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

Robert A. Siegel (admitted *pro hac vice*)
Chris A. Hollinger (admitted *pro hac vice*)
Ryan W. Rutledge (admitted *pro hac vice*)
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071-2899
Facsimile: (213) 430-6407
rsiegel@omm.com
Telephone: (213) 430-6000

Attorneys for Plaintiff
US Airways, Inc.

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-PHX-ROS

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

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

DISCUSSION 3

I. USAPA IS BOUND BY EXISTING COLLECTIVE BARGAINING AGREEMENTS, INCLUDING THE TRANSITION AGREEMENT 3

II. EXISTING COLLECTIVE BARGAINING AGREEMENTS, SUCH AS THE TRANSITION AGREEMENT, CAN BE AMENDED 6

III. UNIONS NEGOTIATING AMENDMENTS TO EXISTING COLLECTIVE BARGAINING AGREEMENTS ARE CONSTRAINED BY THE DUTY OF FAIR REPRESENTATION 7

III. USAPA'S PROCEDURAL ARGUMENTS SHOULD BE REJECTED 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Addington v. US Airline Pilots Ass'n,
No. CV 08-1633-PHX-NVW, 2009 WL 2169164 (D. Ariz. July 17, 2009) 8, 10

Air Line Pilots v. O'Neill,
499 U.S. 654 (1991) 8

Air Wis. Pilots Protection Comm. v. Sanderson,
909 F.2d 213 (7th Cir. 1990) 8

Aluminium v. Hunter Eng'g Co., Inc.,
655 F.2d 938 (9th Cir. 1981) 10, 11

Association of Flight Attendants v. USAir, Inc.,
24 F.3d 1432 (D.C. Cir. 1994) ("*USAir*") 3, 4, 8

Beardsly v. Chicago & N.W. Transp. Co.,
850 F.2d 1255 (8th Cir. 1988) 8

Bernard v. Alaska Airlines,
873 F.2d 213 (9th Cir. 1989) 8

Dement v. Richmond, F&P R.R.,
845 F.2d 451 (4th Cir. 1988) 8

Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union,
396 U.S. 142 (1969) ("*Shore Line*") 5

Ford v. Air Line Pilots Ass'n,
268 F. Supp. 2d 271 (E.D.N.Y 2003) 8

Gvozdenovic v. United Airlines, Inc.,
933 F.2d 1100 (2d Cir. 1991) 8

Haerum v. Air Line Pilots Ass'n,
892 F.2d 216 (2d Cir. 1989) 8

Herring v. Delta Air Lines, Inc.,
894 F.2d 1020 (9th Cir. 1989) 8

International Bhd. of Teamsters v. Texas Int'l Airlines, Inc.,
717 F.2d 157 (5th Cir. 1983) 3

Jones v. Trans World Airlines Inc.,
495 F.2d 790 (2d Cir. 1974) 8

TABLE OF AUTHORITIES
(continued)

Page

Nellis v. Air Line Pilots Ass'n,
815 F. Supp. 1522 (E.D. Va. 1992) 8

Rakestraw v. United Airlines, Inc.,
981 F.2d 1524 (7th Cir. 1992) 8

US Airways, Inc. v. U.S. Airline Pilots Ass'n,
___ F. Supp. 2d ___, 2011 WL 4485795 (W.D.N.C. Sept. 28, 2011) 7, 10

Zapp v. United Transp. Union,
727 F.2d 617 (7th Cir. 1984) 8

STATUTES

45 U.S.C. § 156 7

OTHER AUTHORITIES

The Railway Labor Act (American Bar Ass'n Section of Labor & Employment Law, 2d ed. 1995) at 11-12 3

PRELIMINARY STATEMENT

US Airways, Inc. ("US Airways") remains neutral regarding the merits of the underlying dispute between the US Airline Pilots Association ("USAPA") and the West Pilot class, and takes no position regarding which of the first two alternative declaratory judgments requested in its Complaint should be entered by the Court. US Airways submits this consolidated response to the defendants' cross-motions for summary judgment on Counts 1 and 2 to provide context for the Court's evaluation of their arguments.

On the one hand, the West Pilots are correct that the Transition Agreement is binding on USAPA. By that, US Airways means that the Transition Agreement is a valid collective bargaining agreement ("CBA") between US Airways and its pilots. The fact that there was a change in the pilots' representative—from the Air Line Pilots Association ("ALPA") to USAPA—does not affect the validity of any pre-existing CBA, including the Transition Agreement. That Agreement remains in full force and effect, and USAPA—as the successor to ALPA as the pilots' representative—has rights and obligations thereunder (as does US Airways). Indeed, since replacing ALPA, USAPA has consistently invoked various provisions of the Transition Agreement, and has in no way acted as if that Agreement is anything but a binding contract.

