

1 Karen Gillen
2 US Airways, Inc.
3 111 West Rio Salado Parkway
4 Tempe, AZ 85281
5 State Bar No. 018008
6 Facsimile: (480) 693-5932
7 karen.gillen@usairways.com
8 Telephone: (480) 693-0800

9 Robert A. Siegel (admitted *pro hac vice*)
10 Chris A. Hollinger (admitted *pro hac vice*)
11 O'Melveny & Myers LLP
12 400 South Hope Street
13 Los Angeles, CA 90071-2899
14 Facsimile: (213) 430-6407
15 rsiegel@omm.com
16 Telephone: (213) 430-6000

17 Attorneys for Plaintiff
18 US Airways, Inc.

19 **UNITED STATES DISTRICT COURT**
20 **DISTRICT OF ARIZONA**

21 US Airways, Inc., a Delaware
22 Corporation,

23 Plaintiff,

24 v.

25 Don Addington, an individual; John
26 Bostic, an individual; Mark Burman,
27 an individual; Afshin Iranpour, an
28 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-PHX-ROS

**PLAINTIFF US AIRWAYS, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES PERTAINING TO
DEFENDANTS' CROSS-MOTIONS
FOR SUMMARY JUDGMENT ON
COUNTS 1 AND 2 OF THE
COMPLAINT**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT.....	1
STATEMENT OF FACTS	3
PROCEDURAL HISTORY.....	10
ARGUMENT	10
I. THE TRANSITION AGREEMENT IS BINDING ON USAPA AND US AIRWAYS	10
II. USAPA CAN SEEK TO AMEND THE TRANSITION AGREEMENT CONSISTENT WITH ITS DUTY OF FAIR REPRESENTATION TO THE WEST PILOTS	11
CONCLUSION	12

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

CASES

Addington v. US Airline Pilots Ass’n,
No. CV 08-1633-PHX-NVW, 2009 WL 2169164 (D. Ariz. July 17, 2009) 11, 12

Air Line Pilots Ass’n v. O’Neill,
499 U.S. 65 (1991) 11

Ala. Hosp. Ass’n v. United States,
656 F.2d 606 (Ct. Cl. 1981)..... 11

Association of Flight Attendants v. United Airlines,
71 F.3d 915 (D.C. Cir. 1995) 11

Association of Flight Attendants v. USAir,
24 F.3d 1432 (D.C. Cir. 1994) 11

Beck v. United Food & Commercial Workers Union, Local 99,
506 F.3d 874 (9th Cir.2007)..... 11

Bernard v. Air Line Pilots Association, Int’l,
873 F.2d 213 (9th Cir. 1989)..... 12

Orff v. U.S.,
358 F.3d 1137 (9th Cir. 2004)..... 12

Rakestraw v. United Airlines,
981 F.2d 1524 (7th Cir. 1992)..... 12

Truck Drivers, Local Union 568 v. NLRB,
379 F.2d 137 (D.C. Cir. 1967) 12

US Airways/America West Airlines,
35 N.M.B. 65 (2008) 8

STATUTES

29 U.S.C. §§ 151 *et seq.*..... 3

45 U.S.C. § 152 3

Pub. L. No. 110-161, div. K, tit. I, § 117 (2007) 5

OTHER AUTHORITIES

59 C.A.B. 45 5

Federal Rule of Civil Procedure 8(d) 9

PRELIMINARY STATEMENT

1
2 The defendants in this case, the US Airline Pilots Association (“USAPA”) and the
3 West Pilots Class, are each moving for summary judgment on Counts 1 and 2 of plaintiff
4 US Airways, Inc.’s (“US Airways”) Complaint, whereby US Airways seeks a declaratory
5 judgment that: (i) entry into a collective bargaining agreement (“CBA”) with a non-
6 Nicolau seniority list would constitute a violation of USAPA’s duty of fair representation
7 (“DFR”) to the West Pilots and US Airways is therefore prohibited from implementing a
8 non-Nicolau seniority list; *or, alternatively* (ii) entry into a CBA with a non-Nicolau
9 seniority list would not constitute a violation of USAPA’s DFR and US Airways is
10 therefore not prohibited from implementing a non-Nicolau seniority list. Consistent with
11 its position of neutrality in the underlying seniority dispute between the West Pilots and
12 USAPA, US Airways takes no position regarding the outcome of defendants’ cross-
13 motions for summary judgment, but is filing this brief as suggested by the Court to assist
14 in identifying the relevant facts and legal issues.

