretation or enforcement of a collective bargaining

law on whether USAPA is bound by any agreement made by ALPA with respect to the negotiation of a new CBA is clear. As the newly certified representative of the pilot craft or class, USAPA "has full bargaining rights" and is not "in any way limited by the [previous] contract in pursuit of new terms of employment." *AFA v. USAir.*, 24 F.3d 1432, 1440 (D.C. Cir. 1994). To be sure, the actual objective working conditions established by the previous agreement constitute the *status quo* that must be maintained while the process of negotiation required by the RLA proceeds. *Id.* at 1437; *Shore Line*, 396 U.S. 142, 150-53 (1969). But neither that *status quo* nor any agreement made by the prior representative limits "in any way" the new representative (USAPA) "in pursuit of new terms of employment." *AFA v. USAir*, 24 F.3d at 1440.

Second, USAPA could never be bound by ALPA Merger Policy because it was not a party to it and thus did not "assent[] to any of the terms of that agreement." *AFA v. USAir.*, 24 F.3d at 1434; *Gulf Trading & Transp. Co. v. M/V Tento*, 694 F.2d 1191, 1196 n. 8 (9th Cir. 1982) ("nonparties cannot be bound by an agreement"). "It goes without saying that a contract cannot bind a nonparty." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (holding that even the pro arbitration policies of the Federal Arbitration Act do not require the EEOC to arbitrate a dispute pursuant to an agreement between an employer and an employee to arbitrate employment-related disputes).

Third, even ALPA was free to deviate from its Merger Policy. *See Rakestraw v. United Airlines*, 989 F.2d 944 (7th Cir. 1993). And, if the ALPA Merger Policy was not absolutely binding on ALPA, *a fortiori*, it cannot be binding on USAPA which was never a party to the policy. In *Rakestraw v. United Airlines*, 981 F.2d 1524 (7th Cir. 1992), the court held that ALPA's deviation from its own merger policy when it entered into a CBA that favored the majority TWU pilots over the minority Ozark pilots did not breach its

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agreement (a "grievance" dispute) or a dispute to determine the terms of a new collective bargaining agreement (an "interest" dispute). To the contrary, the Nicolau Award is purely the result of the application of the ALPA Merger Policy, a policy that governed the US Airways MEC and the America West MEC because they were subordinate bodies of ALPA and governed by ALPA's Constitution and other procedures.

duty of fair representation to the plaintiff pilots. *Id.* at 1524. As the *Rakestraw* court recognized, "ALPA's 'merger policy' is the result of evolution, of experimentation and change when circumstances warrant." *Id.* at 1533.

Similarly, the court in *Baker v. Newspaper & Graphic Commc'ns Union, Local 6*, 628 F.2d 156 (D.C. Cir. 1980), found that Local 6 did not breach its duty of fair representation when it entered into a CBA that included dovetailing[4] even though the merger agreement contained an endtailing[5] clause. In affirming summary judgment in favor of the union defendants, the court stated "[w]e know of no case which has held that an internal union agreement can restrict the union's power to negotiate with respect to seniority in collective bargaining." *Id.* at 166. Indeed, in the litigation brought by the US Airways MEC challenging the Nicolau Award, the America West MEC defended the policy, in part by asserting that the Nicolau Award was only a "bargaining proposal," and therefore there was nothing to set aside. (USAPA 56.1, ¶21)

Fourth, and contrary to assertions we expect will be made by the West Pilot Class and US Airways, the Transition Agreement does not require USAPA to include the seniority list generated by the ALPA Merger Policy in a new CBA. USAPA was not a party to that agreement and did not sign or ratify that agreement. Just as USAPA did not assent to the Merger Policy, USAPA likewise did not assent to any of the terms of the Transition Agreement.

Moreover, nothing in the Transition Agreement limits USAPA's right to negotiate. Only the substantive provisions of the Transition Agreement that establish "actual, objective working conditions and practices" are part of the *status quo* that the RLA requires the parties to maintain while negotiating a new agreement. *Shore Line*, 396 U.S. at 153. The so-called "process elements" of the Transition Agreement, pertaining to how agreements regarding rates of pay, rules and working conditions may be arrived at in the

[4] "Dovetailing" is the term commonly used to describe merging seniority lists by seniority date, date of hire or length of service.