On the other hand, USAPA is correct that the Transition Agreement can be amended. The Transition Agreement itself expressly contemplates the potential for amendments, and because the pre-existing CBAs have become "amendable," USAPA also has the right to propose amendments pursuant to Section 6 of the Railway Labor Act ("RLA"). Thus, while USAPA remains bound by the Transition Agreement, it can propose amendments to it.

The unresolved question for this Court to decide is whether USAPA's unalterable insistence on amending the Transition Agreement by replacing the Nicolau Award with a date-of-hire seniority list is consistent with USAPA's duty of fair representation ("DFR") to the West Pilots. USAPA has a legal duty under the RLA to fairly represent all of the

pilots. That duty operates as a constraint on all of the actions USAPA is otherwise permitted to take—including the proposal of amendments to a pre-existing CBA.

The DFR is particularly important here because of US Airways' neutrality regarding the issue of seniority. With respect to many terms and conditions of employment, such as pay or hours, US Airways' own interests ensure that agreements between it and USAPA are negotiated at arms' length. But US Airways has only limited interests regarding seniority, such as ensuring that changes in seniority do not increase its costs, and those interests are protected by the provisions in the Transition Agreement that specified the criteria an integrated seniority list must satisfy before US Airways was obligated to accept it. (Supp. Sep. Stmnt. ¶ 3.) Thus, when USAPA proposes a change to seniority, it is the DFR that must protect the interests of the employees whose rights are affected—not any negotiations between US Airways and USAPA. Here, the West Pilots argue that USAPA's insistence on a date-of-hire seniority list would violate USAPA's DFR. USAPA argues that it would not. On that question, US Airways takes no position and defers to the judgment of the Court.

US Airways does believe that there are no material factual issues in dispute, and that the DFR question raised in Counts 1 and 2 of the Complaint can and should be resolved by the defendants' cross-motions for summary judgment. This will allow the parties to proceed with legal clarity in the negotiation of their CBA – a constructive and positive result.[1]

[1] The Court expressly directed the parties to address only Counts 1 and 2 of the Complaint. (*See* Dec. 1, 2011 Transcript at 35:14-19 ("MR. SIEGEL: Your Honor, I think that makes sense. And if I understand the Court, that, essentially, the briefing, therefore, is really with regard to Count 1 and 2 of the complaint which would be a summary judgment on those two counts? THE COURT: Absolutely. You got it.").) This was soundly based on the need to resolve whether or not the Nicolau Award is binding on the parties. Accordingly, while it disagrees with the defendants' arguments regarding Count 3 (*see* Doc. No. 150 at 22:17-23:16; Doc. No. 152 at 23:21-24:23), US Airways will not address the merits of those arguments absent further direction from the Court.

DISCUSSION

I. USAPA IS BOUND BY EXISTING COLLECTIVE BARGAINING AGREEMENTS, INCLUDING THE TRANSITION AGREEMENT.

ALPA presented the Nicolau Award to US Airways, and US Airways accepted it, in accordance with the requirements of the Transition Agreement. The defendants' cross-motions for summary judgment raise the question of whether the Transition Agreement is now binding on USAPA. As US Airways explained in its opening brief (Doc. No. 156 at 13:23-14:8[2]), the answer is "yes" – USAPA, as successor to ALPA, is bound by the Transition Agreement. The decertification of ALPA and the certification of USAPA did not change the binding nature of the Transition Agreement. *See, e.g., International Bhd. of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 163 (5th Cir. 1983) ("If the employees designate a new collective bargaining representative, it succeeds to the status of the former representative without alteration in the contract terms."); *Association of Flight Attendants v. USAir, Inc.*, 24 F.3d 1432, 1438-39 (D.C. Cir. 1994) ("*USAir*").[3]

In *USAir*, for example, before US Air assumed complete responsibility for management of the Trump Shuttle's operations, the Shuttle flight attendants were represented by the Transport Workers Union ("TWU"), which had negotiated a CBA on their behalf, and the USAir flight attendants were represented by the Association of Flight Attendants ("AFA"), which had negotiated a separate CBA on their behalf. Thereafter, the National Mediation Board determined that the Shuttle and USAir constituted a "single carrier," and the AFA became the collective bargaining representative for the combined flight attendant group. The AFA argued that, as a result of the change in representation for the Shuttle flight attendants (i.e., from the TWU to the AFA), the Shuttle flight

---

[2] All citations to the docket refer to the page numbers in the Court's electronic filing system, and not the documents' internal pagination.