15 When America West Airlines, Inc. (“America West”) and the predecessor to the
16 current US Airways merged in 2005, the two pilot groups were represented by the same
17 union, the Air Line Pilots Association (“ALPA” or the “Association”). Following the
18 merger, ALPA (i.e., the international union), as well as the local units that represented the
19 US Airways pilots (“East Pilots”) and the America West pilots (“West Pilots”), entered
20 into a Transition Agreement with the airlines which required that “[t]he seniority lists of
21 America West pilots and US Airways pilots will be integrated in accordance with ALPA
22 Merger Policy and submitted to the Airline Parties for acceptance.” The Transition
23 Agreement, however, also expressly provided that it “may be modified by the written
24 agreement of the Association and the Airline Parties.”

25 Pursuant to ALPA’s Merger Policy, if two pilot groups were unable to agree on an
26 integrated seniority list, the next step was to integrate the pre-merger seniority lists on a
27 “fair and equitable” basis through an arbitration decision that “shall be final and binding
28 on all parties to the arbitration.” Neither ALPA nor US Airways nor America West

1 participated in the arbitration hearing; the only parties to the arbitration were the East
2 Pilots and the West Pilots, who participated through their respective merger committees.
3 They each retained their own independent and experienced legal counsel, and selected
4 George Nicolau, a highly-regarded mediator and arbitrator with extensive experience in
5 the airline industry. A lengthy arbitration hearing was held, during which each pilot group
6 presented substantial documentary and testimonial evidence, culminating in the issuance
7 of a decision on May 1, 2007 known as the “Nicolau Award.” Arbitrator Nicolau did not
8 integrate pilots based strictly on each pilot’s date of hire with their pre-merger airline, as
9 the East Pilots had sought, but instead attached significance to his assessment of the
10 pilots’ pre-merger career expectations.

11 In response to the Nicolau Award, the East Pilots formed a new labor union,
12 USAPA, whose constitution does not embrace the Nicolau Award but instead endorses
13 strict date-of-hire seniority principles to which the West Pilots are unalterably opposed.
14 The East Pilots outnumbered the West Pilots, and, following an election, USAPA replaced
15 ALPA as the collective bargaining representative for both the East Pilots and West Pilots
16 on April 18, 2008. In September 2008, USAPA proposed to US Airways that the parties
17 amend the Transition Agreement to allow for a date-of-hire seniority list, rather than the
18 Nicolau list. The legality of USAPA’s proposal has been in dispute between USAPA and
19 the West Pilots ever since it was made, and is the core issue in this case.

20 The defendant West Pilots Class contends that USAPA’s insistence on a non-
21 Nicolau seniority proposal is a violation of USAPA’s DFR under the Railway Labor Act
22 (“RLA”). According to the West Pilots Class, it was understood by all parties that the
23 Nicolau Award would constitute a final and binding resolution of the seniority dispute;
24 USAPA’s alleged desire to favor the East Pilots’ interests relative to the West Pilots,
25 through its current seniority proposal, is not a legitimate union objective; and USAPA has
26 no legitimate union objective for rejecting the Nicolau seniority list. According to
27 USAPA, on the other hand: it has the same right to seek to amend the Transition
28 Agreement as did ALPA (including its incorporation of final and binding arbitration

1 pursuant to the ALPA Merger Policy); it is a legitimate union objective to pursue a date-
 2 of-hire seniority list; and, under the circumstances of this case, pursuit of a date-of-hire
 3 seniority list is the only realistic means to achieve a CBA with US Airways that could be
 4 ratified by the combined pilot group.

5 US Airways remains neutral regarding the merits of the underlying seniority
 6 dispute between the two pilot groups, but respectfully asks the Court to resolve this matter
 7 so that it and its pilots can move forward in completing negotiations for a new combined
 8 post-merger CBA.

