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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

US Airways, Inc., a Delaware Corporation,

Plaintiff,

v.

Don Addington, an individual; John Bostic, an individual; Mark Burman, an individual; Afshin Iranpour, an individual; Roger Velez, an individual; and Steve Wargocki, an individual, on behalf of themselves and all other similarly-situated individuals,

and

US Airline Pilots Association, an unincorporated association,

Defendants.

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

**REPLY OF DEFENDANT US AIRLINE PILOTS ASSOCIATION TO THE RESPONSES FILED BY THE WEST PILOT CLASS AND US AIRWAYS ON US AIRLINE PILOTS ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

USAPA submits there are three separate issues with respect to Counts I and II: (1) whether the rule in *Association of Flight Attendants v. US Air,*[1] applies and USAPA is free to negotiate a new collective bargaining agreement without regard to any previous agreements made by ALPA (including the Transition Agreement and the ALPA/Nicolau list), (2) whether the separate DFR claim alleged by the West Pilot Class ("WPC") and asserted by US Airways as the "only" issue that should be decided by the Court (Doc. 164, p. 11) is properly before the Court given the Ninth Circuit's *Addington* decision that this DFR claim is not ripe, and (3) how the DFR claim itself, assuming the Court determines it can now be addressed, should be decided .

After first showing that Judge Wake's vacated decision in *Addington* can be accorded no weight (Point 1), we note that neither US Airways nor WPC has explained why the DFR claim is properly before this Court given *Addington* (Point 2), that US Airways and WPC have failed to show that *AFA* does not apply in this case (Point 3), and that US Airways and WPC therefore have failed to establish that USAPA is bound by either the Transition Agreement or the ALPA/Nicolau list (Point 4). If the Court determines that the DFR claim is properly at issue, we show that WPC has failed to establish that USAPA's conduct is so far beyond a wide range of reasonableness as to be irrational (Point 5), that undisputed facts demonstrate that USAPA's conduct is reasonable (Point 6), and that USAPA's decision not to pursue the ALPA/Nicolau list is reasonable even if it is required to justify a change from the ALPA/Nicolau list, which has never been in effect (Point 7). Finally, we show that Count III should be dismissed (Point 8).

We submit that the proper application of the law, as set out here and in our previous submissions, provides the only realistic road map to resolving this dispute. The law gives a union broad bargaining discretion and, in particular, provides that a newly

[1] 24 F.3d 1432 (D.C. Cir. 1994) ("*AFA*").

certified representative such as USAPA has the right to negotiate a new agreement without being limited by any agreements that might have been entered into by the prior, displaced representative. This places USAPA in a position to resolve this dispute exactly as the Railway Labor Act contemplates—by engaging the various groups within the bargaining unit in genuine, substantive discussion and hammering out a position that serves the legitimate interests of all. That requires the WPC to relinquish its unrealistic demand for the ALPA/Nicolau list, something they are unlikely to do unless this Court affirms the applicability of *AFA* in this case. USAPA is committed to genuine, substantive discussion on the seniority proposal and believes, in particular, that the specific objections to the current proposal raised by the WPC (Doc. 159, ¶38) can be resolved.

**1. THE DISTRICT COURT DECISION IN *ADDINGTON* CAN BE ACCORDED NO WEIGHT**

US Airways' and the WPC's improper citation to the District Court's *Addington* decision and their attempts to include it in the record should be disregarded and stricken by the Court.[2]

The District Court's decision in *Addington* was vacated on appeal. Precedent uniformly holds that an appellate court's decision vacating a lower court's judgment or order "effectively annuls or sets aside the lower court's decision for *all purposes*" and "the appealed from judgment or order" should be treated "as if [it] never occurred." C. Goelz & M. Watts, *Rutter's California Practice Guide: Federal Ninth Circuit Civil Appellate Practice* § 10:231 (emphasis in original), *citing State of Calif. Dept. of Social Servs. v. Thompson*, 321 F3d 835, 847 (9th Cir. 2003).[3] In denying WPC's motion to

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[2] US Airways Separate Statement of Undisputed Facts, Doc. 156-1, ¶18 & n.10, ¶¶26, 33, 37, 40-41; WPC Response to US Airways and USAPA Statements of Facts, Doc. 159, ¶25 & n.10.