[3] *See also* The Railway Labor Act (American Bar Ass'n Section of Labor & Employment Law, 2d ed. 1995) at 11-12 ("If a new representative is selected to replace an incumbent, an existing collective bargaining agreement with the carrier remains in effect in accordance with its duration clause, and the new representative becomes responsible for administering that contract.").

attendants were no longer governed by the TWU CBA but instead were covered by the USAir-AFA CBA. The D.C. Circuit disagreed.

As *USAir* explains, there is a "general principle that collective bargaining agreements survive a change in representative." *Id.* at 1439. In accordance with that principle, the court held that the Shuttle flight attendants remained subject to the TWU CBA – they did not switch over to the AFA CBA simply because they had become represented by the AFA: "AFA has offered no credible basis either in law or contract from which we may conclude that the AFA-USAir agreement represents the status quo for Shuttle flight attendants. Rather, our review of the Act and relevant case law leads us to conclude that the mere change in union representative had no effect on the status quo applicable to Shuttle flight attendants." *Id.* at 1437. Notwithstanding *USAir*, USAPA makes two arguments for a different result here.

First, relying on privity concepts, USAPA states, with respect to the Transition Agreement, that it "was not a party to that agreement and did not sign or ratify that agreement," and that it "did not assent to any of the terms of the Transition Agreement." (Doc. No. 152 at 15:16-19.) USAPA also cites non-RLA cases for the general legal principle that non-parties cannot be bound by a contract. (*Id.* at 14:11-18.) But USAPA misses the point. The parties to a CBA under the RLA include the carrier and its employees – not only the carrier and the union. *See* National Mediation Board Forty-Second Annual Report at 39 (1976) (referring to the NMB's policy that a change in representation does not alter or cancel pre-existing CBAs, and stating that "The purpose of such a policy is to emphasize a principle of the Railway Labor Act that agreements are between the employees and the carrier, and that the change of an employee representative does not automatically change the contents of an agreement.").[4]

[4] This principle is apparent from the very face of the Transition Agreement, which, in terms, is an agreement "made and entered into in accordance with the provisions of the Railway Labor Act, as amended (the "Act"), by and between AMERICA WEST HOLDINGS CORPORATION ("AWHC"), AMERICA WEST AIRLINES, INC. ("AMERICA WEST"), US AIRWAYS GROUP, INC. ("US AIRWAYS GROUP"), US AIRWAYS, INC. ("US AIRWAYS"), and ***the AIR LINE PILOTS in the service of AMERICA WEST and US AIRWAYS***, respectively, as represented by the AIR LINE

Second, USAPA asserts that only the "substantive provisions" of the Transition Agreement are binding as part of the status quo that must remain in effect when it is seeking to negotiate a new CBA, while the Agreement's "process elements" are not. (Doc. No. 152 at 15:21-16:4.) USAPA cites *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142 (1969) ("*Shore Line*"), in support of its position, but *Shore Line* does not address whether the terms of a CBA are binding on a successor union and it says absolutely nothing about the "process elements" of a CBA. US Airways is unaware of any RLA decision recognizing the concept of "process elements," much less an RLA decision drawing any distinction between a CBA's "process elements" and "substantive provisions" with respect to their enforceability. Like any other provision of a binding agreement, the "process elements" of the Transition Agreement are binding on US Airways' pilots and their union.

Moreover, USAPA makes no attempt to define what it means by the "process elements" of the Transition Agreement, and the distinction is, in fact, illusory. For example, the Transition Agreement mandates the use of an expedited dispute resolution procedure before an identified arbitrator to resolve disagreements over the interpretation and application of the Transition Agreement. (*See* Doc. No. 156-3 at 36-38.) While that is surely a "process," it is also a substantive right which the pilots and US Airways hold under the Transition Agreement. And USAPA's own conduct makes clear that these "process elements" remain in effect notwithstanding the change in the pilots' union representative. USAPA itself has filed several grievances under the Transition Agreement's dispute-resolution process, demanding that its grievances be processed pursuant to the Transition Agreement's expedited procedures. (*See* Supp. Sep. Stmnt. ¶¶ 4-5.) And US Airways has complied with USAPA's demand for use of the Transition Agreement procedures. (*Id.*)

PILOTS ASSOCIATION (hereinafter referred to as "the Association") by and through the Master Executive Councils of the America West and US Airways pilots ("America West MEC" and "US Airways" respectively) (collectively referred to as the "Parties")." (Supp. Sep. Stmnt. ¶ 1 (emphasis added).)