9 STATEMENT OF FACTS

10 The predecessor to the current US Airways merged with America West pursuant to
 11 an agreement executed in May 2005. (Sep. Stmt.¹ ¶ 1.) At the time, ALPA represented
 12 the US Airways pilots, now known as “East Pilots,” and the America West pilots, now
 13 known as “West Pilots,” in two separate “bargaining units,” or “crafts or classes.”² (Sep.
 14 Stmt. ¶ 2.) US Airways employed approximately 5,000 East Pilots, more than 1,000 of
 15 whom were on furlough at the time of the merger, and America West employed
 16 approximately 1,900 West Pilots, none of whom were on furlough. (Sep. Stmt. ¶ 3.)

17 The pre-merger US Airways-ALPA CBA, which remains in effect to this day for
 18 the East Pilots, mandated “a seniority integration governed by the Association Merger
 19 Policy, if applicable.” (Sep. Stmt. ¶ 4.)³ Similarly, the pre-merger America West-ALPA
 20 CBA, which remains in effect to this day for the West Pilots, mandated that “the
 21 Company will integrate the two Pilot groups in accordance with Association Merger
 22

23 ¹ “Sep. Stmt. ¶ 1” refers to Plaintiff’s Separate Statement of Undisputed Facts for
 24 Purposes of Plaintiff US Airways, Inc.’s Memorandum of Points and Authorities
 25 Pertaining to Defendants’ Summary Judgment Briefing, dated January 27, 2012,
 submitted herewith.

26 ² The phrase “bargaining unit” is used in decisions under the National Labor Relations
 27 Act, 29 U.S.C. §§ 151 *et seq.*, whereas the analogous phrase under the RLA, which
 governs labor relations in the airline and railroad industries, is “craft or class.” *See*
 45 U.S.C. § 152 (Fourth) & (Ninth).

28 ³ ALPA’s Merger Policy is applicable when, as here, the pilots of both pre-merger
 carriers are represented by ALPA. (Sep. Stmt. ¶ 5.)

1 Policy if both groups are represented by the Association.” (Sep. Stmtnt. ¶ 6.) That CBA
 2 also specified that “the Company will meet promptly with the Association to negotiate a
 3 possible “Fence Agreement” to be in effect during the period, if any, the two carriers are
 4 operated separately without integration of the pilot work force.” (Sep. Stmtnt. ¶ 7.)

5 Following the merger, US Airways, America West, their respective corporate
 6 parents, ALPA, the US Airways Master Executive Council, and the America West Master
 7 Executive Council entered into a Transition Agreement which governed, among other
 8 things, the integration of the East Pilots and West Pilots seniority lists. (Sep. Stmtnt. ¶ 8.)⁴
 9 The Transition Agreement mandated that “[t]he seniority lists of America West pilots and
 10 US Airways pilots will be integrated in accordance with ALPA Merger Policy and
 11 submitted to the Airline Parties for acceptance,” and further required that “[t]he Airline
 12 Parties will accept such integrated seniority list, including conditions and restrictions, if
 13 such list and the conditions and restrictions comply with” specified criteria.⁵ (Sep. Stmtnt.
 14 ¶ 10.)

15 Pursuant to ALPA’s Merger Policy, if two pilot groups were unable to agree on an
 16 integrated seniority list through direct negotiations or mediation, the next step was to
 17 integrate the pre-merger seniority lists on a “fair and equitable” basis through an
 18 arbitration award that “shall be final and binding on all parties to the arbitration.” (Sep.
 19 Stmtnt. ¶ 11 (“The purpose of arbitration shall be to reach a fair and equitable resolution
 20

21 ⁴ A “Master Executive Council,” or “MEC,” is the unit within ALPA, akin to a union
 22 local for an international union, which is responsible for representation of the pilots at one
 23 particular airline, e.g., US Airways or America West. The Transition Agreement was
 24 signed by the chairpersons of the America West and US Airways MECs, and provided,
 25 under the heading “Continued Representation of the America West and US Airways
 26 Pilots,” that: “The Parties will continue to recognize each of the America West and US
 27 Airways MECs as to their authority and responsibility with respect to their respective
 28 collective bargaining agreements until the merger of the two MECs.” (Sep. Stmtnt. ¶ 9.)