[3] *Accord id.* § 10:260 ("with reversal on appeal, the Ninth Circuit's vacatur of a district court judgment nullifies and renders the judgment inoperative"), *citing United States v. Munsingwear*, 340 U.S. 36, 40-41 (1950) (vacatur prevents judgment from "spawning

transfer the instant case, Judge Wake himself said, "[T]he substantive rulings in *Addington* have been vacated pursuant to mandate" and the instant case "would now write on [a] clean slate[]." *Addington*, 2:08-cv-01633-NVW, Doc. 666, at 4. The attempt by US Airways and WPC to interject Judge Wake's decision and discussion of jury findings into this case is improper. Judge Wake's opinion and all references to it should be stricken.

**2. THE DFR CLAIM IS PRECLUDED BY THE NINTH CIRCUIT'S DECISION IN *ADDINGTON***

This Court's dismissal of the WPC cross-claim and the Ninth Circuit's holding and reasoning in *Addington* all show that the DFR claim must be dismissed in whatever guise it is presented. In dismissing the WPC cross-claim, this Court said (Doc. 85, p. 9):

> This claim is identical to the claim the Ninth Circuit ruled was not ripe. The only material change in circumstances since that ruling is the filing of the Declaratory Judgment complaint by US Airways. The West Pilots do not cite, and the Court is not aware of, any authority stating the filing of an action by another entity can convert an unripe case into a ripe case. Based on the Ninth Circuit's ruling on the exact issue, this Court is required to dismiss the West Pilots' Cross-Claim as not ripe.

The responding brief filed by US Airways (Doc. 164, p. 11), shows that it is exactly this precluded DFR claim that US Airways is attempting to have this Court decide.[4] The WPC motion rests on exactly the same claim.[5] USAPA submits that deciding the DFR claim in this case would also run directly contrary to the reasoning of

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any legal consequences"); *Orff v. United States*, 358 F3d 1137, 1149 (9th Cir. 2004) (district court's rulings on merits of certain claims issued without subject matter jurisdiction vacated as nullities).

[4] US Airways argues, Doc. 164, p. 11: "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."

[5] WPC argues, Doc. 150, p. 17: "USAPA would breach its duty of fair representation if it implements a collective bargaining agreement that dishonored the Nicolau arbitration by using a date-of-hire seniority list. . . . On that basis, the West Pilots respectfully ask the Court to enter summary judgment in their favor on Count One and dismiss Count Two."

the Ninth Circuit in *Addington*. The Ninth Circuit held that the DFR claim is not ripe and cannot be ripe until there is a ratified collective bargaining agreement. *Addington*, 606 F.3d at 1179-80. The Ninth Circuit reached this conclusion because "[n]ot until the airline responds to the proposal, the parties complete negotiations, and the membership ratifies the CBA will the West Pilots actually be affected by USAPA's seniority proposal—whatever USAPA's final proposal ultimately is" and "[a] question is fit for decision when it can be decided without considering 'contingent future events that may or may not occur as anticipated, or indeed may not occur at all.'" *Id.*, *quoting Cardenas v. Anzai*, 311 F.3d 929, 934 (9th Cir. 2002) (citations omitted).

Collective bargaining is a dynamic process. As then Chief Judge Browning explained in *Hendricks v. Airline Pilots Ass'n Int'l*, 696 F.2d 673, 677-78 (9th Cir. 1983):

> The collective bargaining relationship . . . is a continuing relationship. "The assumption as well as the aim of [the Railway Labor Act] is a process of permanent conference and negotiation between the carriers on the one hand and the employees through their unions on the other." [citations omitted.] "[C]ollective bargaining agreements must be flexible and subject to change . . . . It is frequently necessary to modify a contract to meet changing conditions." [citation omitted.]

