O'MELVENY & MYERS LLP

BEIJING
BRUSSELS
CENTURY CITY
HONG KONG
LONDON
NEWPORT BEACH
NEW YORK

400 South Hope Street
Los Angeles, California 90071-2899

TELEPHONE (213) 430-6000
FACSIMILE (213) 430-6407
www.omm.com

SAN FRANCISCO
SHANGHAI
SILICON VALLEY
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TOKYO
WASHINGTON, D.C.

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WRITER'S DIRECT DIAL
(213) 430-6005

WRITER'S E-MAIL ADDRESS
rsiegel@omm.com

VIA ELECTRONIC COURT FILING

The Hon. Allyne R. Ross
United States District Judge
United States District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *USAPA v. US Airways, Inc., et al. No. CV-11-2579*

Dear Judge Ross:

Plaintiff US Airline Pilots Association ("Plaintiff") has filed an Amended Complaint ("AC") alleging five claims against US Airways, Inc. ("US Airways") under the Railway Labor Act ("RLA"). Counts II through V of the AC are the same as Counts I through IV of the original Complaint although Plaintiff has pled additional facts in an attempt to save its claims. While US Airways addresses these claims below, it refers the Court to its letter dated June 27, 2011, for a more thorough discussion. In sum, Counts II, III and V should be dismissed under Rule 12(b)(1) because they are minor disputes within the exclusive jurisdiction of the US Airways Pilots' System Board of Adjustment. Count IV should be dismissed under Rule 12(b)(6) because Plaintiff has not alleged facts sufficient to show that US Airways has bargained with a desire not to reach an agreement.

Count I of the AC is a new claim by which Plaintiff alleges that US Airways has interfered with the right of its pilots freely to choose a bargaining representative. US Airways vigorously denies these and all other allegations of unlawful conduct in the AC. Furthermore, even if Plaintiff's assertions of unlawful conduct were true (and they are not), this claim, which is based largely on the allegation that US Airways is not following the contractual grievance and arbitration procedure, and that US Airways has disciplined pilots and ordered them to wear Company issued lanyards instead of lanyards favored by Plaintiff, constitutes a minor dispute that must be arbitrated before the System Board of Adjustment. Thus, it should be dismissed under Rule 12(b)(1). Pursuant to Rule III.A of this Court's Individual Motion Practices, US Airways requests that a pre-motion conference be set at the Court's convenience.

A. Counts I, II, III and V Raise Minor Disputes Subject to Mandatory Arbitration.

In Counts I, II, III and V, Plaintiff alleges that US Airways violated the RLA by improperly docking pilot pay, refusing to schedule arbitrations on an accelerated basis, declining to enter global settlements of grievances and last chance agreements, refusing to resolve grievances arising under a Letter of Agreement devising a voluntary grievance mediation program, extending grievance hearings unnecessarily through the use of stall tactics, imposing

discipline, including discharge, on pilots, and restricting the type of lanyards pilots may wear to display Company identification badges. Plaintiff contends that in so doing US Airways has violated provisions of the RLA requiring parties to maintain the status quo during the course of a "major" dispute and retaliated against pilots for supporting their union.

As explained in our June 27 letter, disputes between a carrier and a union under the RLA are classified as either "major" or "minor." Major disputes are those over the "formation of collective agreements or efforts to secure them." *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 723 (1945). Minor disputes "contemplate[] the existence of a collective agreement already concluded" and involve the application or interpretation of that agreement. *Id.* Federal courts have jurisdiction to resolve major disputes but minor disputes are subject to mandatory arbitration before system boards of adjustment. *Consol. Rail Corp. v. Ry. Labor Executives' Ass'n ("Conrail"),* 491 U.S. 299, 303-04 & n.4 (1989).

The Supreme Court has ruled that carriers bear a "relatively light burden" in establishing that a dispute is minor and therefore subject to mandatory arbitration. Id. at 307. "Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement." *Id.* Thus, in *Conrail,* the carrier changed its drug testing policy such that employees were routinely tested in all periodic and return-to-work physical examinations. Although the carrier's right to include drug testing in physical examinations "rest[ed] solely upon implied contractual terms, as interpreted in light of past practice" the Supreme Court nevertheless found that the carrier's conduct was "arguably justified" by the contract. *Id.* at 312.

