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 REPLY TO DEFENDANTS' RESPONSES ON THEIR CROSS-MOTIONS FOR SUMMARY JUDGMENT ON COUNTS 1 AND 2 OF THE COMPLAINT

PRELIMINARY STATEMENT

The defendants disagree as to whether the US Airline Pilots Association's ("USAPA's") constitutionally-mandated integrated seniority list based on date-of-hire, in derogation of the Nicolau seniority list, is a violation of USAPA's duty of fair representation ("DFR"). The West Pilots argue that the DFR is breached because USAPA is attempting to "dishonor" the Nicolau Award without "an objectively legitimate union purpose for doing so." (*See* Doc. No. 158 at 6:16-23.)[1] USAPA, on the other hand, argues that the standard invoked by the West Pilots is incorrect because "USAPA is neither bound by the Nicolau Award nor required to justify any departure from the Nicolau Award." (*See* Doc. No. 160 at 12:6-8.) According to USAPA, the union "is free to negotiate seniority on a blank slate." (*Id.*) US Airways takes no position on the question of whether USAPA's seniority demand, as mandated by its constitution, violates its DFR to the West Pilots, but files this reply in order to provide the Court with its view on one of the underlying issues debated by the defendants – namely, whether the Transition Agreement, including its commitment to the Nicolau Award, is binding on USAPA.

As set forth in US Airways' opening brief (*see* Doc. No. 156 at 13:23-14:8) and its response (*see* Doc. No. 164 at 7:2-10:16), the case law makes clear that the Transition Agreement is a binding collective bargaining agreement ("CBA") between US Airways and its pilots, and the pilots' selection of a new collective bargaining representative did not affect the binding nature of their pre-existing CBAs. Indeed, even USAPA has admitted to another federal court that "[a]s the certified, exclusive bargaining representative of the now merged US Airways pilots, USAPA became a party to the East CBA and West CBA . . . ." (*US Airline Pilots Ass'n v. US Airways, Inc., et al.*, Case 1:11-cv-02579-ARR-SMG (E.D.N.Y.) (Amended Compl. [Doc. No. 12] ¶ 22 (attached hereto as Exhibit A).) That principle is equally applicable in this case.

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

That said, as also noted in US Airways' prior briefs, the case law makes clear that either party can propose amendments to the binding Transition Agreement pursuant to the terms of that Agreement and Section 6 of the Railway Labor Act – so long as the amendments are consistent with USAPA's DFR to the West Pilots. The question to be resolved by this Court is whether the amendment to the Transition Agreement that USAPA is constitutionally bound to require is, or is not, consistent with its DFR.

DISCUSSION

I. CBAS REMAIN BINDING ON THE PARTIES UNDER THE RLA NOTWITHSTANDING ANY CHANGE IN REPRESENTATION.

USAPA relies on *Association of Flight Attendants v USAir, Inc.*, 24 F.3d 1432, 1438-39 (D.C. Cir. 1994) (*"USAir"*), in support of its argument that the Transition Agreement is not binding on USAPA. (*See* Doc. No. 160 at 8:1-10:17.) This reliance, however, is misplaced. The *USAir* decision compels precisely the opposite conclusion: namely, that the Transition Agreement is binding on USAPA (as well as on US Airways).

In *USAir*, the central question was whether a CBA applicable to Shuttle flight attendants and negotiated by the Transport Workers Union ("TWU") remained effective after the National Mediation Board ("NMB") had determined that the Shuttle flight attendants were part of a larger single bargaining unit that merged them with the USAir flight attendants and certified the Association of Flight Attendants ("AFA") to represent the combined flight attendant group. The AFA made the same argument that USAPA makes here: i.e., that upon the AFA's certification, the TWU CBA ceased to be effective.[2] *See USAir*, 24 F.3d at 1434. The D.C. Circuit rejected that argument. It held that, with respect to the Shuttle flight attendants, the TWU CBA remained in effect under

[2] The AFA also argued that, assuming the TWU CBA ceased to be effective, the existing AFA CBA, which covered the USAir flight attendants, should automatically be extended to cover the Shuttle flight attendants. *See* 24 F.3d at 1437. USAPA does not make such an argument here. Instead, it asserts that, following its certification, the US Airways-ALPA CBA, the America West-ALPA CBA, and the Transition Agreement were all "not 'contractually' binding on USAPA." (Doc. No. 160 at 9:8-9.)

the "general principle that collective bargaining agreements survive a change in representative, at least for status quo purposes." *Id.* at 1439. While "a newly certified union in situations such as this one has full bargaining rights with respect to covered employees without regard to whether the employees previously have been covered by a collective bargaining agreement," the *USAir* court held that "the parties of course need a starting point–or status quo–while a new agreement is negotiated, and, for the reasons given, we conclude that the terms of the [Shuttle]-TWU agreement represent the status quo." *Id.* at 1440.