[5] "Endtailing" is the term commonly used to describe merging seniority lists by placing the employee from one employer below the employees from the other employer.

future, are plainly not part of the *status quo*. These "process elements," including adherence to the Merger Policy, are not "actual, objective working conditions." They therefore do not constitute part of the statutory *status quo* and USAPA is not obligated to adhere to them.

Most importantly, the Transition Agreement cannot in any way limit the authority of USAPA, as a newly certified bargaining representative, with respect to negotiating a new agreement. This is the clear holding of *AFA v. USAir*, 24 F.3d at 1440, that no agreement entered into by the prior representative can "in any way" limit a new representative "in pursuit of new terms of employment." The contrary proposition, asserted by the West Pilot Class and US Airways, if accepted, would undermine the right of the new representative to act as the employees' exclusive bargaining representative under Section 2, Ninth, and conflicts with the right of the majority of the craft or class under Section 2, Fourth "to determine who shall be the representative of the craft or class for the purposes of this [Act]." 45 U.S.C. §§ 152, Fourth & Ninth. Allowing the prior representative to freeze employment conditions for the indefinite future, as the West Pilot Class and US Airways apparently claim, would prevent a dissatisfied majority from protecting its interests. Indeed, dissatisfied with ALPA, their then current representative, the majority of the pilot craft did exactly what the Seventh Circuit suggested in *Air Wisconsin Pilots Prot. Comm. v. Sanderson*, 909 F.2d 213 (7th Cir. 1990), was their legitimate option, they replaced ALPA with a new representative. In the process, they rejected efforts by ALPA and US Airways to persuade them that their vote would be futile. Thus, even though the seniority list produced by the ALPA Merger Policy was then under legal attack (*US Airways MEC v. America West MEC,* 525 F.Supp.2d 127 (D.D.C. 2007)*;* USAPA 56.1, ¶21), ALPA proffered the ALPA list to US Airways in late 2007 and US Airways agreed to the list on December 20, 2007 (USAPA 56.1, ¶¶27,30), acting even after USAPA had filed its application to represent the post-merger pilot craft or class on November 13, 2007. At most this created a tentative agreement between

ALPA and US Airways on a bargaining proposal, but, as *AFA v. USAir*. holds, such an agreement could in no way obligate USAPA.

III. USAPA DOES NOT VIOLATE THE DFR BY SEEKING A SENIORITY SYSTEM BASED ON LENGTH OF SERVICE

Neither the facts that USAPA departed from the Nicolau Award nor that it proposes a seniority system based on length of service show that USAPA violated its duty of fair representation. Given that as a new bargaining representative USAPA is entitled to negotiate a new agreement without regard to any agreements that might have been made by the prior representative, and that no legal or contractual requirement obligates USAPA to adhere to the Nicolau Award, the West Pilot Class falls back on the argument that USAPA breaches its duty of fair representation to the West pilots by deviating from the Nicolau Award and proposing and pursuing a seniority system based on length of service. There is no merit to this argument because the law is clear that a union does not violate its DFR simply by seeking a seniority system based on length of service.[6] Much to the contrary, in order to make out a DFR claim, the West Pilot Class must show something more than a preference for longer service. *See Laturner v. Burlington Northern*, 501 F.2d 593, 599 (9th Cir. 1974); *Rakestraw v. United Airlines*, 981 F.2d 1524 (7th Cir. 1992). The West Pilots must show that USAPA's conduct violates the "arbitrary, discriminatory or in bad faith" DFR standard based on something other than the fact that USAPA's seniority proposal relies on date of hire and therefore favors more senior pilots over less senior pilots.

All seniority systems rely on some measure of length of service and therefore necessarily and inherently discriminate against junior employees. *Cal. Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980); *Humphrey v. Moore*, 375 U.S. 335 (1964). It is firmly established that this "discrimination," which is inherent in the operation of every *bona fide* seniority system, does not by itself establish a violation of the non-discrimination

[6]All of the other crafts involved in the merger, including the flight attendants, dispatchers and mechanics, merged their seniority lists according to date of hire. (USAPA 56.1, ¶22)

provisions of federal law. *Cal. Brewers Ass'n*, 444 U.S. at 600. It is well recognized that integrating seniority is a contentious issue affecting employees after a merger, and is often the subject of litigation by disgruntled and unsatisfied minority employees. *See Herring v. Delta Air Lines*, 894 F.2d 1020, 1023 (9th Cir. 1989) ("The integration of a seniority list is a difficult undertaking because of the inevitability that some individual employees will be disadvantaged in comparison to others."). However, "seniority does not 'belong' to an employee", *Rakestraw*, 981 F.2d at 1535, and the mere existence of differences "in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees" does not make them invalid. *Hardcastle v. W. Greyhound Lines*, 303 F.2d 182,185 (9th Cir. 1962).

