

1 **PATRICK SZYMANSKI** (*pro hac vice*)
2 **PATRICK SZYMANSKI, LLP**
3 1900 L Street, NW, Ste 900
4 Washington, DC 20036
5 Telephone: (202) 721-6035
6 szymanskip@msn.com

SUSAN MARTIN (AZ#014226)
JENNIFER KROLL (AZ#019859)
MARTIN & BONNETT, P.L.L.C.
1850 N. Central Ave. Suite 2010
Phoenix, Arizona 85004
Telephone: (602) 240-6900
smartin@martinbonnett.com
jroll@martinbonnett.com

6 **BRIAN J. O'DWYER** (*pro hac vice*)
7 **GARY SILVERMAN** (*pro hac vice*)
8 **O'DWYER & BERNSTIEN, LLP**
9 52 Duane Street, 5th Floor
10 New York, NY 10007
11 Telephone: (212) 571-7100
12 bodwyer@odblaw.com
13 gsilverman@odblaw.com

14 Attorneys for Defendant US Airline Pilots Association

15 IN THE UNITED STATES DISTRICT COURT

16 DISTRICT OF ARIZONA

17 US Airways, Inc., a Delaware
18 Corporation,

19 Plaintiff,

20 v.

21 Don Addington, an individual; John
22 Bostic, an individual; Mark Burman,
23 an individual; Afshin Iranpour, an
24 individual; Roger Velez, an individual;
25 and Steve Wargocki, an individual, on
26 behalf of themselves and all other
27 similarly-situated individuals,

28 and

US Airline Pilots Association, an
unincorporated association,

Defendants.

) Case No.: 2:10-cv-01570-ROS

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**US AIRLINE PILOTS ASSOCIATION'S
SEPARATE STATEMENT OF FACTS
IN SUPPORT OF USAPA'S MOTION
FOR SUMMARY JUDGMENT**

1 Pursuant to L.R.Civ. 56.1(a), Defendant US Airline Pilots Association (“USAPA”)
2 hereby submits its Separate Statement of Facts in Support of USAPA’s Motion for
3 Summary Judgment. This statement is supported by the attached Declaration of Michael
4 J. Cleary (“Cleary Declaration”), Declaration of Randal E. Mowrey (“Mowrey
5 Declaration”), the Declaration of Courtney A. Borman (“Borman Declaration”), the
6 exhibits hereto and the record before this Court.

7 1. On May 19, 2005, US Airways Group and America West Holdings
8 Corporation (AWHC) entered into an Agreement and Plan of Merger. At the time, US
9 Airways Group owned US Airways, Inc. (US Airways), and AWHC owned America
10 West Airlines, Inc. (America West). Among other things, the Agreement and Plan of
11 Merger provided that US Airways Group would be reorganized, that US Airways Group
12 would own and control both America West and US Airways, and that operations of US
13 Airways and America West would be combined into a single carrier operating under the
14 name US Airways. USAPA Exhibit 3 (Transition Agreement), at p. 1; USAPA Exhibit 4
15 (Nicolau Award), at p 1; *Addington v. USAPA*, 606 F.3d 1174, 1176 (9th Cir. 2010).

16 2. US Airways traces its roots back to All American Aviation, Inc., which was
17 established in Pittsburgh, Pennsylvania, in 1939. It grew into its pre-merger
18 configuration through a series of mergers, including Lake Central Airlines, Mohawk
19 Airlines, Pacific Southwest Airlines, Piedmont Airlines and the Trump Shuttle. As of
20 May 19, 2005, US Airways maintained “domiciles” or bases in Boston, Charlotte, New
21 York (LaGuardia), Philadelphia, Pittsburgh and Washington, D.C., and operated 270
22 passenger jet aircraft including 19 so-called “wide-body” aircraft (9 A330s and 10
23 B767s). US Airways operated these aircraft on flights between points within the United
24 States and from points east of the Mississippi River to Europe and the Caribbean. Cleary
25 Declaration, ¶ 13; USAPA Exhibit 5 (Nicolau Award), at p. 6.

26 3. America West began service in 1983. As of May 19, 2005, America West
27 maintained “domiciles” or bases in Las Vegas and Phoenix and operated 144 passenger
28 jet aircraft none of them “wide-body” aircraft. America West operated these aircraft on

1 flights between points within the United States, including from points west of the
2 Mississippi River to the State of Hawaii. Cleary Declaration, ¶ 14; USAPA Exhibit 5
3 (Nicolau Award), at pp. 6-7.

4 4. The Railway Labor Act (RLA) governs labor-relations in the rail and
5 airline industry, including representation determinations and collective bargaining, and
6 therefore governs these issues with respect to pilots employed by US Airways and
7 America West. 45 U.S.C. §151 & 151a.

8 5. At the time of the merger, the pilots employed by US Airways were
9 represented for the purpose of collective bargaining under the RLA by the Air Line Pilots
10 Association (ALPA) through a subordinate body known as the US Airways Master
11 Executive Council (US Airways MEC). *Addington v. USAPA*, 606 F.3d 1174, 1176 (9th
12 Cir. 2010); Cleary Declaration, ¶ 15.

13 6. At the time of the merger, the pilots employed by America West were
14 represented for the purpose of collective bargaining under the RLA by ALPA through a
15 subordinate body known as the America West Master Executive Council (America West
16 MEC). *Addington v. USAPA*, 606 F.3d 1174, 1176 (9th Cir. 2010); Cleary Declaration, ¶
17 16.