While Judge Browning was addressing bargaining during the term of an agreement, the same need for flexibility applies equally, if not more so, to bargaining for a new agreement. *Accord Hays v. Nat'l Elec. Contractors Ass'n, Inc.*, 781 F.2d 1321, 1324 (9th Cir. 1985) (rejecting a DFR claim where the union negotiated changes in a policy that been in existence for over 20 years). The Ninth Circuit expected that exactly this dynamic process would follow its decision vacating the District Court's decision and judgment—"USAPA's final proposal may yet be one that does not work the disadvantages Plaintiffs fear, even if that proposal is not the Nicolau Award." *Id.*, at 1181; *see also Am. Postal Workers Union, AFL-CIO, Headquarters Local 6885 v. Am. Postal Workers Union, AFL-CIO*, 665 F.2d 1096, 1107 (D.C. Cir. 1981) ("Appellants' dissatisfaction with the outcome, though unfortunate, does not by itself suggest inadequacy in the union's performance"). And, in so doing, the Ninth Circuit strongly

suggested that USAPA is free to deviate from the ALPA/Nicolau list in the course of finding a seniority proposal that was fair to all the pilots a could be ratified.

WPC suggests that the Ninth Circuit's decision is distinguishable because Counts I and II seek a decision on whether USAPA will breach its duty of fair representation "in the future" if it were to enter into a collective bargaining agreement that does not incorporate the ALPA/Nicolau list (Doc. 158, p. 8). But far from eliminating the ripeness issue, the suggestion that this case should be determined on what might happen in the future makes the issue worse for precisely the reasons explained by the Ninth Circuit—"in the context of negotiations toward a CBA, the parties could shift positions until negotiations are complete, and the final agreement could be acceptable to plaintiffs." *Addington*, 606 F.3d at 1184. There is simply no way of predicting whether the terms of the final ratified collective bargaining agreement will be a breach of the duty of fair representation.[6]

This Court's decision to deny the original motion to dismiss is not to the contrary. That motion was decided on the basis of the bare allegations of the complaint. The instant motions for summary judgment will be decided on a factual record developed

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[6] In its response to the cross-motions for summary judgment, US Airways refers to a string cite of cases purportedly in support of its claim that "[t]here have been numerous cases in which courts have addressed allegations that a union's negotiation of particular seniority provisions . . . constitutes a breach of its DFR." (Doc. 164, p. 12.) These cases do nothing more than state the general standard, and a majority of these cases found no violation of the duty of fair representation. Where a court sustained allegations of a DFR, the court was concerned about a union's discrimination on the basis of union membership, *Bernard v. Air Line Pilots Ass'n*, 873 F. 2d 213 (9th Cir. 1989), *Jones v. Trans World Airlines*, 495 F.2d 790 (2d Cir. 1974); the union's absolute exclusion of the minority group from negotiations, *Beardsley v. Chicago & Nw. Transp. Co.*, 850 F.2d 1255 (8th Cir. 1988), *Zapp v. United Transp. Union*, 727 F.2d 617 (7th Cir. 1984); or that the union "negotiate[d] a contract on behalf of one bargaining unit that explicitly deprives members of other bargaining units of specific rights previously guaranteed" *Ford v. Air Line Pilots Ass'n*, 268 F. Supp. 2d 271, 291 (E.D.N.Y. 2003), *Nellis v. Air Line Pilots Ass'n*, 815 F. Supp. 1522 (E.D. Va. 1993), *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 800 (7th Cir. 1976). None of those situations apply to the facts of this case.

from the statements, exhibits, and other materials submitted by the parties. Moreover, as explained in USAPA's motion for summary judgment, a legal issue left unresolved by the Ninth Circuit, namely whether the Nicolau Award would be legally binding on USAPA absent facts and circumstances warranting changes, does not require the Court to address the separate DFR claim. *Addington*, 606 F.3d at 1181 n.3. And, finally, the fact is that *AFA* was not argued either before the Ninth Circuit or before this Court on the motion to dismiss. The DFR claim should therefore be dismissed.

