

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 Ryan W. Rutledge (admitted *pro hac vice*)
12 O'Melveny & Myers LLP
13 400 South Hope Street
14 Los Angeles, CA 90071-2899
15 Facsimile: (213) 430-6407
16 rsiegel@omm.com
17 Telephone: (213) 430-6000

18 Attorneys for Plaintiff
19 US Airways, Inc.

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

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

24 Plaintiff,

25 v.

26 Don Addington, an individual; John
27 Bostic, an individual; Mark Burman,
28 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
OPPOSITION TO US AIRLINE PILOTS
ASSOCIATION'S MOTION TO
CONDUCT DISCOVERY PURSUANT
TO RULE 56(d) OF THE FEDERAL
RULES OF CIVIL PROCEDURE**

1 Plaintiff US Airways, Inc. (“US Airways”) is neutral on the issue of whether
2 summary judgment should be entered for defendant US Airline Pilots Association
3 (“USAPA”) or for the defendant West Pilots Class on Counts 1 and 2 of its Complaint.
4 US Airways does, however, believe that there should be an expedited process for
5 resolution of the legal issues presented in those Counts, so that a major obstacle to
6 completing its collective bargaining negotiations with USAPA can be removed. As part
7 of that expedited process, US Airways believes that discovery is not needed; rather, the
8 legal issues regarding whether or not USAPA is required to adhere to the Nicolau Award
9 can be resolved on the record and arguments that have been submitted to the Court.

10 USAPA asserts that discovery is necessary before deciding the West Pilots’ motion
11 for summary judgment on Count 1, although not before deciding its motion for summary
12 judgment on Count 2. (*See* Doc. No. 163 at 2:22-3:2; 8:23-9:2.)¹ This distinction is not
13 logical. Counts 1 and 2 are different sides of the same coin: they seek alternative
14 declarations that USAPA’s insistence on a date-of-hire seniority list would, or would not,
15 violate its duty of fair representation (“DFR”) to the West Pilots. The common legal
16 question raised by both Counts is whether USAPA has a legitimate union purpose to
17 justify its Constitutionally-mandated date-of-hire seniority list. This Court can determine
18 that issue without discovery.

19 The discovery USAPA seeks generally relates to the “correctness” of the Nicolau
20 Award, as evaluated in hindsight several years after it was issued. One factor Arbitrator
21 Nicolau considered in his Award was the legitimate *pre-merger* career expectations of the
22 East and West Pilots, in light of the financial conditions of US Airways and America West
23 at the time of the merger. (*See* Doc. No. 34-6 at 25-26.) USAPA argues that the fortunes
24 of the East and West Pilots have changed since the time of the Nicolau Award, and it
25 requests discovery regarding how the legacy East and West operations have fared so that
26 it can present evidence about *post-merger* career expectations. (Doc. No. 163 at 5:27-

27 _____
28 ¹ All citations to the docket refer to the page numbers in the Court’s electronic filing
system, and not the documents’ internal pagination.

1 6:10.) But discovery regarding *post-merger* changes in the relative career prospects of
2 East and West Pilots is unnecessary unless the Court first decides, as a legal matter, that
3 *post-merger* career expectations – developed during a period when USAPA was actively
4 resisting the Nicolau Award – could justify USAPA’s requirement that a date-of-hire
5 seniority list, rather than the Nicolau Award, be included in any collective bargaining
6 agreement with US Airways.² This Court can decide that issue without discovery, and
7 only if USAPA may disregard the Nicolau Award could its requested discovery have any
8 relevance.

9 USAPA additionally asserts that three factual statements in US Airways’ and the
10 West Pilots’ submissions require discovery, but none is material to the pending motions
11 for summary judgment:

12 *First*, US Airways’ Separate Statement of Undisputed Facts ¶ 36 states: “If the
13 integrated seniority list mandated by the Nicolau Award had been in effect [in 2008], none
14 of the West Pilots would have been furloughed because their relative seniority positions
15 on the integrated list were higher than on the pre-merger America West seniority list.”
16 (Doc. No. 156-1, ¶ 36 at 12.) This fact should be uncontroversial; it was specifically
17 recognized by the Ninth Circuit. *See Addington v. US Airline Pilots Ass’n*, 606 F.3d 1174,
18 1178 (9th Cir. 2010) (“Under a single CBA incorporating the Nicolau Award, none of the
19 West Pilots would have been furloughed.”). Regardless, US Airways only set forth this
20 fact by way of background; it is not necessary to the resolution of defendants’ cross-
21 motions. Thus, US Airways has no objection if the Court simply declines to consider this
22 fact.