18 7. Pilots at ALPA-represented airlines maintain system seniority lists which
19 rank pilots according to their date of hire. Seniority is important because pilots bid
20 periodically for available positions on particular aircraft at a designated “domicile” and
21 bid monthly for what flights/routes they will fly. A pilot’s assigned domicile determines
22 where he or she must report for work. Many pilots reside at locations other than their
23 assigned domicile and must travel from their residence to their domicile on their own
24 time for each series of flights or to stand by on reserve. For example, a pilot assigned to
25 the US Airways Charlotte domicile may reside in New Hampshire and therefore must
26 travel on his or her own time from New Hampshire to Charlotte to report for his or her
27 assigned flying or reserve duty. Each month pilots bid for their assignments for the next
28 month. A pilot’s ability to bid and hold a particular assignment is important because it

1 determines both how much the pilot is paid and the pilot's work schedule. Pilots are paid
2 based on the time they fly ("block hours") and other duty time at an hourly rate generally
3 based on the size of the aircraft they operate and therefore generally earn more for flying
4 larger aircraft than for flying smaller aircraft. Depending on the individual preferences,
5 seniority determines who has the long overnight in Cancun or who works on weekends
6 and holidays and is awarded his or her desired vacation schedule. Some lines of flying
7 are more efficient and may only take ten days to complete, while others may require as
8 much as nineteen days with additional time away from home for commuting. Pilots also
9 generally prefer the relative certainty of an assigned "line of flying" consisting of a series
10 of scheduled trips or "pairings" each month to the uncertainty of reserve duty which
11 requires the pilot to be available on short notice to substitute on flights as the airline
12 determines may be necessary. Furloughs resulting from reduced available work are also
13 determined by seniority with the least senior pilots being furloughed in the event of a
14 reduction. Both US Airways and America West maintained system seniority lists
15 generally based on date of hire and conducted periodic bids for domicile and aircraft,
16 conducted monthly bids for assigned flying and reserve duty, and furloughed and recalled
17 pilots according to seniority. Mowrey Declaration, ¶ 16; USAPA Exhibit 4 (ALPA
18 Merger Policy, August 10, 2005), at Section 45.C.2.

19 8. At the time of the merger, there were 5098 pilots on the US Airways
20 seniority list, of which 1691 were then currently on furlough. Their dates of hire ranged
21 from April 20, 1966, through June 19, 2000, with Dean Colello who was hired in 1988,
22 shown as the most senior furloughed pilot. At the time he was listed as furloughed in
23 2003, Pilot Colello had 16.4 years of longevity. Colello and many of the other
24 furloughed pilots, although listed as furloughed, were then working for Mid Atlantic, a
25 wholly owned subsidiary of US Airways. These pilots have filed a separate civil action
26 against ALPA which is currently pending. Mowrey Declaration, ¶ 17; USAPA Exhibit 5
27 (Nicolau Award), at p. 6-7.

28 9. At the time of the merger, there were 1894 pilots on the America West

1 Seniority list, none then on furlough, although several had previously been furloughed for
2 various periods. Their dates of hire ranged from June 1, 1983, through April 4, 2005.
3 Mowrey Declaration, ¶ 18; USAPA Exhibit 5 (Nicolau Award), at p. 6-7.

4 10. At the time of the merger, both US Airways and America West had existing
5 collective bargaining agreements covering their pilots. US Airways and ALPA executed
6 the underlying collective bargaining agreement covering the US Airways pilots in 1997
7 (effective at the beginning of 1998) with an “amendable date” of January 2, 2003. The
8 September 11, 2001, terrorist attacks seriously affected the Airline Industry and had a
9 particularly serious effect on US Airways which was heavily concentrated on East coast
10 operations including Boston, New York, Washington, DC, and international destinations.
11 In early 2002, US Airways sought concessions from its unions, including ALPA, as the
12 result of two successive years of heavy operating losses. On August 8, 2002, US
13 Airways pilots ratified a restructuring proposal (“Restructuring I”) that reduced US
14 Airways obligations to the pilots by \$465 million annually for 6-1/2 years. On August
15 11, 2002, US Airways filed for bankruptcy protection claiming that the concessions
16 granted by its unions prior to the bankruptcy were not adequate. On December 13, 2002,
17 US Airways pilots ratify a second restructuring proposal (“Restructuring II”) that granted
18 US Airways additional productivity and wage concessions valued at \$101 million
19 annually and additional pension concessions valued at \$78 million annually. On March
20 31, 2003, US Airways emerged from bankruptcy. On October 21, 2004, US Airways
21 pilots ratify a third concessionary agreement (“Transformation Plan”) that cut US
22 Airway’s costs by an average of \$367.4 million annually over 5 years. As a result of
23 these and other interim agreements, the collective agreement in effect between US
24 Airways and ALPA on the date of the merger consisted of the 1998 agreement plus a
25 series of supplementary “Letters of Agreement (LOAs)” and had an amendable date of
26 December 30, 2009. Cleary Declaration, ¶ 17-19.

27 11. As a result of the post-September 11 concessions granted US Airways in
28 August and December 2002 and in October 2004 and the continuing delay in collective

1 bargaining, East pilots have had only pay cuts and no increases since 2002 and are and
2 continue to fall further behind the industry average. For example, as of August 1, 2011,
3 East pilots flying 737 aircraft earn only 77% of the industry average for pilots flying 737s
4 at other airlines. The comparisons for other aircraft are similar as shown in USAPA
5 Exhibit 22 which was prepared for use in bargaining with US Airways. West pilots have
6 had no increase since 2006. As of August 1, 2011, West pilots flying 737 aircraft earn
7 only 83% of the industry average for pilots flying 737s at other airlines. Again, the
8 comparisons for other aircraft are similar. These substandard wages are continuing and
9 cumulative. Cleary Declaration, ¶ 22-23; USAPA Exhibit 22.

10 12. America West and ALPA entered into a collective bargaining agreement
11 setting the wages and other terms and conditions of employment for the pilots employed
12 by America West in December 2003 with an amendable date of December 31, 2006.
13 Cleary Declaration, ¶ 21.

14 13. As a result of the delay in reaching a new collective bargaining agreement,
15 the West pilots have not had any increase in their wage rates since January 2007. Cleary
16 Declaration, ¶ 22.