So, too, with regard to the Nicolau Award. The Transition Agreement established a process for integration of the seniority lists – namely, "final and binding" arbitration between the East Pilots and West Pilots "in accordance with ALPA Merger Policy." (Sep. Stmt. [Doc. No. 156-1] at ¶¶ 10-11.) But it also created an obligation on the part of US Airways to accept the integrated seniority list generated through that agreed-upon process so long as the specified conditions were met, and it thereby created prospective substantive rights that inured to the benefit of the pilots and not just process rights. (Doc. No. 156-1 at ¶ 10.) Once ALPA (as the pilots' representative) presented the integrated seniority list to US Airways and US Airways accepted it, if not sooner, those substantive rights materialized and were not, as USAPA would have it, a mere "tentative agreement between ALPA and US Airways on a bargaining proposal." (Doc. No. 152 at 16:27-17:1.) Thus, even if USAPA's proffered distinction between "substantive rights" and "process elements" had support in the RLA jurisprudence, which it does not, the Transition Agreement undeniably created "substantive rights" with respect to seniority integration and USAPA inherited that status quo when it replaced ALPA as the pilots' representative.

II. EXISTING COLLECTIVE BARGAINING AGREEMENTS, SUCH AS THE TRANSITION AGREEMENT, CAN BE AMENDED.

Given that the integrated seniority list generated by the Nicolau Award was accepted by US Airways as required by the Transition Agreement, which is binding on US Airways' pilots (whether represented by ALPA or USAPA), the next question presented by the defendants' cross-motions for summary judgment is whether the Transition Agreement can be amended. It can. Because it is a binding CBA, however, the Transition Agreement must be adhered to unless and until it is amended. But USAPA does not violate the Transition Agreement by merely proposing an amendment thereto.[5]

[5] To the extent USAPA asserts that US Airways has argued otherwise (*see* Doc. 152 at 16:14-17), it is mistaken.

In fact, USAPA has the right to propose amendments to the Transition Agreement for two independent reasons.

First, Section XII.B of the Transition Agreement states that the Agreement "[m]ay be modified by written agreement of the Association and the Airline Parties." (Supp. Sep. Stmnt. ¶ 2.) While the "Association" refers to ALPA, USAPA has succeeded to ALPA's status under the Transition Agreement. Thus, USAPA has the contractual right to propose amendments to the Transition Agreement, and, if US Airways agrees to USAPA's proposals, the Agreement can be modified.

Second, the RLA itself provides for periodic renegotiation of the terms and conditions of employment. *See, generally*, 45 U.S.C. § 156. The pre-existing CBAs for both the East Pilots and the West Pilots have, for quite some time, been subject to re-negotiation and amendment pursuant to their terms and in conjunction with Section 6 of the RLA. *See US Airways, Inc. v. U.S. Airline Pilots Ass'n*, ___ F. Supp. 2d ___, 2011 WL 4485795 at *3 (W.D.N.C. Sept. 28, 2011). Accordingly, USAPA has the right to propose amendments to the Transition Agreement for that reason as well.

The fact that the CBAs are subject to re-negotiation and amendment, however, does not lessen their status as providing existing contractual rights and obligations. US Airways, USAPA, and the pilots are all bound by the provisions of the pre-existing CBAs (including the Transition Agreement) unless and until those agreements are amended.

III. UNIONS NEGOTIATING AMENDMENTS TO EXISTING COLLECTIVE BARGAINING AGREEMENTS ARE CONSTRAINED BY THE DUTY OF FAIR REPRESENTATION.

Given that the integrated seniority list generated by the Nicolau Award was accepted by US Airways as required by the Transition Agreement, which is binding on US Airways' pilots (whether represented by ALPA or USAPA), but that USAPA may seek to amend the Transition Agreement, the next question presented by the defendants' cross-motions for summary judgment is whether USAPA can now seek to amend the seniority provisions of the CBAs in a manner that would have the effect of undoing the Nicolau Award.