Moreover, in the context of integrating seniority lists in a merger, "it is almost inevitable that some individuals will be injured, and that even where the same union represents both bodies of employees, it does not breach its duty to individual members as long as it proceeds on some reasoned basis." *Clayton v. Republic Airlines*, 716 F.2d 729, 732 (9th Cir. 1983); *see also Ratkosky v. United Transp. Union*, 843 F.2d 869, 876 (6th Cir. 1988) ("[T]he fact that a seniority system in a collective bargaining agreement favors one group more than another does not in itself constitute a breach of the union's duty."). "In establishing seniority systems, there are a variety of legitimate options, and the courts are careful not to substitute their judgments for those of the authorized labor organization." *Ratkosky*, 843 F.2d at 876. In recognizing the wide range of reasonableness unions have in negotiating agreements following mergers, courts have refused to find a breach of the DFR when a union implements endtailing or dovetailing. *Rakestraw*, 981 F.2d at 1533; *Ratkosky*, 843 F.2d 869 (refusing to re-negotiate an agreement establishing seniority rights based on a two-tiered system that included dovetailing was not a breach of the union's duty of fair representation).

Thus, a union does not breach its DFR to junior employees merely by negotiating a seniority system that prefers employees with longer service. To the contrary, in order to establish a breach of the duty of fair representation, a plaintiff must show something

more than "discrimination" based on length of service. There must be an independent showing, wholly absent in the instant case, that "the union's behavior is so far outside a 'wide range of reasonableness,' as to be irrational." *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). Given the decision of the Court of Appeals in *Addington I* and this Court's decision dismissing the cross-claim asserted by the West Pilot Class, the only DFR claim arguably at issue in this case is the narrow threshold question of whether the Transition Agreement precludes USAPA from departing from the Nicolau Award as a bargaining proposal. That only this narrow issue is arguably before the Court follows from the fact that the Ninth Circuit in *Addington I* concluded that "[p]laintiffs' DFR claim is not ripe," 606 F.3d at 1184, but explicitly refrained addressing the "question of the extent to which the Nicolau Award is binding on USAPA," 606 F.3d at 1181 n.3. Thus, despite the otherwise broad holding of the Ninth Circuit decision in *Addington I* that the DFR claim asserted by the West Pilot Class is not ripe, it could be argued that the narrow threshold issue of whether *any* departure from the Nicolau List violates the DFR remains open for decision because it is a necessary part of deciding whether the Nicolau List "is binding on USAPA."[7]

USAPA had and has good reasons to propose the Nicolau Award and instead to propose a system based on date of hire with conditions and restrictions that protects the pre-merger career expectations of each pilot group without affording either pilot group a

[7] USAPA has asserted in answer to the Complaint, in its affirmative defenses, and in the Proposed Case Management Plan its position that no DFR claim can be any part of this case given the Ninth Circuit decision in *Addington I*. We do not waive this claim by noting that the bare issue of a departure from the Nicolau Award, no matter how small, may arguably be at issue in this case. *Addington I* makes clear that any other DFR claim, including an attack on USAPA's current seniority proposal, is not ripe and must be dismissed because that proposal is only the Union's current proposal, is subject to change through consultation with the West pilots and through negotiation with US Airways, and therefore, as the Ninth Circuit noted, "neither the West Pilots nor USAPA [nor US Airways] can be certain what seniority proposal ultimately will be acceptable to both USAPA and the airline as part of a final CBA." 606 F.3d at 1179. To the extent that we describe features of USAPA's current seniority proposal, we do so only to show that USAPA is completely justified in deviating from the Nicolau Award.