17 14. After the merger was announced, on September 23, 2005, AWHC, America
18 West, US Airways Group, US Airways, ALPA, the US Airways MEC and the America
19 West MEC entered into a “Transition Agreement” that established how various
20 employment terms and merger-related conditions of employment would be affected by
21 the merger. USAPA Exhibit 3. Among other things, under the Transition Agreement,
22 the Airline Parties agreed to “continue to recognize [ALPA] as the collective bargaining
23 representative of the America West and US Airways pilots” and “will continue to
24 recognize each of the America West and US Airways MECs as to their authority and
25 responsibility with respect to their respective collective bargaining agreements until the
26 merger of the two MECs.” (Section I.) The Transition Agreement further provided that
27 “[t]he pilot workforces . . . will remain separate and covered by their respective collective
28 bargaining agreements” until “Operational Pilot Integration” which would occur only

1 after “completion of the integrated pilot seniority list” and negotiation of a single
2 collective bargaining agreement. (Section VI.A.) The Transition Agreement further
3 guaranteed that the Airline Parties would continue to operate a defined minimum number
4 of aircraft for each pilot group and that, with a minor exception, “flying between points
5 west of the Mississippi River and the State of Hawaii will be flown by America West
6 pilots” and flying “between points east of the Mississippi River and Europe or the
7 Caribbean will be flown by US Airways pilots.” (Section II.5.) The Transition
8 Agreement provided that openings at America West would be offered to furloughed US
9 Airways pilots, that America West would not hire any new pilots until all furloughed US
10 Airways pilots had been offered a position at America West that when new pilots were
11 hired they would be placed on a third seniority list junior to all other West pilots.¹
12 (Section II.7.) The Transition Agreement provided that these provisions would “be
13 modified to apply to both pilot groups” “[i]n the event of America West furloughs.”
14 (Section II.10.) The Transition Agreement further provided that “[t]he combining of the
15 America West and US Airways MECs will be governed by [ALPA’s] Constitution and
16 By-Laws and its Merger and Fragmentation Policy (“ALPA Merger Policy”)” with stated
17 certain conditions and restrictions (Sections III.C and IV.A). The Transition Agreement
18 also provided that ALPA and the Airline parties would negotiate “a single collective
19 bargaining agreement applicable to the merged operations of America West and US
20 Airways and that the airline operations of America West and US Airways . . . shall be
21 merged “no later than twelve (12) months following the later of (i) completion of the
22 integrated pilot seniority list and (ii) negotiation of the Single Agreement” (Section
23 VI.A.)

24 15. ALPA maintains a “Merger and Fragmentation Policy” (usually referred to
25

26 ¹ In practice US Airways did not assign newly hired pilots to a separate (third)
27 seniority list but offered them positions in either the West or the East system and placed
28 them at the bottom of the appropriate seniority list. USAPA filed a grievance claiming
this practice violated the Transition Agreement. The grievance was denied. USAPA
Exhibit 18 (Decision by Arbitrator Richard Bloch).

1 simply as the “Merger Policy”) to resolve seniority and other issues in the event of a
2 merger or other airline transaction. USAPA Exhibit 4. ALPA Merger Policy establishes
3 in Section 45.G.5 that the basis for the combination of the seniority lists must be a “fair
4 and equitable agreement” according to the following goals (stated “in no particular
5 order”):

- 6 a. Preserve jobs.
- 7 b. Avoid windfalls to either group at the expense of the other.
- 8 c. Maintain or improve pre-merger pay and standard of living.
- 9 d. Maintain or improve pre-merger pilot status.
- 10 e. Minimize detrimental changes to career expectations.

11 USAPA Exhibit 5 (Nicolau Award), at 2.

12 16. Because both groups of pilots—at US Airways and at America West—were
13 represented by ALPA, both groups were governed by the ALPA Merger Policy. Pursuant
14 to the ALPA Merger Policy, the US Airways MEC and the America West MEC
15 appointed “Merger Committees” for the purpose of pursuing the procedures established
16 in ALPA Merger Policy. The Merger Committees were unable to agree on a merged
17 seniority list either through direct negotiations or with the help of a mediator. As a result,
18 the Merger Committees, as required by the ALPA Merger Policy, proceeded to
19 arbitration with a neutral serving as chairman of a Board of Arbitration that consisted of
20 three persons: the neutral arbitrator previously selected by the parties and two pilot
21 neutrals who are ALPA members at other airlines not involved in the merger, each
22 selected by one of the Merger Committees. The pilot neutrals serve as independent
23 decision makers and do not act as representatives of the respective Merger Committees.
24 The Board of Arbitration conducts hearings at which each Merger Committee presents a
25 proposal for combining the two seniority lists, supported by argument, testimony and
26 exhibits. USAPA Exhibit 4 (ALPA Merger Policy, August 10, 2005); Mowrey
27 Declaration, ¶ 20.

28 17. The US Airways Merger Committee and the America West Merger

1 Committee followed the procedures of ALPA Merger Policy through arbitration before a
2 Board of Arbitration consisting of neutral arbitrator George Nicolau and pilot neutrals
3 Stephen Gillen (selected by the America West Merger Committee) and James Brucia
4 (selected by the US Airways Merger Committee). The Board of Arbitration conducted
5 hearings in Washington, D.C., in December 2006 and January and February 2007, during
6 which both Merger Committees presented evidence and argument. The parties filed post-
7 hearing briefs in March 2007. USAPA Exhibit 5 (Nicolau Award), at p. 3; Mowrey
8 Declaration, ¶ 21.

9 18. The Board of Arbitration issued its opinion and award (known as the
10 “Nicolau Award”) on May 1, 2007. USAPA Exhibit 5 (Nicolau Award). The Board of
11 Arbitration took into account changes in aircraft and pilot staffing for each airline that
12 occurred after the date the merger was announced. The Board of Arbitration noted that as
13 of January 1, 2007, the US Airways fleet had been reduced from 270 aircraft (19 wide
14 bodies) to 226 aircraft (still 19 wide bodies) with firm orders for an additional 19 A320s
15 and that the America West fleet had been reduced from 144 aircraft to 133 with the
16 scheduled elimination of one additional B737 by July 1, 2007. *Id.* at pp. 6-7. The Board
17 of Arbitration further noted that as of January 1, 2007, US Airways had 3005 active pilots
18 including pilots who had been returned from furlough and that America West had 1829
19 active pilots. *Id.* at p. 7. The Board observed that as of January 1, 2007, Pilot Colello who
20 was the most senior pilot listed as furloughed from US Airways on the date the merger
21 was announced “was now a B757 First Officer with some 300 active US Airways pilots
22 beneath him.” *Id.*, at page 29. The Board of Arbitration determined that the two
23 seniority lists should be merged into an “Integrated System Seniority List” (1) by
24 reserving the first active 423 positions (“equal to the number of Captains and First
25 Officers flying the A330 and B767 International” aircraft, i.e., “wide bodies”) to the most
26 senior US Airways pilots,² (2) by integrating B757 Captains, A320/B737 Captains, B757

27 ² The number 423 was determined after extracting inactive pilots from the seniority
28 list. Position 423 becomes position 517 once all the inactive pilots are reinserted into the
list. USAPA Exhibit 5 (Nicolau Award), at pp. 31, 32 n.5.