The changes to the status quo alleged by Plaintiff in Counts II and III raise minor disputes under *Conrail*. For example, Section 21 of the collective bargaining agreement ("CBA") contains a comprehensive framework for the grievance and arbitration process and a Letter of Agreement (a supplement to the CBA) controls the availability of accelerated arbitrations. Even if US Airways has refused to process grievances to arbitration on an accelerated basis as Plaintiff contends (and it has not), US Airways is arguably justified in doing so because the Letter of Agreement allows accelerated arbitrations only for "cases that are mutually selected by the parties." Similarly, the allegation that US Airways takes excessive time to present grievances to the System Board of Adjustment raises a minor dispute because US Airways is arguably justified by provisions of the CBA permitting a party to "summon any witnesses" and present evidence "either orally or in writing, or both," and by the fact that the CBA contains no time limits for arbitration hearings. These and Plaintiff's other allegations raise minor disputes because US Airways will show that its conduct, as alleged, is arguably justified under the CBA and the past practice of the parties. *See Thacker v. St. Louis S.W. Ry. Co.*, 257 F.3d 922, 923-24 (8th Cir. 2001); *Air Line Pilots Ass'n v. Champion Air, Inc.*, No. 06-2467, 2007 WL 1229385, at *5 (D. Minn. Apr. 27 2007). These claims therefore must be arbitrated.

Similarly, Plaintiff contends in Count V that US Airways violated the RLA by failing "to settle or otherwise resolve disputes" under the CBA. (AC ¶ 198.) This Count is based on the same facts as Counts II and III and concerns the application of the CBA provisions related to the grievance process. Courts have dismissed similar claims because they were minor disputes subject to mandatory arbitration. *Bhd. of Maint. of Way Employees v. Union Pac. R.R. Co.*, 358 F.3d 453, 457-58 (7th Cir. 2004). *See also Conrail*, 491 U.S. at 306-07.

Finally, Plaintiff's new Count I also raises a minor dispute within the exclusive jurisdiction of the System Board of Adjustment. Claims of interference with organizing rights under Sections 2, Third and Fourth of the RLA are available to "address[] primarily the

precertification rights and freedoms of unorganized employees." *Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*, 480 U.S. 426, 440 (1989). Because Plaintiff in this case was certified in 2008, pre-certification organizing rights are not at issue. *See Ass'n of Flight Attendants v. Horizon Air Indus., Inc.*, 280 F.3d 901, 905 (9th Cir. 2002). In cases like the present one, where the alleged interference involves primarily post-certification pilot discipline and discharge, courts have held that Section 2, Third and Fourth claims raise minor disputes appropriate for the system board of adjustment. *Indep. Union of Flight Attendants v. Pan Am. World Airways, Inc.*, 789 F.2d 139 (2d Cir. 1986).

B. Count IV of the Amended Complaint Is Meritless.

In its original Complaint, Plaintiff alleged that US Airways had bargained in bad faith by expressing hostility toward the bargaining process, refusing to schedule "additional" bargaining sessions, refusing to respond to certain union proposals and offering proposals that were outside existing industry standards. In Count IV of the AC Plaintiff further contends that US Airways understaffed its bargaining team, made changes to the grievance procedure unilaterally and intimidated pilots for raising safety concerns during the course of bargaining. (AC ¶ 182.) These allegations are not only false, they fail to state a claim under Section 2, First of the RLA.[1]

The Supreme Court has cautioned that with respect to bad faith bargaining claims "great circumspection should be used in going beyond cases involving 'desire not to reach an agreement' for doing so risks infringement of the strong federal labor policy against government interference with . . . collective bargaining agreements." *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 579 n.11 (1971). Plaintiff's allegations fall far short of alleging a desire not to reach agreement. In fact, the Union concedes that US Airways has attended bargaining sessions regularly and exchanged proposals (albeit proposals the Union does not like). (AC ¶¶ 28-42.) Moreover, Plaintiff acknowledges that the negotiations are currently under the supervision of the National Mediation Board ("NMB"), which has unfettered authority to establish the timing, location and format of the negotiations and to release the parties when it determines that an agreement cannot be reached. These admissions are inconsistent with a desire not to reach agreement. Courts have dismissed bad faith bargaining claims on far more egregious allegations. *Nw. Airlines Corp. v. Ass'n of Flight Attendants*, 483 F.3d 160, 175 (2d Cir. 2007); *Air Line Pilots Ass'n, Int'l v. Spirit Airlines, Inc.*, No. 08-CV-13785, 2009 WL 1803236, at *13-15, 18 (E.D. Mich. June 18, 2009); *BNSF Ry. Co. v. United Transp. Union*, 462 F. Supp. 2d 746, 761 (S.D. Tex. 2006); *Ass'n of Flight Attendants v. Midway Airlines, Inc.*, No. 88 C 7447, 1989 WL 18233, at *3-5 (N.D. Ill. Feb. 28, 1989).

Sincerely,

/s/ Robert A. Siegel

Robert A. Siegel (SBN 2205284)
Attorney for US Airways

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[1] As noted by US Airways in its June 27 letter, bargaining has been hampered by a bitter seniority dispute between pilot groups related to the 2005 merger of US Airways and America West Airlines, Inc. *See Addington v. U.S. Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010); *see also US Airways, Inc. v. Addington*, No.2:10-cv-01570-ROS, slip op. at 3-8 (D. Ariz. June 1, 2011).