⁵ These criteria were: (i) no “system flush” (through which “an active pilot may
 displace any other active pilot from the latter’s Position”); (ii) furloughed pilots could not
 displace active pilots; (iii) no differential pay where a pilot is paid for a position not
 actually flown; (iv) ability of pilots who are in the process of being trained for a new
 position to be assigned to that position “regardless of their relative standing on the
 integrated seniority list;” and (v) no conditions and restrictions that “materially increase
 costs associated with training or company paid moves.” (Sep. Stmtnt. ¶ 10.)

1 consistent with ALPA policy.”); Sep. Stmt. ¶ 11 (“The Award of the Arbitration Board
 2 shall be final and binding on all parties to the arbitration and shall be defended by
 3 ALPA.”).⁶ ALPA is not a party in any such arbitration and its role is limited: “The role
 4 of ALPA in seniority integration is solely to provide the process by which the affected
 5 pilot groups on ALPA airlines arrive at the merged seniority list for presentation to
 6 management, through their respective merger representatives, using arbitration if
 7 necessary. Responsibility for the merged seniority list falls upon the respective merger
 8 representatives with ALPA National in a neutral position on the merits.” (Sep. Stmt.
 9 ¶ 12; *see also* Sep. Stmt. ¶ 13 (“The merger representatives of the affected airlines shall
 10 be charged with the preparation of their contentions regarding the merger and their
 11 subsequent presentation before the Arbitration Board.”).)

12 The East Pilots and West Pilots were unable to agree on an integrated seniority list,
 13 so they participated in a seniority-integration arbitration pursuant to ALPA’s Merger
 14 Policy as required by their pre-merger CBAs as well as the Transition Agreement. (Sep.
 15 Stmt. ¶ 14.) Arbitrator George Nicolau was chosen by the merger representatives of the
 16 East Pilots and the West Pilots to serve as Chairman of the Arbitration Board. (Sep.
 17 Stmt. ¶ 15.) Mr. Nicolau is a full-time arbitrator, mediator and attorney, with extensive
 18 experience in the airline industry; he is also a past President of the National Academy of
 19 Arbitrators, and has received the Distinguished Service Award of the American
 20 Arbitration Association. (Sep. Stmt. ¶ 16.)⁷

21
 22 ⁶ Subsequent to the US Airways/America West merger, Congress enacted the
 23 McCaskill-Bond legislation addressing airline industry mergers. The statute provided,
 24 where the employees of the pre-merger carriers were represented by different unions, that
 25 “sections 3 and 13 of the labor protective provisions imposed by the Civil Aeronautics
 26 Board in the Allegheny-Mohawk merger (as published at 59 C.A.B. 45) shall apply to the
 27 integration of covered employees of the covered air carriers.” Pub. L. No. 110-161,
 28 div. K, tit. I, § 117 (2007). Sections 3 and 13 of the *Allegheny-Mohawk* labor protective
 provisions, in turn, mandated that “provisions shall be made for the integration of
 seniority lists in a fair and equitable manner,” including through arbitration where “The
 decision of the arbitrator shall be final and binding on the parties.” 59 C.A.B. 45, 45, 49
 (1972). These provisions are identical to those adopted in the ALPA Merger Policy.

⁷ The other two (non-voting) members of the Arbitration Board, selected by the merger
 representatives of the East Pilots and the West Pilots, respectively, were Captain Stephen
 Gillen and Captain James P. Brucia. (Sep. Stmt. ¶ 17.) Neither person was affiliated

1 The arbitration was extensive. Both sides were separately represented by
 2 experienced counsel, the East Pilots by Katz & Ranzman, P.C., and the West Pilots by
 3 Bredhoff & Kaiser, P.L.L.C., and they “agreed on the arbitration ground rules.” (Sep.
 4 Stmt. ¶¶ 19-20.) Arbitrator Nicolau summarized the proceeding as follows:

5 After receiving pre-hearing statements of position, the Arbitration Board
 6 *held a hearing over eighteen days* in Washington, D.C. in the months of
 7 December, 2006 and January and February, 2007, during which *both*
 8 *Parties were afforded full opportunity to offer evidence and argument*
 9 *and to present, examine and cross-examine witnesses. A transcript,*
 10 *consisting of 3102 pages, was taken. There were 20 witnesses and 14*
 11 *volumes of exhibits.* Subsequent to the hearing, the Parties filed
 12 comprehensive post-hearing briefs, with the Record closed on March 23,
 2007, the day of their receipt. Thereafter, the Board met in a number of
 executive sessions to weigh the arguments and reach its conclusions. In
 doing so and in the process of fashioning the Award, it called upon and
 received, with the express permission of the Parties, the assistance and
 comments of their technical experts, *with no objection raised as to the*
fairness or regularity of the proceedings.

13 (Sep. Stmt. ¶ 21 (emphasis added).)

14 This process – in which neither ALPA nor US Airways nor America West played
 15 any role – resulted in a 35-page arbitration award issued by Arbitrator Nicolau on May 1,
 16 2007. (Sep. Stmt. ¶ 22.) The Nicolau Award did not integrate pilots based strictly on
 17 each pilot’s “date of hire” with their pre-merger airline, as the East Pilots had sought,⁸ but
 18 instead fashioned what Arbitrator Nicolau thought to be a “fair and equitable” seniority
 19 integration – attributing “considerable importance” to the pilots’ “career expectations” at
 20 each pre-merger airline, while also giving “consideration” to the “Date of Hire” factor.

21 (Sep. Stmt. ¶ 24.) This approach was consistent with ALPA Merger Policy, which
 22 prescribed that “The merger representatives shall carefully weigh all the equities inherent
 23 in their merger situation,” and that they “should attempt to match equities to various
 24 methods of integration until a fair and equitable agreement is reached, keeping in mind the

25
 26 with US Airways or America West. (Sep. Stmt. ¶ 18.)

27 ⁸ Sep. Stmt. ¶ 23 (“The US Airways initial proposal was “grounded on a pilot’s Date of
 28 Hire adjusted for Length of Service. That proposal placed the most senior America West
 pilot below some 900 US Airways pilots and integrated a number of furloughed US
 Airways pilots with active America West pilots.”).

1 following goals, in no particular order: a. Preserve jobs. b. Avoid windfalls to either
2 group at the expense of the other. c. Maintain or improve pre-merger pay and standard of
3 living. d. Maintain or improve pre-merger pilot status. e. Minimize detrimental changes
4 to career expectations.” (Sep. Stmt. ¶ 25.) The Nicolau Award placed approximately
5 500 East Pilots at the top of the seniority list, 1700 furloughed East Pilots at the bottom of
6 the list, and blended the remainder of East Pilots with West Pilots generally according to
7 their relative positions on their pre-merger seniority lists. (Sep. Stmt. ¶ 26.)

8 ALPA presented the integrated seniority list generated through the Nicolau Award
9 to post-merger US Airways in late 2007, as required by the Transition Agreement; the
10 seniority list satisfied the specified criteria (*see note 5 supra*), and therefore, as also
11 required by the Transition Agreement, US Airways accepted the list on December 20,
12 2007. (Sep. Stmt. ¶¶ 27-29.) However, the integrated seniority list has never taken
13 effect because the Transition Agreement prohibits post-merger US Airways from using an
14 integrated seniority list prior to “Operational Pilot Integration,” and because “Operational
15 Pilot Integration” cannot occur under the Transition Agreement until after the negotiation
16 of a single collective bargaining agreement applicable to the integrated pilot groups –
17 which, largely because of the unresolved seniority dispute, has not happened to this day.
18 (Sep. Stmt. ¶ 30.)