windfall at the expense of the other.[8] For example, a presentation made by the US Airways MEC to ALPA explained how the Nicolau Award, among other things, incorrectly described 326 pilots (including Dean Colello) as on furlough when in fact they were flying at US Airways subsidiary Mid-Atlantic Airlines, placed West pilots with less than two months of service above East pilots with more than 16 *years* of service, deprived senior East pilots of wide body flying and gave it to West pilots who had no wide body flying, and would take captain positions away from East pilots and give them to West pilots with less service. The windfall to West pilots is demonstrated by the facts that under the Nicolau Award West pilots would be able to bid and hold a captain position 1-9 years earlier than what they could have expected at America West while the East pilots with whom they were slotted, many with 16-17 years of uninterrupted service, would have their ability to bid and hold a captain's position delayed by 1-4 years. (USAPA 56.1 Statement, ¶ 21)

Prior to the Merger, East pilots with 10-15 years of service expected to progress up the list as retirements eliminated more senior pilots and they expected to be able to exercise their eventual higher seniority to bid regular lines of flying instead of the uncertainty of reserve duty, to bid better paying captain positions instead of first officer positions, and to bid better paying wide body and international flying. By inserting hundreds, and in some cases a thousand or more, less senior and generally younger West pilots above these relatively older East pilots, the Nicolau Award eliminated for many East pilots any realistic hope that they would ever hold a regular line or ever be able to bid wide body or international flying. (USAPA 56.1 Statement, ¶21) And, of course, to the extent the Nicolau Award destroyed the career expectations of the East pilots, it

[8] We emphasize that to the extent we explain why USAPA's decision not to follow the Nicolau Award was reasonable, we are not engaged in what the West Pilot Class will undoubtedly characterize as a "collateral attack" on the decision, for as we have explained at length, the Nicolau Award is in no way binding on USAPA or the merged pilot craft, and therefore USAPA has no need to overturn or vacate that decision. We describe the faults and shortcomings of the decision solely to show that USAPA's decision to propose a different seniority proposal was neither arbitrary, discriminatory or in bad faith.

conferred a bonanza on West pilots who would immediately become eligible for regular lines and wide body and international flying.

The reaction to the Nicolau Award was strong and immediate. The US Airways MEC asked ALPA to set the decision aside, concluding that the East pilots would never ratify a collective agreement that included it. ALPA made several attempts to broker a compromise between the two MECs, but each was rejected by the America West MEC which apparently was unwilling to forego any part of their new found bonanza. When the efforts at compromise failed, the US Airways MEC filed suit in the District of Columbia to set aside the Nicolau Award as contrary to the Merger Policy.

In the midst of these events, USAPA was formed and filed an application with the NMB to replace ALPA as the bargaining representative for the merged pilot craft. USAPA prevailed in the NMB conducted election and was certified by the NMB as the new representative for the merged pilot craft in April 2008. USAPA thereafter proposed a different seniority system based on date of hire with conditions and restrictions designed to protect the legitimate career expectation of both the East and the West pilots. The only thing the USAPA proposal takes away from the West pilots is the unreasonable expectation that they will enjoy the windfall that would be the product of the Nicolau Award, a windfall at the expense of East pilots who have spent 2, 3 and often 4 or 5 times longer working for US Airways and who have given up pension benefits and taken significant pay cuts to keep US Airways operating. US Airways has not responded to USAPA's proposal in negotiations, and USAPA has been rebuffed in repeated attempts to engage the West pilots and their representatives in discussions aimed at addressing whatever concerns they might have about the USAPA proposal. These efforts have either been boycotted or have been met with the demand "Nic or nothing." Under all these circumstances, USAPA's decision to pursue a seniority system other than the Nicolau Award is legitimate and reasonable and certainly not "so far outside a 'wide range of reasonableness' . . . as to be irrational." *O'Neill*, 499 U.S. at 67.

Finally, it is noted that the West Pilot Class does not offer any evidence to support

their DFR claim other than the deep-seated merit based disagreement by East pilots over seniority integration. There is no independent evidence to show that USAPA's "conduct toward . . . members of the collective bargaining unit is arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, 386 U.S. at 190.

IV. USAPA MUST BE ALLOWED "BROAD AUTHORITY" IN ORDER TO RESOLVE THE DIFFERENCES AMONG THE PILOTS AND REACH A CBA THAT CAN BE RATIFIED

USAPA must be allowed to exercise the "broad discretion" unions are entitled to exercise under the law so that it can work to resolve, to the extent possible, the differences among the various groups of pilots and produce a collective bargaining agreement that a majority of the pilots will ratify.