1 First Officers and A320/B737 First Officers from US Airways and America West by ratio
2 starting at position 424 (immediately below the reserved wide-bodied US Airways
3 captains and first officers) and extending down through Pilot Colello (position 4770), and
4 (3) placing all US Airways pilots who were listed as furloughed as of the date the merger
5 was announced in seniority order, including Pilot Colello below the most junior America
6 West pilot as of the date of the merger (positions 4770 (Colello) through 6520). *Id.* at
7 Exhibit A. The Board of Arbitration also determined to include a set of “Conditions and
8 Restrictions” that limit the ability of certain groups of pilots to exercise the seniority
9 granted by their placement on the combined list in order to protect the positions of other
10 pilots. *Id.* at pp. 33-36. For example, one condition and restriction (commonly known as
11 “no bump, no flush”) provides that the implementation of the Integrated System Seniority
12 List “shall not cause . . . the displacement of any pilot from his or her current position.”
13 *Id.* at p. 33. Another condition and restriction reserves the top 423 (wide-body) positions
14 to senior US Airways pilots “for a period of four years from the date of the Award” but
15 provides that this condition and restriction shall cease if the then current Age 60
16 mandatory retirement limit for pilots is changed to Age 65. *Id.* at pp. 33-34.

17 19. One member of the Board of Arbitration, Captain Bruscia, dissented.
18 USAPA Exhibit 5 (dissenting opinion of Capt. Bruscia). He “differ[ed] with my fellow
19 members of the Board . . . in the area of credit that should be given to a pilot based on
20 date of hire and the pilot's resulting length of service.” *Id.* at p. 2. In particular, Captain
21 Bruscia noted that “[t]he most senior furloughed US Airways pilot (Colello) was hired in
22 1988 and had accrued 16.4 years of service as of the date of announcement of the merger.
23 *Id.* He was furloughed in 2003. *Id.* Below Colello, there were over 440 pilots on furlough
24 with at least 15½ years of tenure and well over 12 years of credited length of service. *Id.*
25 The remaining furloughees . . . had at between 5 years and 15 years of tenure and from
26 1½ to 6 years of service.” *Id.* Captain Bruscia further noted,

27 The junior 305 pilots on the America West seniority list all had less
28 than 2 years of service when the merger was announced on May 19,2005.
In fact, the bottom 150 pilots on the America West list were hired less than

1 1 year before the announcement. I do not agree with the Board's decision,
2 in the particular circumstances of this case, to integrate only working pilots
3 as of the date announcement, leaving all those on furlough at that date on
4 the bottom of the combined seniority list. As a consequence of the Board's
5 decision, America West pilot Odell, who was hired less than 2 months
6 before the merger was announced, has been placed immediately senior to
7 US Airways pilot Colello who was hired more than 16 years earlier and
8 who had over 16 years of credited length of service. I disagree with this
9 placement, which disregards Colello's substantial service time.

10 *Id.* at pp. 2-3. Captain Brucia concluded: "At a minimum, it is my opinion that the US
11 Airways pilots, who had already received notice of their opportunity to return to work
12 from furlough, should have received some consideration for the substantial time they
13 have already invested in their airline. In the event that the "new" company again decided
14 to furlough pilots in the near future, conditions and restrictions could have been used to
15 insure a measure of protection for the junior America West pilots to protect them from
16 furlough for some period of time. In fact such a restriction was part of the US Airways
17 Pilot's integration proposal in this case. I believe that this approach would have better
18 balanced the equities that each pilot group brought to this merger." *Id.* at pp. 3-4.

19 20. Under the Transition Agreement the Integrated System Seniority List
20 determined under ALPA Merger Policy by the Board of Arbitration could not go into
21 effect until a consolidated collective bargaining agreement was negotiated between the
22 post-merger US Airways and ALPA (Section VI.A). The Transition Agreement also
23 recognized the separate authority of the America West MEC and the US Airways over
24 their respective collective agreements "until the merger of the two MECs" (Section I.B).
25 USAPA Exhibit 3 (Transition Agreement).

26 21. The US Airways MEC demanded that ALPA set aside the Nicolau Award
27 because it violated ALPA Merger Policy. USAPA Exhibit 6 (US Airways Presentation to
28 ALPA Executive Council, May 21, 2007). On May 21, 2007, the US Airways MEC
29 made a presentation to ALPA explaining why the Award should be invalidated. *Id.* The
30 presentation explained, in part:

 The award mixes US pilots with approximately 17 years of active service
 and no furlough time with AW new hires, who were still in initial ground

1 school at the time of the announcement of the merger. It would deprive
2 these same US pilots of their attrition-based promotional opportunities to
3 Captain and wide body international Captain. Instead, it would transfer
4 those promotional opportunities to AW new hires based on absurd and
5 contradictory theories. ALPA Merger Policy prohibits such gratuitous
6 destruction of one pilot group's pay, lifestyle and careers
7 in order to benefit the other group.

8 *Id.* at p. 1. The presentation demonstrated in graphic detail how younger West pilots with
9 little service would reap windfall gains in violation of the Merger Policy's mandate that
10 any award issued under the policy must "[m]inimize detrimental changes to career
11 expectations" and "[a]void windfalls to either group at the expense of the other." The
12 presentation explained how the Nicolau Award, among other things, incorrectly described
13 326 pilots (including Dean Colello) as on furlough when in fact they were flying at US
14 Airways subsidiary Mid-Atlantic Airlines, placed West pilots with less than two months
15 of service above East pilots with more than 16 *years* of service, deprived senior East
16 pilots of wide body flying and gave it to West pilots who had no wide body flying, and
17 would take captain positions away from East pilots and give them to West pilots with less
18 service. At pages 11-16 the presentation demonstrated the windfall the Nicolau Award
19 represented to the West pilots by noting that under the Award West pilots would be able
20 to bid and hold a captain position 1-9 years earlier than what they could have expected at
21 America West while the East pilots with whom they were slotted, many with 16-17 years
22 of uninterrupted service, would have their ability to bid and hold a captain's position
23 delayed by 1-4 years. USAPA Exhibit 6.