The Supreme Court has affirmed that a union must comply with its DFR in negotiating CBAs, and has held that a union breaches its duty in that context if its actions are arbitrary, discriminatory, or in bad faith. *See Air Line Pilots v. O'Neill*, 499 U.S. 654 (1991). There have been numerous cases in which courts have addressed allegations that a union's negotiation of particular seniority provisions – precisely what USAPA seeks to negotiate here in lieu of the seniority list required by the Nicolau Award – constitutes a breach of its DFR. *See, e.g., Bernard v. Alaska Airlines*, 873 F.2d 213 (9th Cir. 1989); *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1535 (7th Cir. 1992); *Gvozdenovic v. United Airlines, Inc.*, 933 F.2d 1100 (2d Cir. 1991); *Air Wis. Pilots Protection Comm. v. Sanderson*, 909 F.2d 213, 216 (7th Cir. 1990); *Herring v. Delta Air Lines, Inc.*, 894 F.2d 1020, 1023 (9th Cir. 1989); *Haerum v. Air Line Pilots Ass'n*, 892 F.2d 216 (2d Cir. 1989); *Dement v. Richmond, F&P R.R.*, 845 F.2d 451, 457-58 (4th Cir. 1988); *Beardsly v. Chicago & N.W. Transp. Co.*, 850 F.2d 1255 (8th Cir. 1988); *Zapp v. United Transp. Union*, 727 F.2d 617 (7th Cir. 1984); *Jones v. Trans World Airlines Inc.*, 495 F.2d 790 (2d Cir. 1974); *Ford v. Air Line Pilots Ass'n*, 268 F. Supp. 2d 271 (E.D.N.Y 2003); *Nellis v. Air Line Pilots Ass'n*, 815 F. Supp. 1522 (E.D. Va. 1992); *see also Addington v. US Airline Pilots Ass'n*, No. CV 08-1633-PHX-NVW, 2009 WL 2169164, at *10-13 (D. Ariz. July 17, 2009) (discussing decisions). These, and other DFR cases involving bargaining conduct, set forth the applicable legal standard for this Court's resolution of the DFR issue as between the West Pilots and USAPA.

On this point, USAPA cites *USAir* for the proposition that it "has full bargaining rights" and is not "in any way limited by the [previous] contract in pursuit of new terms of employment." (Doc. No. 152 at 14:2-5 (*quoting USAir*, 24 F.3d at 1440).) But *USAir* was not a DFR case. The snippets from *USAir* cited by USAPA regarding its authority are consistent with the principles set forth above: although the Transition Agreement is binding on USAPA so long as it remains in effect, USAPA has "full bargaining rights" in "pursuit of new terms of employment" by proposing amendments to the CBAs. That is all that *USAir* decided. The issue not addressed by *USAir* is whether USAPA, by insisting on

a date-of-hire seniority list under the circumstances of the present case, is or is not violating its statutory DFR.

USAPA states that "a union does not breach its DFR to junior employees merely by negotiating a seniority system that prefers employees with longer service." (Doc. No. 152 at 18:26-27.) That is one way to frame the issue. Another way to frame the question is to focus not on whether USAPA would breach its DFR to the West Pilots "merely by negotiating a seniority system that prefers employees with longer service" in the first instance – but instead on whether USAPA would breach its DFR by seeking a seniority system that "prefers employees with longer service" only after a different seniority list was created through a voluntary "final and binding" arbitration between the East Pilots and West Pilots. Under the former approach, USAPA's current seniority demands are measured against a clean slate; under the latter approach, USAPA's demands are measured against what previously transpired between the West Pilots and the East Pilots.

And on those questions, US Airways expresses no opinion. The West Pilots argue (in accordance with the findings of Judge Wake, which were overturned on ripeness grounds) that seniority decisions made for the benefit of a majority group at the expense of the minority lack a legitimate union purpose. (*See* Doc. No. 150 at 16:14-16.) By contrast, USAPA argues that its insistence on a "date-of-hire" seniority system is not arbitrary, discriminatory, or in bad faith. (*See* Doc. No. 152 at 17:17-20.) US Airways asks the Court to resolve that dispute so that all parties will be apprised of their rights and obligations in advance of any potential breach thereof.

III. USAPA'S PROCEDURAL ARGUMENTS SHOULD BE REJECTED.

After arguing that the Court should enter summary judgment in its favor on Count 2, and deny summary judgment in the West Pilots' favor on Count 1, USAPA makes a series of arguments which, if adopted by the Court, would result in a denial of summary judgment on ***both*** Counts 1 and 2. None of those arguments has merit.