The practicalities of this case are painfully clear. ALPA, the prior representative, generated a seniority proposal for the merged pilot craft that upset a clear majority of the pilots. A clear majority of the pilots voted to replace ALPA with a new representative. It then fell to USAPA to fashion a new proposal and negotiate with US Airways for a new agreement covering all of the pilots. "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co. v Huffman*, 345 U.S. 330, 338 (1953). It is up to USAPA, not the Court and not the other parties to this dispute, to "weigh the relative advantages and disadvantages of differing proposals" and sort out these "[i]nevitable differences." *Id.*; *Humphrey v. Moore*, 375 U.S. 335, 349 (1984).

Equally important is the need for whatever seniority system USAPA negotiates to be an agreement that a majority of the pilots will approve in a ratification vote, otherwise artificially reduced wages and benefits and friction will continue between the two pilot groups. Ratification by majority vote is a necessary step to reaching an agreement. *Addington I*, 606 F.3d at 1178. Given the makeup of the merged pilot craft and what have now become long held differences, it is a difficult hurdle. The Ninth Circuit

observed, "[a]s demonstrated by ALPA's . . . difficulties in reaching a CBA, the pilot groups, and individual pilots with their ratification/non-ratification powers, are the major contributors to the absence of a CBA . . . ." *Id.*, at 1178 n.2. Indeed, it has long been the judgment of the US Airways MEC and then USAPA that, given the predominance of East pilots in the merged pilot craft, a collective bargaining agreement incorporating the Nicolau Award cannot be ratified. *See id.*, at 1178. Again, the task of fashioning a seniority system acceptable to the merged pilot craft is USAPA's responsibility and burden. The principal obstacle to moving forward on this task is the incorrect notion held by junior West pilots that they are entitled to the windfall of the Nicolau Award—positions high on the seniority list and immediate wide-body international flying—a career expectation they did not have at America West and something they would never have in a stand-alone America West operation. The current USAPA seniority proposal preserves their pre-merger career expectations on West flying and gives them the future of captain positions and international flying, but only as they stand in line behind older pilots with many more years of service, as the East pilots have done. The process of reaching an agreement that serves the legitimate interests of the entire merged pilot craft has been long delayed by meritless litigation, allowing US Airways to continue to benefit from artificially reduced wages. It is time for bargaining to truly begin unaffected by the claim that USAPA is required to follow the ALPA Merger Policy and the seniority list it produced.

V. US AIRWAYS IS NOT ENTITLED TO PROSPECTIVE IMMUNITY FOR ITS ACTIONS IN COLLECTIVE BARGAINING

The Complaint's third claim for relief in which US Airways seeks a declaration "that it would not be liable under the Railway Labor Act or otherwise if it were to enter into . . . a collective bargaining agreement" not incorporating the Nicolau Award, fails to set forth a claim upon which relief can be granted. (Complaint, pp. 20-22, Dkt. No. 1) The relief sought is overbroad.

There are many seniority arrangements, other than the one encompassed by the Nicolau Award, that the parties might adopt after vigorous bargaining. No one can say at this juncture whether the end result of the parties' bargaining will violate the rights of one or more pilots in the consolidated, post-merger craft or class, or what form that violation may take. Put simply, the third claim for relief depends on presently unknown, future events whose legality cannot be adjudicated now. *See Addington I*, 606 F.3d at 1179.

This result will cause no hardship for US Airways. As noted, an air carrier's obligation under Section 2, First & Ninth, of the Act is to bargain in good faith over rates of pay, rules and working conditions, including seniority, with the certified representative of craft or class employees. 45 U.S.C. § 152, First & Ninth The courts have routinely declined to relieve carriers of their absolute bargaining duty, *see, e.g.*, *America West Airlines v. NMB*, 119 F3d 772, 778 (9th Cir. 1997), *reh'g denied*, 124 F.3d 211 (1997), *cert. denied*, 523 U.S. 1021 (1998), *aff'g* 153 L.R.R.M. 2176, 2180-81 (D. Ariz. 1996), even when the carrier becomes subject to primary and secondary strike pressures. *See United Airlines v. Airline Div., Int'l Bhd. of Teamsters*, 874 F.2d 110, 114-15 (2d Cir. 1989); *Virgin Atl. Airways v. NMB*, 956 F.2d 1245, 1252 (2d Cir. 1992). After all, no carrier is compelled by the RLA to actually enter into an agreement. *Railway Clerks v. Non-Contract Employees*, 380 U.S. 650, 667 (1965). Both parties to a CBA have the right and obligation to resist illegal bargaining demands, and both are potentially liable to injured persons if they do not. *Jones v. Trans World Airlines*, 495 F.2d 790 (2d Cir. 1974); *United Indep. Flight Officers v. United Air Lines*, 572 F. Supp. 1494, 1508 (N.D. Ill. 1983), *aff'd*, 756 F.2d 1274 (7th Cir. 1985). There is no basis in law for the unprecedented prospective immunity from liability US Airways seeks.