### 3. UNDER *AFA*, USAPA IS ENTITLED TO NEGOTIATE A NEW COLLECTIVE BARGAINING AGREEMENT WITHOUT REGARD TO ANY AGREEMENTS MADE BY ALPA, INCLUDING THE ALPA/NICOLAU LIST

Neither US Airways nor WPC have shown any reason why this Court should not follow *AFA*.WPC does not even address *AFA* in its response. (Doc. 158.) The attempt by US Airways to distinguish *AFA*, (Doc. 164, p. 3), is completely disingenuous, so much so that it clearly demonstrates that US Airways is not "neutral" in this dispute. First, US Airways completely ignores the plain statement by Judge Edwards that "It is . . . clear that neither USAir nor AFA is *contractually* bound by the Eastern-TWU Agreement for these parties have not assented to any of the terms of that agreement." 24 F.3d at 1433-34 (emphasis added).[7] US Airways equally ignores the several other statements by Judge Edwards that the terms of a previous collective bargaining agreement serve only to "fix the 'status quo'" under the RLA governing "rates of pay, rules, and working conditions . . . until [the bargaining parties] agree otherwise." *Id.* at 1434. This careful explanation of the court's reasoning by a respected jurist and a recognized expert in the area cannot be

[7] Judge Edwards knew what he was saying. Before being appointed to the United States Court of Appeals for the D.C. Circuit, Judge Edwards taught labor law, "served as a neutral labor arbitrator under a number of major collective bargaining agreements," published several books and law review articles on labor law and served as Chairman of the Board of Directors at AMTRAK. United States Court of Appeals for the District of Columbia website, at http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+HTE.

dismissed as "snippets" (Doc. 164, p. 8). And the fact that US Airways deliberately misrepresents the court's reasoning shows that US Airways is far from "neutral" and that it can make no claim to either impartiality or dispassionate expertise in addressing the matters before this Court.[8] The bottom line is that *AFA* is well reasoned and authoritative and should control. As *AFA* holds, "a newly certified union in situations such as this one has full bargaining rights" and is not "in any way limited by the [previous] contract in pursuit of new terms of employment." 24 F.3d at 1440.

**4. THE RLA STATUS QUO DOES NOT INCLUDE THE ALPA/NICOLAU LIST**

US Airways equally ignores controlling precedent that the RLA status quo is limited to "actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose." *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 153 (1969), and cases discussed at USAPA Response, (Doc. 160, pp. 4-6). The ALPA/Nicolau list is not in effect and cannot be considered an "actual, objective working condition" that is "in effect." It is clear, moreover, that the ALPA/Nicolau list must be ratified by the pilots before it can go into effect. US Airways' Memorandum, Doc. 156, p. 7; USAPA Exhibit 3 (Transition Agreement), Section IV.A I, ALPA/Nicolau list does not go into effect until a consolidated collective bargaining agreement is negotiated). As explained in *Transport Workers Union v. Haw. Airlines*, 2009 WL 972483 (D.Haw. April 8, 2009), *aff'd without opinion, 344 Fed. App'x. 351* (9th Cir. 2009), discussed at USAPA Response, Doc. 160, p. 5 n.5, an unratified contract proposal is not part of the RLA status quo. *Accord*

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[8] US Airways' support for the WPC is not surprising. As a result of the merger, America West CEO Doug Parker became and continues as CEO of the merged operation. The instant action, filed shortly after the Ninth Circuit vacated the District Court's decision in *Addington* and after a conveniently timed letter from counsel for the *Addington* plaintiffs threatening renewed litigation, appears to be an effort to circumvent the Ninth Circuit's decision and to revive the same DFR claim in another guise. US Airways has supported the WPC position in bargaining by refusing to negotiate over USAPA's seniority proposal. The motive for these actions is consistent and transparent.