24 22. All of the other crafts involved in the merger, including the flight
25 attendants, dispatchers and mechanics, merged their seniority lists according to date of
26 hire. Seniority for the dispatchers was merged based on an arbitration decision issued by
27 Arbitrator Richard Bloch who concluded:

28 In summary, based on these findings, the conclusion is that fairness and
equity in this case militates strongly toward a date of hire list. On the one
hand, this outcome may consign certain West employees to furlough and
will, of course, make them more vulnerable, based on their relative
seniority, to later displacements. But that is, after all, the essence of length-

1 of-tenure based seniority, which, in this particular case, heavily favors the
2 older U.S. Airways work force.

3 Mowrey Declaration, ¶ 22.

4 23. On June 26, 2007, the US Airways MEC filed a complaint against the
5 America West MEC in the Superior Court for the District of Columbia to vacate the
6 Nicolau Award. USAPA Exhibit 8 (Complaint by US Airways MEC v. America West
7 MEC). The Complaint alleged that the Nicolau Award violated ALPA Merger Policy, in
8 part, because it gave “windfalls (unwarranted and unexpected benefits) to the pilots of
9 America West at the expense of US Airways pilots, thereby permanently depriving US
10 Airways pilots of their career expectations, while affording gains in career promotion to
11 America West pilots which they could not have achieved absent the Award.” *Id.* at ¶ 7.
12 The America West MEC removed the case to federal court. In opposing the motion to
13 remand filed by the US Airways MEC, the America West MEC asserted that the Nicolau
14 Award was nothing more than a “bargaining proposal” and that there therefore was no
15 binding action to be vacated. USAPA Exhibit 9 (Opposition by America West MEC to
16 motion to remand), at p. 20 (“proposal regarding seniority integration”). The United States
17 District Court remanded the case, finding that the complaint presented no federal
18 question that would support removal. *US Airways MEC v. America West MEC*, 525
19 F.Supp.2d 127 (D.D.C. 2007).

20 24. At the same time, it filed suit in Superior Court for the District of Columbia
21 to vacate the Nicolau Award, the US Airways MEC wrote to ALPA demanding that
22 ALPA refrain from sending the Nicolau seniority list to US Airways in order to prevent
23 US Airways from accepting the list while the litigation was pending. USAPA Exhibit 9
24 (Letter from US Airways MEC to ALPA, dated June 26, 2007).

25 25. In late July 2007, the US Airways MEC determined that the East Pilots,
26 who significantly outnumber the West Pilots, would not ratify a collective bargaining
27 agreement that incorporated the Nicolau Award because, for example, the Award placed
28 considerably younger probationary West pilots with under two months seniority above

1 East pilots who had more than sixteen years of credited length of service. By its
2 placement of the younger America West pilots above East pilots with considerable length
3 of service, the Nicolau Award adversely affected the career expectations of thousands of
4 East pilots. Mowrey Declaration, ¶ 23.

5 26. During the latter half of 2007 and into the early part of 2008, ALPA made
6 several attempts to persuade the US Airways MEC and the America West MEC to reach
7 a compromise on the dispute over the Nicolau Award. These efforts included the Rice
8 Committee, a so-called “Blue Ribbon Committee,” and meetings conducted by ALPA
9 between the US Airways MEC and the America West MEC at the Wye River Conference
10 Center in Maryland. None of these efforts were successful. Mowrey Declaration, ¶ 24.

11 27. In mid-2007, several pilots formed a new organization known as the US
12 Airline Pilots Association (USAPA). Cleary Declaration, ¶ 24.

13 28. USAPA’s Constitution and Bylaws states that one of USAPA’s objectives
14 is “To maintain uniform principles of seniority based on date of hire and the perpetuation
15 thereof, with reasonable conditions and restrictions to preserve each pilot’s un-merged
16 career expectations.” USAPA Exhibit 2 (USAPA Constitution and Bylaws), at p. 8.

17 29. In late 2007, while the litigation by the US Airways MEC against the
18 America West MEC seeking to vacate the Nicolau Award was still pending and despite
19 the demand by the US Airways MEC not to release the Nicolau seniority list to US
20 Airways, ALPA presented the Nicolau Award to US Airways for acceptance under the
21 terms of the Transition Agreement (Section IV.A). USAPA Exhibit 3 (Transition
22 Agreement), at p. 6; Complaint ¶ 28.

23 30. On November 13, 2007, USAPA filed an application with the National
24 Mediation Board (NMB) seeking to replace ALPA as the representative of a combined
25 bargaining unit (referred to in the RLA as a “craft or class”) consisting of both the US
26 Airways pilots and the America West pilots. USAPA Exhibit 1 (NMB Certification,
27 April 4, 2008).

28 31. By late 2007, US Airways had recalled all East pilots who had been on

1 furlough at the time the merger was announced. Of the 1691 pilots who were originally
2 listed as furloughed, approximately 700 actually accepted recall. In late 2007 and early
3 2008, US Airways hired 101 new pilots. Borman Declaration, ¶ 6.

4 32. On December 20, 2007, while the litigation by the US Airways MEC
5 against the America West MEC seeking to vacate the Nicolau Award was still pending
6 and while the application by USAPA to replace ALPA as the bargaining representative
7 for the merged pilot craft was pending with the NMB, US Airways accepted the seniority
8 list and restrictions and conditions as determined in the Nicolau Award. Complaint, ¶ 28.

9 33. In early 2008, the NMB determined that US Airways pilots and the
10 America West pilots constituted a single craft for purposes of labor representation and
11 conducted an election among the pilots. 5,238 pilots were eligible to vote; 2,723 voted
12 for USAPA and 2,254 voted for ALPA. There were no objections to the election, and the
13 NMB certified USAPA as the new bargaining representative of the combined pilot group
14 on April 18, 2008. USAPA Exhibit 1 (NMB Certification, April 4, 2008).

15 34. The certification of USAPA as the new bargaining representative of the
16 merged pilot craft extinguished the existence of the US Airways MEC and the America
17 West MEC, and, because the parties were no longer in existence the suit to vacate the
18 Nicolau Award that had been filed by the US Airways MEC against the America West
19 MEC was dismissed. USAPA Exhibit 10 (Joint Stipulation of Dismissal); Mowrey
20 Declaration, ¶ 25.