19 The East Pilots perceived the Nicolau Award to be less favorable to them as a
20 group than the “date-of- hire” integrated seniority list they had sought from Arbitrator
21 Nicolau. (Sep. Stmt. ¶ 31.) In response, the East Pilots formed a new labor union,
22 USAPA, whose constitutional “objectives” include “maintain[ing] uniform principles of
23 seniority based on date of hire and the perpetuation thereof, with reasonable conditions
24 and restrictions to preserve each pilot’s un-merged career expectations.” (Sep. Stmt.
25 ¶ 32.) The East Pilots outnumbered the West Pilots, and, following a representation
26 election between USAPA and ALPA, the National Mediation Board (“NMB”) certified
27 USAPA as the new collective bargaining representative for both the East Pilots and West
28

1 Pilots on April 18, 2008. (Sep. Stmt. ¶ 33.)⁹ Thereafter, USAPA and US Airways
2 engaged in collective bargaining negotiations for a single labor contract, but, as noted
3 above, no agreement has been reached. (Sep. Stmt. ¶ 34.)

4 In June 2008, US Airways announced that it intended to furlough approximately
5 300 pilots, 140 of whom would be West Pilots. (Sep. Stmt. ¶ 35.) If the integrated
6 seniority list mandated by the Nicolau Award had been in effect, none of the West Pilots
7 would have been furloughed because their relative seniority positions on the integrated list
8 were higher than on the pre-merger America West seniority list. (Sep. Stmt. ¶ 36.) Six
9 (West) pilots filed a class-action lawsuit on September 4, 2008 against USAPA and US
10 Airways, contending that: (i) USAPA had breached its duty of fair representation (“DFR”)
11 to the West Pilots through its insistence on a “date-of-hire” integrated seniority list and its
12 refusal to seek implementation of the Nicolau Award in its negotiations with US Airways
13 for a single collective bargaining agreement; and (ii) US Airways had breached its
14 obligation under the Transition Agreement to negotiate in good faith with USAPA for a
15 single collective bargaining agreement. (Sep. Stmt. ¶ 37.) In September 2008, while the
16 litigation was pending, USAPA made its first and only seniority list proposal in the
17 collective bargaining negotiations with US Airways. That proposal consisted of a non-
18 Nicolau seniority list that was “based on the integration of the pre-merger US Airways . . .
19 and former pre-merger America West . . . certified pilot seniority lists . . . on a date-of-
20 hire basis.” (Sep. Stmt. ¶ 38.) Although the USAPA proposal provided, for a stated
21 period of time in some specific circumstances, that strict date-of-hire principles would not
22 be applied in a manner detrimental to the West Pilots, the proposal would have
23 specifically mandated that “Furlough and recall shall be accomplished on an integrated
24 seniority list basis and shall supersede protected position provisions.” (Sep. Stmt. ¶ 39.)
25

26
27 ⁹ Previously, the NMB had determined that the US Airways/America West merger
28 created a “single transportation system” for RLA purposes, and, as a result, both pilot
groups were combined into one consolidated bargaining unit. *US Airways/America West
Airlines*, 35 N.M.B. 65 (2008).

1 Ultimately, the claims against US Airways were dismissed for lack of jurisdiction
2 and the claims against USAPA went to trial. (Sep. Stmtnt. ¶ 40.) At trial, the jury found
3 that USAPA had violated its DFR to the West Pilot class because it “cast aside the result
4 of an internal seniority arbitration solely to benefit East Pilots at the expense of West
5 Pilots,” and “failed to prove that any legitimate union objective motivated its acts.” (Sep.
6 Stmtnt. ¶ 41.) On appeal, the Ninth Circuit did not reach the merits of the West Pilots’
7 DFR claim against USAPA, but instead held that their claim was not ripe. (Sep. Stmtnt.
8 ¶ 42.)

9 In its ongoing collective bargaining negotiations with USAPA, however, US
10 Airways must either accept or reject USAPA’s demand for a date-of-hire seniority list. If
11 US Airways accepts USAPA’s seniority demand, the West Pilots have made clear that
12 they will sue US Airways for “facilitat[ing]” or “assist[ing]” USAPA’s breach of DFR,
13 and US Airways will thus be exposed to tens of millions of dollars in damages and
14 invalidation of any CBA that is reached with USAPA. (Sep. Stmtnt. ¶ 43.) If US Airways
15 rejects USAPA’s demand, USAPA has made clear that it will initiate a work stoppage at
16 its “earliest opportunity,” exposing US Airways to hundreds of millions of dollars in lost
17 revenue and customer goodwill. (Sep. Stmtnt. ¶ 44.) Given the continuing legal
18 uncertainty surrounding USAPA’s seniority demands as well as the express threats by the
19 West Pilots and USAPA, US Airways brought this action seeking alternative declaratory
20 judgments in accordance with Federal Rule of Civil Procedure 8(d). (Sep. Stmtnt. ¶ 45.)
21 And, as the Court has ruled, US Airways’ claims are ripe. (Sep. Stmtnt. ¶ 46.)