*Goclowiski v. Penn Cen. Transp. Co.*, 571 F.2d 747 (3rd Cir. 1978) (denying defendants' motion for summary judgment where factual issues exist as to whether the agreement is invalid because it was never ratified by the membership).[9]

Also beside the point is US Airways' suggestion (Doc. 164, p. 5), that USAPA is somehow bound to the ALPA/Nicolau list because it followed the dispute resolution process of the Transition Agreement. USAPA followed the dispute resolution process provided by the Transition Agreement to resolve questions about "actual, objective working conditions" that are currently "in effect." This fact does not in any way indicate that the ALPA/Nicolau list—which is not in effect and which cannot come into effect unless and until a single integrated collective bargaining agreement is negotiated and then ratified—is part of the RLA status quo.

**5. IF THE COURT DETERMINES TO ADDRESS THE DFR CLAIM, THE BURDEN IS ON THE WPC TO SHOW THAT USAPA'S CONDUCT FALLS OUTSIDE A "WIDE RANGE OF REASONABLENESS"**

If the Court decides to address the DFR claim in this case, then the burden is on WPC to prove that USAPA's conduct "can fairly be characterized as so far outside a 'wide range of reasonableness,' *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S.Ct.

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[9] Also without merit is US Airways' reliance on *International Bhd. of Teamsters v. Texas Int'l Airlines*, 717 F.2d 157, 163 (5th Cir. 1983), and on an out-of-context quote taken from THE RAILWAY LABOR ACT (American Bar Ass'n Section of Labor & Employment Law, 2d ed. 2005) 11-12; US Airways' Response, Doc 160, p. 3 & n.3. Unlike *AFA* and the instant case, and as the court itself explained, the "basic issue" in *Texas Int'l* was "determining who represents the hitherto covered employees after the merger." 717 F.2d at 158. *Texas Int'l* did not address the matter at issue in this case—the nature of the post-merger status quo—because, without a bargaining representative, there can be no contract or status quo. The sentence quoted from THE RAILWAY LABOR ACT is inapposite because it concerns "an existing collective bargaining agreement . . . in effect in accordance with its duration clause" and here the duration clauses have long since lapsed, the agreements have long been amendable and neither the America West nor the US Airways agreement is "in effect in accordance with its duration clause." The text accurately describes *AFA* in other sections more closely related to the issue present in this case. *Id.* at 225, 442-43.

681, 686, that it is wholly 'irrational' or 'arbitrary.'" *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 78 (1991). "Any substantive examination of a union's performance . . . must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their responsibilities." *Id.* "Unions are given broad discretion by the courts in their collective bargaining decisions." *Ratkovsky v. United Transp. Union*, 843 F.2d 869, 876 (6th Cir. 1988); *accord Bautista v. Pan American World Airline, Inc.*, 828 F.2d 546, 550 (9th Cir. 1987) (union reasonably agreed to change what plaintiffs alleged was a vested contractual right to permanent lifetime employment as a "rational accommodation[] to changed economic circumstances"). This determination depends on an assessment of current facts, not facts that were in existence seven years ago when the ALPA/Nicolau list was created. Any analysis of the DFR claim must take into account the current landscape and the facts and circumstances that have transpired since the ALPA/Nicolau list was created. *See O'Neill*, 499 U.S. 65, 67 (1991) (alleged DFR claim must be assessed "in light of the factual and legal landscape at the time of the union's actions"); *Addington*, 606 F.3d at 1181 (stating, "USAPA's final proposal may yet be one that does not work the disadvantages Plaintiffs fear, even if that proposal is not the Nicolau Award."); *Hendricks v. Airline Pilots Ass'n Int'l*, 696 F.2d 673 (9th Cir. 1983); *Hays v. Nat'l Elec. Contractors Ass'n*, 781 F.2d 1321, 1324 (9th Cir. 1985).

**6. THE UNDISPUTED FACTS SHOW THAT USAPA'S SENIORITY PROPOSAL DOES NOT VIOLATE THE DFR**

If the Court decides to address the DFR claim , USAPA asserts, for the reasons stated here and in response to US Airways and the WPC (Doc. 160, p. 5-6), that this issue must be decided on a blank slate and as though the ALPA/Nicolau list did not exist. For as *AFA* holds, USAPA, as a newly certified bargaining representative, is not "in any way limited by the [previous] contract in [its] pursuit of new terms of employment." 24 F.3d at 1438. However, regardless of the point of departure, the undisputed facts show that USAPA's seniority proposal is "reasonable" and "rational" and does not violate the DFR.