21 35. In 2008, US Airways was forced to reduce flying because of economic
22 conditions. US Airways closed the Pittsburgh domicile effective March 1, 2008, and in
23 June 2008 announced the furlough of 300 pilots, 175 from the West and 125 from the
24 East. Due to offers of enhanced voluntary leaves of absence negotiated by USAPA, 144
25 West pilots and 84 East pilots were actually furloughed.³ *Addington v. USAPA*, 606 F.3d

26
27 ³ USAPA has included in this Statement of Undisputed Facts the best information it
28 has concerning various changes in flying and flight operations and about the financial
status of US Airways. This information appears in paragraphs 35-36, 44, and 52-54.
USAPA has based the statements made in these paragraphs on reports received from US
Airways and filed with various government agencies and believes this information is

1 1174, 1178 (9th Cir. 2010); Borman Declaration, ¶ 8.

2 36. The merger between America West Holdings Corporation and US Airways
3 became effective on September 27, 2005. US Airways Group reported financial data
4 separately for America West Airlines and US Airways on its 10-K (annual) and 10-Q
5 (quarterly) filings with the United States Securities and Exchange Commission through
6 June 30, 2007. On the 2006 10-K filing, US Airways Group reported that for calendar
7 2006 America West Airlines incurred an operating loss of \$35 million and US Airways
8 realized net income of \$345 million. On the 10-Q filing for the second quarter of 2007,
9 US Airways Group reported that for the first six months of 2007 America West Airlines
10 realized operating income of \$22 million and US Airways realized net income of \$211
11 million. For the 18 month period from January 1, 2006, through June 30, 2007, this
12 amounts to an operating loss for America West of \$13 million and net income for US
13 Airways of \$556 million. Cleary Declaration, ¶ 26.

14 37. On September 4, 2008, six individual West pilots (the *Addington* plaintiffs)
15 filed suit against USAPA and US Airways in the United States District Court for the
16 District of Arizona. *Addington v. US Airline Pilots Association*, Case No. CV 08-1633-
17 PHX-NVW, alleging, in part, that USAPA breached its duty of fair representation to the
18 West pilots by refusing to adhere to the Nicolau Award. The claims against US Airways
19 were dismissed and the Court certified a class of West pilots. A jury trial was scheduled
20 for late April 2009. *See Addington v. USAPA*, 606 F.3d 1174, 1177-78 (9th Cir. 2010).

21
22 accurate. As set forth in the proposed Case Management Plan and as described at the
23 Scheduling Conference held December 1, 2011, USAPA believes it should have the
24 opportunity to conduct discovery on these operational and financial matters, including
25 furloughs and recalls, aircraft population, hours of flying and the volume of traditional
26 East routes being flown by West pilots (and vice versa). USAPA believes that these facts
27 are irrelevant to the core legal issue properly before the Court but contends that it should
28 be able to conduct discovery on these subjects before any judgment can be issued against
USAPA on what it believes are extraneous DFR claims precluded by the *Addington*
decision. In particular, USAPA believes that all of this information undercuts the
underlying premise of the Nicolau Award, namely that the West operation was
significantly more viable than the East operation and therefore show that the Award was
fatally flawed and arbitrarily promoted West pilots over East pilots, and further shows
that USAPA's decision to advocate a date of hire seniority system with significant
restrictions and conditions is reasonable and not arbitrary, discriminatory or in bad faith.

1 38. On September 30, 2008, as part of negotiations for a new collective
2 bargaining agreement, USAPA submitted its seniority proposal to US Airways. The
3 proposal placed West pilots on the merged seniority list according to their original dates
4 of hire with America West and included extensive conditions and restrictions that
5 prevented East pilots from displacing them from their customary West assignments and
6 allowed them to bid into East flying including wide body aircraft and international routes
7 as vacancies were created as the result of growth, retirements and other normal attrition
8 among East pilots. Moreover, under USAPA's proposal 63 senior West pilots would
9 immediately become eligible to bid wide body positions. US Airways has not responded
10 to the proposal. Mowrey Declaration, ¶ 26.

11 39. Following the problems raised by the Nicolau Award, ALPA made
12 significant changes to its Merger Policy, including giving parties the option of a Board of
13 Arbitration consisting of three impartial neutral arbitrators rather than a Board with one
14 arbitrator and two pilot members and changing the factors to be considered to explicitly
15 include "longevity." Under the new Merger Policy, the factors to be considered in
16 reaching a "fair and equitable" resolution are (Section 45.C.4.e):

- 17 • Career expectations.
- 18 • Longevity.
- 19 • Status and category.

20 USAPA Exhibit 11 (ALPA Merger Policy, dated April 30, 2009); Mowrey Declaration, ¶
21 27.

22 40. After the Court dismissed plaintiffs' claims against US Airways in the
23 *Addington* case on the ground that they were minor disputes within the jurisdiction of the
24 system board rather than the Court, the *Addington* plaintiffs filed a grievance alleging, in
25 part, that US Airways was required to adhere to the Nicolau Award under the terms of the
26 Transition Agreement and could not deviate from the Award "unless such amendment is
27 ratified by a majority of the West pilots." USAPA Exhibit 17 (Letter from Kelly J.
28 Flood, counsel for the Addington plaintiffs, dated December 2, 2007). This grievance

1 was docketed for hearing and US Airways agreed to expedite the hearing. USAPA
2 Exhibit 18 (Letter from Bob Siegel, counsel for US Airways, dated December 9, 2008).
3 The *Addington* plaintiffs declined to participate in a hearing scheduled for January 9 and
4 later withdrew their grievance. USAPA Exhibit 20 (Letter from Kelly J. Flood, dated
5 June 19, 2009).

6 41. Jury trial was held in the *Addington* case in late April and early May 2009.
7 The jury found in favor of the West Pilots on their claim for breach of the duty of fair
8 representation, and, after a bench trial on remedy, the District Court issued an order on
9 July 17, 2009, directing USAPA to “negotiate and implement a single collective
10 bargaining agreement with US Airways that will implement the Nicolau Award seniority
11 proposal.” USAPA vigorously objected throughout the proceedings on multiple grounds
12 including ripeness, evidence and jurisdiction. USAPA appealed. *See Addington v.*
13 *USAPA*, 606 F.3d 1174, 1178 (9th Cir. 2010).