22 Consistent with its position of neutrality in the underlying seniority dispute, the
23 first two counts in US Airways’ Complaint seek a judicial declaration that: (i) entry into a
24 CBA with a non-Nicolau seniority list would constitute a violation of USAPA’s DFR and
25 US Airways is therefore prohibited from implementing a non-Nicolau seniority list; *or*,
26 *alternatively* (ii) entry into a CBA with a non-Nicolau seniority list would not constitute a
27 violation of USAPA’s DFR and US Airways is therefore not prohibited from
28 implementing a non-Nicolau seniority list. (Sep. Stmtnt. ¶ 47.)

PROCEDURAL HISTORY

On November 22, 2011, the parties filed a Joint Proposed Case Management Plan wherein they all agreed that cross-motions for summary judgment were an appropriate mechanism for resolution of Counts 1 and 2 in US Airways' Complaint. (*See* Doc. No. 130, at pp. 13-18.) At the subsequent Case Management Conference, the Court directed the West Pilots and USAPA to file cross-motions for summary judgment with respect to the first two counts of the Complaint. (*See* Hollinger Decl. Exh. G at 34:10-37:16.)

The Court indicated that the issues to be addressed in the summary judgment briefing included: "whether or not the principles of duty of fair representation permit USAPA to make a proposal to change the transition agreement and to present a list other than Nicolau" (*id.* at 32:24-33:1); "whether USAPA and US Airways and this Court [are] bound by the Nicolau agreement . . . or whether or not USAPA can independently litigate it" (*id.* at 34:13-16); "is the Nicolau agreement binding on this Court with all of the permutations that we have discussed today" (*id.* at 35:7-8); and if the Court were to "find that the Nicolau agreement is binding, then the question is the depth and breadth of that agreement and that is whether or not it somehow doesn't cover the issue of unfair representation" (*Id.* at 36:13-16.)

The Court suggested further that since US Airways "certainly understand[s] the issue in a neutral way" it "should have an opportunity to also brief the issue." (*Id.* at 33:25-34:2.)

ARGUMENT

I. THE TRANSITION AGREEMENT IS BINDING ON USAPA AND US AIRWAYS.

Following the US Airways/America West merger in 2005, the East Pilots and West Pilots, through each of their ALPA MECs, and separate from and in addition to ALPA as the international organization, agreed that "[t]he seniority lists of America West pilots and US Airways pilots will be integrated in accordance with ALPA Merger Policy and

1 submitted to the Airline Parties for acceptance.” (Sep. Stmt. ¶ 10.) And, under ALPA
 2 Merger Policy, any seniority arbitration award “shall be final and binding on all parties to
 3 the arbitration.” (Sep. Stmt. ¶ 11.) It is well-settled under the RLA that, USAPA – as
 4 the successor to ALPA as the collective bargaining representative for the East Pilots and
 5 West Pilots – inherited the rights and obligations set forth in the collectively-bargained
 6 Transition Agreement. *See, e.g., Association of Flight Attendants v. United Airlines*,
 7 71 F.3d 915, 919 (D.C. Cir. 1995); *Association of Flight Attendants v. USAir*,
 8 24 F.3d 1432, 1438-39 (D.C. Cir. 1994).