USAPA's discussion of *USAir* relies on snippets taken out of context from the court's decision – e.g., "In sum, *AFA* applies, USAPA is not 'contractually' bound by any of ALPA's agreements and USAPA is not 'in any way limited by the [predecessor's] contract in pursuit of new terms of employment.'" (Doc. No. 160 at 10:15-17.) But USAPA's sweeping assertions fail adequately to take into account the D.C. Circuit's central holding that, by virtue of the status quo provisions of the RLA, the TWU CBA was indeed binding on the successor union, the AFA – even though the AFA had "'*not assented to any of the terms of that agreement*.'" (Doc. No. 160 at 10:2-3 (*quoting USAir*, 24 F.3d at 1434) (emphasis added in USAPA's brief).)

Correctly understood, *USAir* is consistent with well-established authority. As the court in *Brotherhood of Maintenance of Way Employes v. Guilford Transportation Industries, Inc.*, 808 F. Supp. 46 (D. Me. 1992), recognized, the NMB has consistently taken the position that a CBA survives a change in the employees' collective bargaining representative:

> In its First Annual Report, the NMB stated that "a change in representation does not alter or cancel any existing agreement made in behalf of the employees by their previous representatives." The First Annual Report of the NMB at 23-24 (1935). The NMB has repeatedly reaffirmed this position since 1935. *See, e.g., Metro-North R.R.*, 10 N.M.B. 345, 349 (1983); *Lehigh Valley R.R. Co.*, 3 N.M.B. 225, 226 (1960). In its 42nd Annual Report, the Board repeated the proposition, explaining that

> [t]he 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. The procedures of Section 6 of the Railway Labor Act are to be followed if any changes in agreements are desired.
>
> *Air Transport Employees v. Western Airlines, Inc.*, 105 L.R.R.M. 3004 (C.D. Cal. 1980) (citing 42nd Annual Report of National Mediation Board for 1976, at 39). Moreover, very recently the NMB has also made clear that when it applies its merger procedures to determine representation in the context of transactions among rail carriers like the leases here, there is "no effect on the survival of existing collective bargaining agreements." *Merger Procedures*, 17 N.M.B. 44, 54 (1989).

808 F. Supp. at 52-53. The NMB has also stated that "'The only effect of a certification by the Board is that the employees have chosen other agents to represent them in dealing with the management under the existing agreement.'" *See International Ass'n of Machinists & Aerospace Workers v. Northwest Airlines, Inc.*, 843 F.2d 1119, 1125, *vacated as moot*, 854 F.2d 1088 (8th Cir. 1988) (*quoting* Forty-Second Annual Report of the National Mediation Board at 39 (1976)).

Courts that have considered the issue have reached the same conclusion. For example, *International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157, 163 (5th Cir. 1983), states: "If the employees designate a new collective bargaining representative, it succeeds to the status of the former representative without alteration in the contract terms." *See also May v. Shuttle, Inc.*, 129 F.3d 165, 176 (D.C. Cir. 1997); *Northwest Airlines, Inc.*, 843 F.2d at 1125; *Aircraft Mechanics Fraternal Ass'n v. United Airlines, Inc.*, 406 F. Supp. 492, 507 n.23 (N.D. Cal. 1976).

II. THE STATUS QUO INCLUDES ALL OF THE TERMS OF THE PARTIES' CBAS.

USAPA contends that the "status quo" referenced and enforced in *USAir* did not include all of the terms of the pre-existing TWU CBA, but rather only the "actual, objective working conditions" then in place for the Shuttle flight attendants. (*See* Doc.

No. 160 at 10:19-11:16.) But there is nothing in *USAir* that supports this argument, or even discusses it. The D.C. Circuit's holding was to the contrary: "the parties of course need a starting point–or status quo–while a new agreement is negotiated, and, for the reasons given, we conclude that the terms of the Eastern-TWU agreement represent the status quo." *USAir*, 24 F.3d at 1440.