Among the facts offered by USAPA in its Statement of Facts (Doc. 153) and as

Additional Controverting Facts in its response to the facts offered by the WPC are the following: (1) at the time of the merger America West was about to file for bankruptcy (Doc. 161, ACF ¶1); (2) in 2008 US Airways furloughed 175 West pilots and 125 East pilots (Doc. 153, ¶35); (3) the separate 10-K filings for America West and US Airways for the 18 month period from January 1, 2006, through June 30, 2007 show a net operating loss of $13 million for America West and net income of $556 million for US Airways (Doc. 153, ¶36); (4) the USAPA seniority proposal made to US Airways in September 2008 placed West pilots on a merged seniority list according to their original dates of hire with America West and included extensive conditions and restrictions that prevented East pilots from displacing West pilots from their customary West assignments and allowed them to bid into East flying including wide-body aircraft and international routes as vacancies were created as the result of growth, retirements, and other normal attrition among East pilots (Doc. 153, ¶38); (5) the complete USAPA proposal is set forth in USAPA Exhibits 13-15, 25; (6) under USAPA's proposal 63, senior West pilots would immediately have become eligible to bid wide-body positions (Doc. 153, ¶38); (7) 24 percent of trips currently flown by West pilots consist of routes flown by East pilots before the merger (Doc. 153, ¶53); (8) this means that work equivalent to approximately 180 East Captain positions and 175 First Officer positions (or a total of 355 East pilot positions) is currently being performed by West pilots and also means that if the East and West operations were operated separately, without any ability to share routes, the number of positions available to West pilots would be substantially fewer, resulting in furloughs in the West and additional new hires in the East (Doc. 153, ¶53); (9) East pilots would not have ratified a collective bargaining agreement that incorporated the ALPA/Nicolau list (Doc. 153, ¶25); and (10) all other crafts at US Airways merged their seniority lists by date of hire (Doc. 153, ¶22; USAPA Exhibit 23).

These facts show that USAPA's current seniority proposal, which is subject to amendment, further negotiation, and ratification, fairly represents the interests of the consolidated pilot craft as a whole, protects the pre-merger expectations of both the West

pilots and the East pilots, is reasonable and rational and does not violate USAPA's duty of fair representation. In particular, as we explained in our opening memorandum, a seniority proposal based on length of service does not violate the duty of fair representation and is in fact presumptively reasonable (Doc. 152, pp. 12-17). Moreover, a bargaining representative is entitled to take into account whether the proposals it makes can be ratified. *See Herring v. Delta Airlines, Inc.*, 894 F.2d 1020, 1023 (9th Cir. 1990). And, as we have said from the outset, USAPA has tried and will continue to try to engage the West pilots in a legitimate dialogue about the proposal to address their concerns but, unfortunately, has been met thus far at every turn by insistence on the ALPA/Nicolau list.

On the substance of USAPA's current seniority proposal, WPC makes only four discrete complaints (Doc. 159, ¶38). WPC does not claim that USAPA fails to protect their current assignments. Nor does WPC contest USAPA's statement that its proposal would immediately make at least 63 senior America West pilots eligible for wide-body assignments unavailable at America West or as a part of the West flying currently performed by the former America West pilots. WPC complains that (1) the USAPA list makes no adjustment for whether a pilot was on furlough, (2) the list "puts a majority of the West pilots at or close to the bottom of the list," (3) the protection for West pilots are eliminated if US Airways reduces staffing by 25% or more, and (4) the list offers no protection against furloughs (Doc. 158, ¶38). With respect to the first and third complaints, we note that all pilots—both America West and US Airways—are treated equally. There are no furlough adjustments for either group and both are placed on the list according to their date of hire. Moreover, an America West pilot's position on the list does not affect his or her protection with respect to West flying. That is protected and WPC does not claim otherwise. With respect to the second and fourth complaints, we note that the Transition Agreement guarantees a minimum level of flying (USAPA Exhibit 3, paragraph II.A.4) and that there are new hires at the bottom of both the current East and West lists (USAPA SOF, Doc. 153, ¶52), making furloughs and certainly a furlough as deep as 25 percent affecting pre-merger pilots unlikely. In any event, USAPA

believes that the limited nature of the WPC complaints show that the current proposal lies well within a "wide range of reasonableness" and furthermore that these discrete issues may be resolved by internal union processes without the need for judicial intervention.