VI. ANY CLAIM ALLEGING BREACH OF THE DFR IS UNTIMELY AND BARRED BY LACHES AND MUST BE DISMISSED

Any claim by US Airways based upon the duty of fair representation should also be dismissed as untimely. The statute of limitations for a breach of the duty of fair representation claim is six months. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151,

170-172 (1983); *Kelly v. Burlington N.R.*, 896 F.2d 1194, 1197 (9th Cir. 1990). A DFR claim accrues when the plaintiff knew or should have known that a breach occurred. *Galindo v. Stoody Co.*, 793 F.2d 1502, 1509 (9th Cir, 1986).

The instant action was commenced on July 26, 2010. At the very latest, US Airways knew that USAPA would not pursue the Nicolau Award as of September 30, 2008, the date when USAPA submitted a seniority proposal that deviated from the Nicolau Award. (USAPA 56.1, ¶33)[9] Accordingly, no claim that USAPA's September 30, 2008 bargaining proposal was a breach of the DFR could have been brought after March 30, 2009. No such claim was ever brought or raised by US Airways directly or indirectly (e.g. such as the instant declaratory judgment claim).

US Airways never asserted any counterclaim or asserted any cross-claim nor did it seek any relief relating to a DFR in *Addington I.* Instead, it moved to dismiss on various grounds while USAPA's seniority proposal was pending along with the West Pilots' claim that USAPA had breached its DFR. US Airways did not raise the DFR issue until the commencement of the instant action on July 26, 2010, by which time it was time-barred.

US Airways' claim relating to breach of the DFR is similarly barred by the doctrine of laches. A claim is barred by laches when the plaintiff unreasonably delays filing suit, and the delay prejudices the defendant. *See Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 952-54 (9th Cir. 2001). In determining whether a plaintiff has delayed inexcusably in filing claims, the court first must determine when the plaintiff knew or should have known of the allegedly unlawful conduct, and then the date on which the lawsuit is finally filed. *Id.* at 953.

As shown above, despite knowing, at the latest, as of September 30, 2008 that

[9] Indeed, September 30, 2008 was the *latest* date the DFR claim accrued. US Airways and the West Pilot Class knew or should have known USAPA would not advance a seniority list based upon the Nicolau Award when it was certified as the bargaining representative on April 18, 2008. (*See* Case Management Plan, at p. 3, Dkt. 130), where US Airways acknowledges that USAPA's seniority proposal "is consistent with its constitutional mandate".

USAPA would not advance a seniority proposal based upon the Nicolau Award, US Airways waited until July 2010 to commence this action seeking a determination as to whether USAPA breached its DFR. It did not raise this claim in *Addington I*, notwithstanding the West Pilots' DFR claim that USAPA breached the DFR.[10] The concerns raised by US Airways in the instant action, to the extent credited as genuine, were as ripe then as they are now.

US Airways' delay in asserting this claim has severely prejudiced USAPA because US Airways has delayed bargaining for an integrated contract. In its complaint in this action US Airways claims that it is "neutral as to the merits of the seniority dispute" (Complaint, ¶, Dkt. No. 1), implicitly acknowledging it will not bargain over seniority until disposition of this suit. US Airways could have obtained the same relief in the context of *Addington I*, the proceedings before Judge Wake, the lengthy jury trial, the bench trial on damages, and the appeal to the Ninth Circuit. By inexcusably failing to raise this issue in timely fashion and its attempt to raise the issue almost two years after the latest date on which it had knowledge, US Airways has needlessly multiplied the proceedings, compounding expenses to USAPA, and has delayed ultimate resolution of its claims, while benefiting from a pilot pay structure that is overwhelmingly in its favor.