23
24
25 ² Arbitrator Nicolau based his Award on the facts that existed at the time of the
26 merger, and rejected arguments to consider developments that occurred after the merger.
27 (See Doc. No. 34-6 at 31 (“As evidenced by Captain Brucia’s Concurring and Dissenting
28 Opinion, attached hereto, he disagrees with this aspect of the award. His view is that at a
minimum consideration should be given to those US Airways pilots already recalled;
In the majority’s view, *this gives weight to post-merger expectations rather than pre-
merger expectations, contrary to what ALPA policy foresees.*”) (emphasis added).)

1 *Second*, US Airways’ Separate Statement of Undisputed Facts ¶¶ 43 and 45
2 respectively state: “If US Airways accepts USAPA’s seniority demand, the West Pilots
3 have made clear that they will sue US Airways for ‘facilitat[ing]’ or ‘assist[ing]’
4 USAPA’s breach of DFR, and US Airways will thus be exposed to tens of millions of
5 dollars in damages and invalidation of any CBA that is reached with USAPA,” and
6 “Given the continuing legal uncertainty surrounding USAPA’s seniority demands as well
7 as the express threats by the West Pilots and USAPA, US Airways brought this action
8 seeking alternative declaratory judgments in accordance with Federal Rule of Civil
9 Procedure 8(d).” (Doc. No. 156-1, ¶ 43 at 14 & ¶ 45 at 15.) USAPA seeks discovery on
10 these statements in order to re-litigate an issue that was decided by this Court when it
11 denied USAPA’s motion to dismiss on ripeness grounds. As this Court explained, “while
12 the precise nature of US Airways’ injury is unknown, the fact of *some* injury appears
13 certain. Regardless of the action taken by US Airways, serious injury will occur. The
14 Nicolau Award will either be accepted or it will not. If it is accepted, USAPA has
15 promised a work stoppage. If it is not accepted, the West Pilots will sue US Airways.”
16 (Doc. No. 85 at 8:4-8 (emphasis in original).) USAPA submitted argument on these
17 issues at the motion to dismiss stage, and it offers no persuasive reason and no evidence to
18 support its suggestion that the previously-submitted evidence of the West Pilots’ threat to
19 sue US Airways was contrived. (Doc. No. 61-2 at 2, 4.)

20 *Third*, the West Pilots’ Statement of Facts ¶ 2 states: “At the time of the merger,
21 US Airways had recently come out of bankruptcy.” (Doc. No. 151, ¶ 2 at 2.) That fact is
22 judicially noticeable and indisputably true, and USAPA does not actually purport to
23 dispute it. Instead, USAPA seeks discovery regarding America West’s financial condition
24 to argue that it had financial troubles as well. But that was specifically addressed by the
25 parties in the Nicolau arbitration. The East Pilots argued that America West “was
26 approaching bankruptcy” and that both US Airways and America West “were in poor
27 financial condition.” (Doc. No. 34-6 at 14.) The West Pilots, on the other hand, argued
28 that US Airways was “nearing liquidation” while America West “was strong and

1 growing.” (*Id.* at 17.) Arbitrator Nicolau was of the view “that neither picture is
2 persuasive,” but that “it cannot be disputed that there were differences in the financial
3 condition of both carriers and that US Airways was the weaker.” (*Id.* at 26.) Given that
4 these factual issues were specifically addressed in the Nicolau arbitration, further
5 discovery regarding them is unnecessary, unless the Court first concludes that USAPA
6 may re-litigate the correctness of the Nicolau Award.

7 In sum, the defendants’ cross-motions for summary judgment raise questions of
8 law regarding what would, or would not, constitute a legitimate union objective in the
9 context of a union’s requirement of a date-of-hire seniority list instead of a previously-
10 arbitrated seniority list. Unless the Court concludes that the facts about which USAPA
11 seeks discovery are material to proving a legitimate union objective, the requested
12 discovery is unnecessary. *See, e.g., Tatum v. City & County of San Francisco*,
13 441 F.3d 1090, 1101 (9th Cir. 2006) (“Absent a showing by Tatum that additional
14 discovery would have revealed specific facts precluding summary judgment, the district
15 court did not abuse its discretion by denying Tatum’s request for a continuance under
16 Rule 56(f).”); *California ex rel. California Dep’t of Toxic Substances Control v.*
17 *Campbell*, 138 F.3d 772, 780 (9th Cir. 1998) (“the facts that the defendants hope to elicit
18 during discovery are not essential to resisting [plaintiff’s] summary adjudication motion.
19 . . . Accordingly, the district court did not abuse its discretion when it denied the
20 defendant’s request to stay summary adjudication and continue discovery.”). Because the
21 discovery USAPA seeks is not material to the issue that must be decided by the
22 defendants’ summary judgment motions, it would only serve to cause unnecessary delay
23 in the resolution of this case. USAPA’s motion should be denied.

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

Dated: March 9, 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 March 9, 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:70631230.2

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