14 42. USAPA appealed the District Court’s judgment in *Addington I*. On appeal,
15 USAPA argued, among other things, that:

- 16 • the case was not ripe;
- 17 • as a legal matter, there could not have been a breach of the duty of fair
18 representation because federal law does not allow a claim for breach of the
19 duty of fair representation based on facts prior to USAPA becoming the
20 certified bargaining agent;
- 21 • there would be no breach of the duty of fair representation merely by
22 following the date-of-hire standard with protections for the West Pilots, the
23 same seniority system implemented by every other union at US Airways;
- 24 • there was insufficient evidence to support a finding of breach of the duty of
25 fair representation, and 5) the scope of the district court’s injunction dictating
26 substantive contractual terms was beyond the district court’s jurisdiction.

27 In addition, among other rulings challenged on appeal, USAPA argued that the district
28 court utilized incorrect jury instructions and made numerous evidentiary and other errors

1 which would require reversal including that the district court erroneously:

- 2 • prohibited USAPA from challenging the process, procedure, or decision of the
- 3 Nicolau Award
- 4 • prohibited the introduction of evidence concerning how all of the other US
- 5 Airways' unions adopted a date-of-hire approach;
- 6 • directed the jury that it could not consider a preference for honoring date-of-
- 7 hire seniority as a legitimate union objective;
- 8 • prohibited the jury from considering the independent merits, or biases, of
- 9 ALPA Merger Policy, and
- 10 • declined to instruct the jury that a finding of "bad faith" required a finding of
- 11 "fraud, deceitful action or dishonest conduct."

12 *See* Br. of Appellant, at 16-17, *Addington v. USAPA*, 606 F.3d 1174 (9th Cir. 2010) (No.

13 09-16564), ECF No. 15.

14 43. On November 13, 2009, after being unable to reach agreement on a new

15 collective bargaining agreement in direct negotiations with US Airways, USAPA

16 submitted applications requesting the mediatory services of the NMB with respect to both

17 the US Airways and the America West collective agreements. On January 27, 2010, the

18 NMB initiated mediation and assigned a mediator. USAPA Exhibit 21 (NMB Letter,

19 dated January 27, 2010).

20 44. US Airways closed its LaGuardia, Las Vegas and Boston domiciles in the

21 first half of 2010. There were no associated furloughs. Almost all of the pilots displaced

22 by these closures bid into other domiciles. Pilots who otherwise would have been

23 furloughed either accepted early retirement or enhanced leaves of absence negotiated by

24 USAPA or had their furloughs offset by pilots elsewhere in the system who took early

25 retirement or enhanced leave. Borman Declaration, ¶ 9.

26 45. On June 4, 2010, the United States Court of Appeals for the Ninth Circuit

27 issued an opinion in the *Addington* case holding that the District Court did not have

28 jurisdiction over the duty of fair representation claim made by the West pilots because it

1 “is not ripe” and remanding the case to the District Court “with directions that the action
2 be DISMISSED.” *Addington v. USAPA*, 606 F.3d 1174 (9th Cir. 2010). The court did
3 not rule on the merits of the issues raised by USAPA on appeal finding that “we are
4 without jurisdiction to address the merits of the claim unless it is ripe.” *Id.* at 1179.

5 46. On October 20, 2010, USAPA held a well-publicized informational
6 meeting in a conference room at the Phoenix airport to explain to the West pilots the
7 details of the USAPA seniority proposal and promote discussion. Representatives from
8 USAPA including all USAPA’s then current officers, members of the negotiating, merger
9 and communications committee, legal counsel and members of the USAPA executive
10 board were present. Only four or five West pilots attended. The Merger Committee
11 distributed copies of the proposal along with a set of Frequently Asked Questions and
12 presented a PowerPoint explaining the USAPA proposal. The USAPA officers and
13 members of the Merger Committee invited input from the West pilots made it clear to
14 those in attendance that the proposal was subject to amendment, negotiation and
15 ratification. Copies of the Proposal that was distributed and the Frequently Asked
16 Questions USAPA Exhibits 13-15.⁴ Cleary Declaration, ¶ 27.

17 47. USAPA attempted to persuade Mark Burdick, a West pilot, to become a
18 member of the Merger Committee which is primarily responsible for seniority, seniority
19 integration and related matters and which formulated USAPAs current seniority proposal.
20

21 ⁴ On information and belief, the Army of Leonidas, an organization established by a
22 group of West pilots to direct and fund the *Addington* litigation and this litigation and in
23 general to preserve the significant windfall gains promised to West pilots by the Nicolau
24 Award, and several of its supporters individually sent communications and took other
25 actions to persuade West pilots to boycott this meeting and to boycott other attempts by
26 USAPA (see paragraph 47) to engage West pilots in substantive discussions concerning
27 the USAPA seniority proposal both to explain the proposal and to solicit constructive
28 suggestions for improving it to better protect the legitimate interests of West pilots. As
set forth in the proposed Case Management Plan and as described at the Scheduling
Conference held December 1, 2011, this is another subject on which USAPA believes it
should have the opportunity for discovery before any judgment is issued adverse to
USAPA’s position in this case. In particular, USAPA believes this evidence will show
that the leaders of the West pilot group have obstructed USAPA’s legitimate efforts to
fulfill its duty of representation to the West pilots by engaging them in substantive
discussions on the USAPA seniority proposal. See also note 3, above.

1 Captain Burdick in fact had served on the Negotiating Advisory Committee which assists
2 the professional negotiator representing USAPA in bargaining with US Airways.
3 USAPA also attempted to persuade another West pilot, Ken Stravers, who had been on
4 the America West Merger Committee to serve on the USAPA Merger Committee.
5 Captain Stravers declined after the Court of Appeals overturned the District Court
6 decision in *Addington*. Cleary Declaration, ¶ 28.