VII. PLAINTIFF SEEKS RELIEF THAT WILL IMPROPERLY INTERFERE WITH USAPA'S AUTHORITY AS THE PILOTS' BARGAINING REPRESENTATIVE IN VIOLATION OF THE RLA

By this action, US Airways asks the Court to interfere with USAPA's authority under the RLA as the certified representative of US Airways pilots. Any attempt by US Airways to force USAPA to incorporate the Nicolau Award is a direct attack on the US Airways' pilots' choice of USAPA as their exclusive certified bargaining representative. There is no dispute that USAPA was formed, *inter alia*, to advance the objective to "maintain uniform principles of seniority based on date of hire and the perpetuation

[10] Indeed, the case should also be dismissed for US Airways' failure to assert a compulsory counterclaim as it it clearly arises out of the same transactions and occurrences as the *Addington I* West Pilots' claims that USAPA breached the DFR. Fed. R. Civ. P. 13(a).

thereof, with reasonable conditions and restrictions to preserve each pilot's un-merged career expectations." (Ex. 2, USAPA Constitution, §8.D.) By voting to certify USAPA as their bargaining agent, a majority of the US Airways pilots clearly expressed the view that the Nicolau Award was inconsistent with this fundamental organizational objective, as was their right to do. *See Rakestraw*, 981 F.2d at 1533 ("[W]orkers generally may decide by majority vote where their interests lie.").

US Airways' attempts to have this Court enter an order that would force USAPA to take on a particular position regarding seniority is contrary to the intent behind the longstanding "principle that a union's . . . promulgations is entitled to judicial deference" *Air Wisconsin Pilots Prot. Comm. v. Sanderson*, 909 F.2d 213, 218 (7th Cir. 1990). The principle "is to protect the internal affairs of unions from heavy-handed judicial interference, and is consistent with what has become in the last half century a settled though not total aversion to federal judicial intervention in labor relations." *Id.*, at 218. Such an order would be an impermissible attack on the pilots' choice of USAPA as their bargaining representative in violation of the RLA.

VIII. THIS COURT LACKS SUBJECT MATTER JURISDICTION

A. US Airways' claims are not ripe as per the decision of the Ninth Circuit.

Although this Court decided otherwise in denying USAPA's motion to dismiss, USAPA continues to oppose all the claims asserted in this action for the reasons stated by the Ninth Circuit in *Addington I*, namely that "not until . . . [US Airways] responds to the [seniority] proposal, the parties complete negotiations, and the membership ratifies the CBA will the West Pilots actually be affected by USAPA's seniority proposal – whatever USAPA's final proposal ultimately is. Because these contingencies make the claim speculative, the issues are not yet fit for judicial decision." 606 F.3d at 1180.

B. US Airways lacks standing to assert a breach of the DFR claim.

It is without cavil that "[a] union has the statutory duty to represent all members of the appropriate bargaining unit fairly." *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 312 (3d Cir. 2004); *see also Humphrey v. Moore*, 375 U.S. 342 (1964); *Vaca v. Sipes*, 386

U.S. 171, 186 (1967). "Conversely, the union's statutory duty of fair representation does not extend to those persons who are not members of the pertinent bargaining unit." *Bensel*, 387 F.3d at 312; *see also Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 74-75, (1991) (the union's duty of fair representation to its members is akin to the duty a trustee owes to trust beneficiaries and likened to the relationship between attorney and client). "In other words, exclusive representation is a necessary prerequisite to the statutory duty to represent fairly." *Bensel*, 387 F.3d at 312 (citing *Vaca*, 386 U.S. at 177).

US Airways' complaint rests on a speculative DFR claim brought in the future by the West Pilot Class. The alternative judicial declarations US Airways seeks in Counts I, II, and III require a decision on whether USAPA violated its DFR. (*See* Joint Proposed Case Management Plan, pp. 4, 10, Dkt. No. 130) However, US Airways lacks standing to request such a declaration, and the complaint should be dismissed as a matter of law.

CONCLUSION

The Court should grant USAPA's motion for summary judgment and enter an order dismissing Counts I and III of the Complaint and declaring that USAPA does not violate its duty to bargain under Section 2, Two & Ninth, of the RLA, by proposing and pursuing a seniority system that differs from the Nicolau Award.

Respectfully submitted this 27th day of January, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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