USAPA purports to base its interpretation of the "status quo" on *Detroit & Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142 (1969) ("*Shore Line*"). (*See* Doc. No. 160 at 11:3-16.) But in doing so, USAPA misconstrues the Supreme Court's holding. *Shore Line* addressed the question whether "the status quo which the [Railway Labor] Act requires be maintained consists *only* of the working conditions specifically covered in the parties' existing collective bargaining agreement" or instead whether, in addition to what is included in the CBA, "the status quo *extends* to those actual, objective working conditions out of which the dispute arose . . . ." 396 U.S. at 143, 153 (emphasis added). There, the carrier sought to establish new work assignments. The Court held that even though the CBA did not expressly address or prohibit the creation of the new positions, the status quo did. *Shore Line* thus stands for the principle that the status quo may be *broader* than the CBA's terms. *See also Pittsburgh & Lake Erie R.R. v. Ry. Labor Execs.' Ass'n*, 491 U.S. 490, 506 (1989) ("*P&LE*") (discussing "our conclusion in [*Shore Line*] that the status quo provision required adherence *not only to working conditions contained in express or implied agreements* between the railroad and its union *but also* to conditions 'objectively' in existence when the union's [Section 6] notice was served") (emphasis added).[3] By arguing that *Shore Line* mandates a status quo that is narrower than the terms of the CBA, USAPA stands the Supreme Court's decision on its head.

[3] The Supreme Court in *P&LE* held that *Shore Line* "extended the relevant language of § 156 to its outer limits, and we should proceed with care before we apply that decision to the facts of these cases." *Id.*

USAPA also relies on *Transport Workers Union v. Hawaiian Airlines, Inc.*, 2009 WL 972483 (D. Haw. Apr. 8, 2009), for the proposition "that an agreement between a union and an employer that never became effective . . . is not part of the RLA *status quo*." (Doc. No. 160 at 11:23-28, n.2.) But *Hawaiian Airlines* dealt only with a tentative agreement that was never actually implemented, and thus is not applicable to this case. The Transition Agreement here is not merely a tentative agreement. It is a fully-executed CBA, signed by the airlines, the union, and the Master Executive Councils which separately represented the East Pilots and the West Pilots. (*See* Doc. No. 156-3 at 40-41.) Upon execution of the Transition Agreement, the parties (including ALPA at first and then USAPA) treated it as a binding contract: they acted in accordance with the Transition Agreement's terms by, *inter alia*, adjudicating grievances regarding its interpretation and application pursuant to its dispute-resolution procedures. (*See* Doc. No. 164 at 9:13-25.) The fact that the Nicolau Award has not yet been implemented does not change the fact that the Transition Agreement contains a commitment to the Nicolau Award, and such contractual commitment is therefore part of the status quo.[4]

The Second Circuit's decision in *Airline Pilots Association, International v. Pan American World Airways, Inc.*, 765 F.2d 377 (2d Cir. 1985), not *Hawaiian Airlines*, addresses the issue of whether the terms of a fully-executed CBA providing for future changes in rates of pay, rules, or working conditions are part of the status quo. In that case, the union had agreed to wage concessions for a 2-year period. Before they expired, the carrier re-opened negotiations for a new CBA, which triggered the RLA's status quo provisions. In reliance on *Shore Line's* statement that the status quo "extends to those actual, objective working conditions out of which the dispute arose," 396 U.S. at 153, the

[4] According to USAPA, "there is absolutely no merit to the suggestion by US Airways that the ability of US Airways and USAPA to modify the Transition Agreement arises not from the RLA but from the provision of the Transition Agreement that provides it 'may be modified by the written agreement of the Association [i.e., ALPA] and the Airline Parties.'" (Doc. No. 160 at 5:17-21.) In fact, US Airways has explained that the Transition Agreement can be amended for both reasons. (*See* Doc. No. 164 at 11:3-15.)

carrier argued that "this 'status quo' provision requires that the parties continue with the concessionary working arrangements in effect at the time of the Section 6 notice." 765 F.2d at 380. The Second Circuit disagreed: "In focusing on 'actual, objective working conditions,' however, the Court did not mean to prevent the parties from entering into an agreement to utilize 'rates of pay, rules, or working conditions' other than those in existence at the time when the Section 6 notice was filed." *Id.* at 381. Thus, the Second Circuit held that the status quo included the higher wages provided for by the CBA, even though those wages were not in effect. Similarly here, the terms of the Transition Agreement, including its commitment to the Nicolau Award, are part of the status quo between the parties, even if those terms had not yet been implemented.

CONCLUSION

The Transition Agreement is binding on USAPA, both under ordinary principles of contract law and under the status quo provisions of the RLA. That stated, USAPA can propose amendments to the Transition Agreement, subject to its DFR to the West Pilots. US Airways takes no position on the question whether USAPA would, or would not, breach its DFR by insisting on (and entering into a CBA with US Airways containing) a date-of-hire seniority list under the circumstances of this case. Instead, US Airways respectfully requests that the Court resolve that issue by granting summary judgment in favor of either the West Pilots Class or USAPA on either Count 1 or 2.

Dated: March 19, 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 19, 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

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