### 7. THE FACTS DO NOT ESTABLISH A VIOLATION OF THE DFR EVEN IF USAPA IS REQUIRED TO JUSTIFY DEVIATING FROM THE ALPA/NICOLAU LIST

As we have shown, even if the Court determines that the DFR claim can be addressed in this case, USAPA is required to show only that its proposal is reasonable and is not required to meet any different burden because its proposal represents a "change" from the ALPA/Nicolau list, which, of course, is not in effect. USAPA submits, however, that other facts that are not in dispute show that its proposal satisfies this standard.

In addition to the facts listed in the preceding section, USAPA offered the following: (11) the ALPA/Nicolau list places younger America West pilots who were still in ground school above US Airways pilots with 16 years or more of service (Doc. 153, ¶21); (12) the ALPA/Nicolau list incorrectly described 326 US Airways pilots as on furlough when in fact they were actively flying at US Airways subsidiary Mid-Atlantic Airlines (Doc. 153, ¶21); (13) the ALPA/Nicolau list took wide-body and international flying away from US Airways pilots and gave the work to younger America West pilots who prior to the merger had no expectation of wide-body or international flying (Doc. 153, ¶21); (14) the ALPA/Nicolau list gave a windfall to America West pilots who under that list would be able to bid and hold a captain position and regularly scheduled line of flying 1-9 years earlier than reasonably expected prior to the merger, while the US Airways pilots many with 16-17 years of uninterrupted service would have had their ability to bid and hold a captain position or a regularly scheduled line of flying delayed by 1-4 years (Doc. 153, ¶21, USAPA Exhibit 6); (15) as a result of these and other problems created by the ALPA/Nicolau list it was apparent that a collective bargaining agreement that included the ALPA/Nicolau list would not be ratified (a fact fully appreciated by the Ninth Circuit in *Addington*) (Doc. 153, ¶25).

Taken together, these facts show that USAPA is entirely justified in its decision not to pursue the ALPA/Nicolau list in collective bargaining. These facts show that the premise underlying the ALPA/Nicolau list—that America West was an economically robust, successful, and growing operation that swooped in to save a bankrupt, withering US Airways operation—was not true either when the Nicolau Award was issued or in view of subsequent facts and events. To the contrary, but for the merger, America West would have filed its own bankruptcy petition. The SEC 10-K filings show that during an 18 month period following the merger, the West operation lost $13 million while the East operation made $556 million. And, since the merger West flying has significantly diminished while East flying has remained stable or has grown such that approximately 335 positions that originated with US Airways are now being flown by West pilots. These facts, along with the salient truth that a collective bargaining agreement that included the ALPA/Nicolau list could not be ratified, fully justify a departure from the ALPA/Nicolau list.

Moreover, the WPC has made no showing of the necessary arbitrary, bad faith or discriminatory conduct on the part of USAPA in rejecting the Nicolau Award. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Bautista v. Pan Am. World Airlines*, 828 F.2d 546, 549 (9th Cir. 1987). The record is devoid of evidence of animus on the part of USAPA in rejecting the Nicolau Award. There is, for example, no evidence of any subjective motivation to discriminate against the West Pilots. *See Jeffreys v. CWA*, 354 F.3d 270, 275 (4th Cir. 2003) ("While the arbitrariness of the . . . [union's] actions turns on the objective adequacy of the union's conduct, whether the . . . [union] acted discriminatorily or in bad faith depends on the subjective motivation of the union's officials."). "Without evidence of discrimination, however, merely distinguishing between . . . [the East and West pilots] is not discriminatory." *NW. Airlines v. Phillips*, 758 F.Supp.2d 786, 790 (D. Minn. 2010).