7 48. In October 2011, USAPA President Michael Cleary traveled to Dallas,
8 Texas, to meet with Phoenix Domicile Representative Eric Ferguson who was a member
9 of the USAPA Board of Pilot Representatives and an active member of the Army of
10 Leonidas. President Cleary explained to Pilot Ferguson his view that the East pilots and
11 the West pilots should attempt to resolve their differences over seniority and the Nicolau
12 Award by entering into direct discussions with the assistance of a nationally recognized
13 mediator. President Cleary explained his view that continued litigation would only delay
14 matters further and would not resolve the matter, particularly given that any resolution of
15 the seniority issue would need to be ratified by the merged pilot craft. Pilot Ferguson
16 subsequently informed President Cleary that he could not agree to the proposal, that the
17 West Pilots wanted the Nicolau Award, and they would continue to litigate the matter
18 before the United States District Court in Arizona. Cleary Declaration, ¶ 29.

19 49. On November 17, 2010, USAPA President Michael Cleary sent a letter to
20 all US Airways pilots urging mediation of the dispute. Cleary Declaration, ¶ 30; USAPA
21 Exhibit 21.

22 50. USAPA again argued that the East and West pilots should enter into direct
23 discussion with the assistance of a nationally recognized mediator in submitting its
24 position in the proposed Case Management Plan. The West Pilot Class rejected the
25 proposal. Case Management Plan Dkt. No.130, at p. 17; Cleary Declaration, ¶ 31.

26 51. USAPA continues to solicit input from the West pilots concerning the
27 seniority proposal and is open to amending the proposal to accommodate additional
28 suggestions to protect the interests of the West pilots. Cleary Declaration, ¶ 32.

1 52. All furloughed pilots—West and East—were offered recall to the smaller
2 EMB190 aircraft by December 2010 and to group 2 aircraft (737s and A319/320s) by
3 May 2011. All of the furloughed West pilots still on furlough were offered recall to East
4 positions; initially 52 declined and 20 accepted; another 3 accepted effective in February
5 and March 2012. During 2011, US Airways hired 49 new pilots. As of 2011, there were
6 3394 pilots on the East seniority list and 1658 on the West seniority list. US Airways
7 plans to hire 44 new pilots in the first quarter of 2012 and to continue hiring at the rate of
8 approximately 20 pilots each month thereafter. Borman Declaration, ¶ 10-13.

9 53. At a Crew News meeting held on August 5, 2010, in Phoenix, a
10 representative of US Airways stated that 24 percent of current West flying consists of
11 routes flown by East pilots before the merger. Mowrey Declaration, ¶ 29. This 24
12 percent East to West transfer translates to a loss of approximately 180 East Captain
13 positions and 175 First Officer positions, or a total loss of 355 East pilot positions. *Id.* ¶
14 30. The Transition Agreement (USAPA Exhibit 3) still governs the assignment of flying
15 to East and West pilots and gives US Airways broad leeway to assign flights that begin
16 and end in in the United States to either East or West pilots. The loss of East pilot
17 positions is somewhat offset by a relatively small number of former West routes being
18 flown by East pilots. The fact that a significant number of West pilots are flying routes
19 that otherwise would be flown by East pilots means that if the East and West operations
20 were operated separately, without any ability to share routes, the number of positions
21 available to West pilots would be substantially fewer, resulting in furloughs in the West
22 and additional new hires in the East. Mowrey Declaration, ¶ 30.

23 54. As of the end of 2011, US Airways operated 220 jet passenger aircraft in its
24 East operation including 26 wide bodied aircraft (16 A330s and 10 767s) and 120 aircraft
25 in its West operation, none wide bodied. Borman Declaration, ¶ 14.

26 55. On May 27, 2011 USAPA commenced an action in the United States
27 District Court for the Eastern District of New York, *USAPA v. US Airways*, 11 Civ.
28 02579, which alleges, inter alia, that US Airways has been continuously in violation of

1 Section 2 (First) of the RLA, 45 U.S.C. § 152 (First), by intentionally failing to “exert
2 every reasonable effort” to reach a single integrated collective bargaining agreement with
3 USAPA, and its predecessor ALPA, since negotiations to amend the collective
4 bargaining agreement began in 2008 and that since USAPA was certified as bargaining
5 representative in April, 2008, US Airways has engaged in surface bargaining on
6 numerous matters, including the seniority dispute at issue in this action, and employed
7 evasive and dilatory tactics in resolving disputes. The Eastern District of New York
8 action also alleges that since about 2006, US Airways has systematically frustrated
9 effective administration of the parties’ contractual dispute resolution procedures and
10 long-established practices in violation of the duty to maintain the status quo and which
11 are tantamount to a repudiation of the collective bargaining agreement. US Airways’
12 motion to dismiss the amended complaint in that action has been fully briefed. Oral
13 argument on the motion has not been scheduled. Amended Complaint, E.D.N.Y., No.
14 11-CIV-2579 (ARR) (SMG), Doc. No. 12.

15 56. Contrary to the allegations in the Complaint (¶ 4, 34, 42, 44, 50, 52, 61),
16 USAPA has never threatened to strike. Cleary Declaration, ¶ 33. In any event, a strike
17 could only occur if and when the NMB releases the parties from mediation and the final
18 cooling-off period prescribed by the Railway Labor Act has expired.

19 Respectfully submitted this 27th day of January, 2012.

20
21 **Martin & Bonnett, P.L.L.C.**

22 By: s/Susan Martin
23 Susan Martin
24 Jennifer L. Kroll
25 1850 N. Central Ave. Suite 2010
26 Phoenix, AZ 85004

27 Patrick Szymanski (*pro hac vice*)
28 Patrick Szymanski, LLP
1900 L Street, NW, Ste 900
Washington, DC 20036

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Brian J. O'Dwyer (*pro hac vice*)
Gary Silverman (*pro hac vice*)
O'Dwyer & Bernstein, LLP
52 Duane Street, 5th Floor
New York, NY 10007

Attorneys for US Airline Pilots Association

CERTIFICATE OF SERVICE

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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:

US Airways, Inc.
Karen Gillen
111 West Rio Salado Parkway
Tempe, AZ 85281

Robert A. Siegel
Chris A. Hollinger
Ryan W. Rutledge
400 South Hope Street, Suite 1500
Los Angeles, CA 90071-2899

Attorneys for Plaintiff

Marty Harper
Kelly J. Flood
Andrew S. Jacob
Katherine V. Brown
Polsinelli & Shughart, PC
CityScape
One East Washington St., Ste. 1200
Phoenix, AZ 85004

Attorneys for West Pilot Class

s/T. Mahabir