9 **II. USAPA CAN SEEK TO AMEND THE TRANSITION AGREEMENT**
 10 **CONSISTENT WITH ITS DUTY OF FAIR REPRESENTATION TO THE**
 11 **WEST PILOTS.**

12 Although the Transition Agreement is binding on USAPA and US Airways, it
 13 expressly provides that it “may be modified by the written agreement of the Association
 14 and the Airline Parties.” (*See* Hollinger Decl. Exh. C, § XII.B at p. 14.) In seeking to
 15 amend the Transition Agreement, however, USAPA’s conduct is regulated by its duty of
 16 fair representation (“DFR”) to the West Pilots. In other words, its actions cannot be
 17 arbitrary, discriminatory, or in bad faith. *See generally Air Line Pilots Ass’n v. O’Neill*,
 18 499 U.S. 65, 78 (1991); *Beck v. United Food & Commercial Workers Union, Local 99*,
 19 506 F.3d 874, 879 (9th Cir.2007); *Bernard v. Air Line Pilots Association, Int’l*,
 20 873 F.2d 213, 216 (9th Cir. 1989).

21 In prior litigation between the West Pilots and USAPA, District Judge Neil V.
 22 Wake reviewed the relevant decisions and interpreted this DFR standard to mean that
 23 USAPA must have “some legitimate union objective” in advocating for a non-Nicolau
 24 seniority list, and that “by adopting and promoting a certain integrated seniority list for no
 25 reason other than to favor one group of employees at the expense of another,” USAPA
 26 had breached its DFR. *Addington v. US Airline Pilots Ass’n*, No. CV 08-1633-PHX-
 NVW, 2009 WL 2169164, at *11 (D. Ariz. July 17, 2009);¹⁰ *see also id.* at *11

27 ¹⁰ Although the district court’s rulings in *Addington* do not carry precedential
 28 weight in light of the Ninth Circuit’s subsequent ruling, this Court may refer to them to
 the extent it finds it helpful to do so. *See Ala. Hosp. Ass’n v. United States*, 656 F.2d 606,

1 (discussing *Bernard v. Air Line Pilots Association, Int'l*, “Under *Bernard*, a union may
 2 not diverge from its merger policy solely to advance the seniority rights of union members
 3 at the expense of non-union members.”); *id.* (discussing *Truck Drivers, Local Union 568*
 4 *v. NLRB*, 379 F.2d 137, 143 (D.C. Cir. 1967), “Of particular relevance was the union’s
 5 sole motivation to ‘win[] an election by a promise of preferential representation to the
 6 numerically larger number of voters.’”); *but see id.* at *14 (discussing *Rakestraw v. United*
 7 *Airlines*, 981 F.2d 1524, 1535 (7th Cir. 1992), “By acting to restore a seniority system vis-
 8 a-vis newly hired pilots, the union served the legitimate objective of “stability” by
 9 protecting long-term employee expectations against outright erasure.”).

10 US Airways submits that the Court’s resolution of the defendants’ cross-motions
 11 for summary judgment should be based on the Court’s application of the above-recited
 12 DFR standard and related case law to the circumstances of this case. In determining
 13 “whether or not the principles of duty of fair representation permit USAPA to make a
 14 proposal to change the transition agreement and to present a list other than Nicolau” (*See*
 15 *Hollinger Decl. Exh. G at 32:24-33:1*), US Airways submits that the salient material facts
 16 are undisputed, and that the Court is therefore in a position to definitively rule on the
 17 defendants’ cross-motions for summary judgment as to Counts 1 and 2 of Complaint, and
 18 issue a declaration that: (i) entry into a CBA with a non-Nicolau seniority list would
 19 constitute a violation of USAPA’s DFR and US Airways is therefore prohibited from
 20 implementing a non-Nicolau seniority list; *or alternatively* (ii) entry into a CBA with a
 21 non-Nicolau seniority list would not constitute a violation of USAPA’s DFR and US
 22 Airways is therefore not prohibited from implementing a non-Nicolau seniority list. (Sep.
 23 Stmt. ¶ 47.)

CONCLUSION

24
 25 For the reasons discussed above, US Airways requests that the Court resolve
 26 Counts 1 and 2 of the Complaint on the defendants’ cross-motions for summary judgment
 27

28 610 (Ct. Cl. 1981) (cited with approval by *Orff v. U.S.*, 358 F.3d 1137, 1149-1150 (9th
 Cir. 2004)).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2012, the foregoing document was electronically transmitted to the United States District Court Clerk’s Office using the CM/ECF System for filing and transmittal.

/s/ Robert A. Siegel
Robert A. Siegel

OMM_US:70403025.3