USAPA asserts that US Airways' claims are not ripe, and, relatedly, that US Airways lacks standing because its Complaint allegedly "rests on a speculative DFR claim brought in the future by the West Pilot Class." (Doc. No. 152 at 28:8-9; *see, generally, id.* at 27:16-28:12.) This Court has already rejected that argument: "US Airways also has a choice of two unappealing options: US Airways can abandon the Nicolau Award during negotiations and be sued by the West Pilots or US Airways can insist on the Nicolau Award and be subject to a work stoppage. Either way, US Airways will be harmed. [USAPA's] proposed rule that US Airways cannot seek a declaration of its rights before being sued or subject to a work stoppage finds no support in existing constitutional ripeness doctrine." (Doc. No. 85 at 5:23-6:4.) Nothing in USAPA's brief replication of its prior ripeness arguments suggests any reason for the Court to depart from its prior decision. To the contrary, USAPA's assertion that the harm to US Airways is speculative ignores the fact that the Western District of North Carolina recently found that USAPA has already engaged in an unlawful work stoppage. *See US Airways, Inc. v. U.S. Airline Pilots Ass'n*, 2011 WL 4485795 (W.D.N.C. Sept. 28, 2010).

USAPA also asserts that US Airways' claims are barred by the statute of limitations and/or the doctrine of laches. (*See* Doc. No. 152 at 24:24-26:17.) Putting aside the incongruity of USAPA simultaneously arguing that US Airways' claims are both unripe and untimely, USAPA's argument overlooks that this is a lawsuit for declaratory judgment. It was not until the West Pilots threatened to sue US Airways for participation in USAPA's breach of DFR if it agreed to a non-Nicolau seniority proposal, and USAPA threatened to engage in a work stoppage if it did not, that US Airways' claim for declaratory relief accrued. *See Societe de Conditionnement en Aluminium v. Hunter Eng'g Co., Inc.*, 655 F.2d 938, 944 (9th Cir. 1981) (claim for declaratory relief becomes ripe based on a "real and reasonable" apprehension of harm). And that did not occur until after the Ninth Circuit's decision in *Addington*, which vacated Judge Wake's injunction that had prohibited USAPA from bargaining for a date-of-hire seniority list. In short, US

Airways brought its action within months of being confronted with the Hobson's Choice identified in the above-quoted passage from the Court's prior decision.

Finally, USAPA asserts that "US Airways' delay in asserting this claim has severely prejudiced USAPA because US Airways has delayed bargaining for an integrated contract." (Doc. No. 152 at 26:7-8.) Nothing could be farther from the truth. US Airways was engaged in active collective bargaining negotiations with ALPA before the Nicolau Award was issued, and it proposed a comprehensive CBA almost five years ago, in May 2007. (Supp. Sep. Stmt. ¶ 6.) If USAPA and US Airways' pilots have been prejudiced by delay, that delay was not caused by US Airways.

Since USAPA is unalterably committed to a seniority proposal that a jury found to be unlawful – even though that judgment was overturned on ripeness grounds – US Airways is entitled to seek a judicial declaration of its rights and obligations so that it can avoid acting unlawfully or incurring liability.

CONCLUSION

Consistent with standard airline industry practice, the East Pilots and West Pilots agreed to participate in "final and binding" arbitration to resolve their seniority-integration dispute. The resulting Nicolau Award was submitted to US Airways, and US Airways accepted the integrated seniority list as required by the collectively-bargained Transition Agreement. USAPA, however, has the right to seek amendments to the pre-existing CBAs (including the Transition Agreement), but can only do so consistent with its DFR to the West Pilots. The question is whether USAPA would breach its DFR by proposing (and entering into a contract with US Airways containing) a date-of-hire seniority list under the circumstances of this case. US Airways respectfully requests that the Court resolve that issue – and only that issue – by granting summary judgment in favor of either the West Pilot Class or USAPA on either Count 1 or 2.

Dated: February 21, 2012.

O'Melveny & Myers LLP

By: /s/ Robert A. Siegel
Robert A. Siegel (*pro hac vice*)
Chris A. Hollinger (*pro hac vice*)
Ryan W. Rutledge (*pro hac vice*)
400 South Hope Street, Suite 1500
Los Angeles, CA 90071-2899

US Airways, Inc.
Karen Gillen, State Bar No. 018008
111 West Rio Salado Parkway
Tempe, AZ 85281

Attorneys for Plaintiff US Airways, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 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:70604249.1