The record is also devoid of any evidence of bad faith on the part of USAPA. Neither US Airways nor the WPC have presented evidence contradicting USAPA's

contention that it rejected the ALPA/Nicolau list because it improperly provided a windfall to some pilots over others and failed to respect the career expectations of all of the pilots. *See James v. Int'l Bhd. of Locomotive Eng'rs*, 302 F.3d 1139, 1149 (10th Cir. 2002) (no DFR where "[t]he union contends its officials were motivated solely by the rational concern of how best to preserve the union's strength in the face of sweeping changes in the railroad industry, and plaintiffs have advanced little or no evidence to contradict this"). Thus, US Airways and the WPC "fall short of the legal standard for establishing bad faith . . ." *Id.* "[T]here is no requirement that unions treat their members identically as long as their actions are related to legitimate union objectives." *Vaughn v. Air Line Pilots Ass'n, Intern.*, 604 F.3d 703, 712 (2d Cir. 2010). The fact that USAPA's decision to represent all its members and reject the Nicolau Award disappointed some of the West Pilots does not mean in itself that USAPA failed to fairly represent any of its members. *See Jeffreys*, 354 F.3d at 276.

In sum, these facts are worlds apart from the discrimination or attempt to oppress a minority by a majority referenced in the cases relied on by the WPC. To the contrary, the facts demonstrate an effort by the collective bargaining representative to get the best result for the pilots as a whole after a minority was awarded unfair advantages at the expense of the majority. Pursuing a date of hire seniority list with conditions and restrictions protecting the West Pilots is well within the discretion accorded USAPA under the Railway Labor Act. The bottom line is that USAPA has offered sufficient legitimate objective reasons for rejecting the Nicolau Award and the WPC's motion for summary judgment should be denied.

**8. COUNT III SHOULD BE DISMISSED**

Count III should be dismissed. USAPA moved for summary judgment on Count III, showing that there is no precedent for the prospective immunity requested by US Airways and that judgment should be entered dismissing Count III as matter of law (Doc. 152, pp. 18-19). US Airways has refused to respond to the motion asserting that at the scheduling conference the Court directed motions addressed only to Counts I and II and

therefore precluded USAPA from moving for summary judgment on Count III (Doc. 164, p. 2 n1). But US Airways selectively focuses on only one exchange with the Court, ignores others that refer to all three Counts, and ignores that the Court did not say anything directing any party not to address Count III.[10] USAPA therefore respectfully disagrees and believes that summary judgment dismissing Count III is appropriate because it presents a purely legal issue and there is no justification for delay. *See, e.g.*, *Filco v. Amana Refrigeration, Inc.*, 709 F.2d 1257, 1260 (9th Cir. 1983). *See al*so Fed. R. Civ. P. 56(b); *The Timing of Summary Judgment*, 198 F.R.D. 679, 681 (2001) (Rules permit filing of summary judgment at early stage). USAPA respectfully requests that US Airways be ordered to respond to USAPA's motion without further delay or that Count III be dismissed.

**CONCLUSION**

For the reasons stated here and in our previous Memoranda, the Court should enter judgment dismissing Counts I and III and granting USAPA's motion for summary judgment on Count II.

Respectfully submitted this 19th day of March 2012.

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[10] While the Court discussed motions on Counts I and II, it also stated "I understand the three issues that have been presented to me by US Air and those will be resolved [in a declaratory judgment]." (Doc. 140, Tr. p. 5:9-11, Dec.1, 2011.) The Court concluded by summarizing the upcoming briefing: ". . . if I decide it resolves the entire case, that's the end of it . . . ," and further "and so that's the way we'll go and we'll see if we can resolve this case finally." (*Id*. at 37:1-2, 38:9-10.) USAPA's understanding is that it could file on all three counts so the case can be finally resolved.

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 19, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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