UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

US AIRLINE PILOTS ASSOCIATION *Plaintiff/Counter-Defendant*, v. US AIRWAYS, INC., AMERICAN AIRLINES, INC. and THE ALLIED PILOTS ASSOCIATION *Defendants/Counter-Plaintiffs.*	Case No. 14-CIV-00328 (BAH)

JOINT REPORT OF PARTIES UNDER L.R. 16.3(d)

A. DATE OF CONFERENCE AND APPEARANCES OF COUNSEL

April 16, 2014

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B. STATEMENT OF JURISDICTION

This Court has jurisdiction over the complaint pursuant to 28 U.S.C. §§ 1331. This Court has subject-matter jurisdiction to adjudicate the merits of the Defendants and Counter-Plaintiffs'("Defendants") counterclaims pursuant to 28 U.S.C. § 1331 (federal question), as the counterclaims seek declarations pursuant to 28 U.S.C. § 2201 and § 2202 respecting the parties' rights and obligations under a federal statute – the McCaskill-Bond Amendment to the Federal Aviation Act, 49 U.S.C. § 42112, note 117– and a determination that US Airline Pilots Association ("USAPA" or "Plaintiff") has violated its obligations under a federal statute – the Railway Labor Act, 45 U.S.C. § 152, First.

1. Defendants' Additional Statement Regarding Jurisdiction:

Based on comments by USAPA's counsel during the parties' April 16, 2014 conference, in which USAPA (through counsel) for the first time in these proceedings explicitly acknowledged that there likely were contract-interpretation disputes between the parties (which disputes USAPA, incorrectly in the view of Defendants, asserted could be resolved by the Court rather than a labor arbitrator), and based on the statements in USAPA's draft report, in which USAPA for the first time took the position that "Paragraph 10(f) [of the MOU] stated that after the merger closing date, the airlines and the pilots' representatives would negotiate a seniority integration protocol agreement for negotiation of the seniority list integration and ***the selection of***

arbitrators to decide on the seniority list integration dispute if the parties did not reach an agreement on combining the seniority lists" (*see* Plaintiff's Statement of Facts, *infra*) (emphasis added), it is now clear that there are disputes between USAPA on the one hand, and Defendants US Airways, Inc. ("US Airways"), American Airlines, Inc. ("American") and Allied Pilots Association (the "APA") on the other hand, regarding the interpretation and application of the four parties' Memorandum Of Understanding Regarding Contingent Collective Bargaining Agreement ("MOU"), and that the resolution of those disputes will be material to the Court's adjudication of the merits of the claims and counter-claims in this case. The specifics of those contract-interpretation disputes are discussed later in this Report (*see* Section C(2), *supra*). It is the position of Defendants that, pursuant to the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, such contract-interpretation disputes can only be resolved by an arbitral board of adjustment established pursuant to Paragraph 20 of the MOU. The significance to the litigation case management and schedule of these contract-interpretation disputes, and the Court's lack of authority to resolve them, is discussed in Section D(14), *supra*.

2. **USAPA's response to Defendants' Additional Statement Regarding Jurisdiction**

USAPA disagrees with the Defendants' characterization of the claims before the Court. Its claim seeks the Court's adjudication of the rights of US Airways pilots arising under federal law. The counterclaims asserted by American, US Airways and the APA also state claims arising under federal law. To the extent the parties' MOU will be subject to interpretation, the agreement will be interpreted under the statutory provisions of the McCaskill-Bond Amendment. The adjudication of the parties' claim and counterclaims is only for the Court and not for determination by an arbitrator. Finally, the Defendants failed to assert a defense of arbitration in answer to USAPA's complaint as required by Fed. R. Civ. P. 8(c)(1) and they therefore waived

their ability to assert that defense. USAPA states further its position on this subject in Section D(14)(b) below.

C. STATEMENT OF CASE AND FACTS

1. Plaintiff's Statement of Case and Facts:

The complaint asserts an action under the McCaskill-Bond Amendment, 49 U.S.C. § 42112, Note 117, by the US Airline Pilots Association ("USAPA"), certified collective bargaining representative of the pilots of US Airways, against American Airlines, Inc. ("American"), US Airways, Inc. ("US Airways"), and the Allied Pilots Association ("APA"), certified bargaining representative of the pilots of American Airlines arising from their dispute over the combination (also called "integration") of the seniority lists covering the pilots of American and US Airways as part of the merger of American and US Airways. The airlines are "air carriers" under the McCaskill-Bond Amendment and under the Railways Labor Act., 45 U.S.C. § 151, *et seq*. The APA and USAPA are "representatives" covered by the Railway Labor Act. The Defendants have asserted counterclaims against USAPA under the McCaskill-Bond Amendment and the Railway Labor Act. The court has subject matter jurisdiction over the complaint under the McCaskill-Bond Amendment and over the counterclaims under the McCaskill-Bond Amendment and the Railway Labor Act.

The McCaskill-Bond Amendment, 49 U.S.C. § 42112, Note 117, governs the combination of airline employee seniority lists when airlines merge their operations. It sets forth requirements for a "fair and equitable" combination of the employees' seniority lists, including the application of Sections 3 and 13 of the Labor Protective Provisions ("LPPs") established by the former Civil Aeronautics Board in the 1973 merger of Allegheny Airlines and Mohawk Airlines. Section 3 of the LPPs requires that employee seniority lists be combined in a fair and equitable manner. LPP

Section 13 establishes under its subpart 13(a) a period of 20 days following the effective date of a merger in which the airlines and affected employee groups representatives can negotiate in an effort to reach agreement on how the employees' seniority lists could be fairly and equitably combined. After 20 days, any party can apply to the National Mediation Board ("NMB") to receive a list of seven arbitrators from which the parties would select one arbitrator to hold hearings and then determine how the seniority lists would be fairly combined. The decision of the arbitrator was to be issued within 90 days of the merger date.

Under Section 13(b), the parties can negotiate to establish an alternative method to integrate the seniority lists or a method to select an arbitrator other than the application to the NMB set forth in Section 13(a). Section 13(b) preserves the right of any party to apply to the NMB under Section 13(a) for a panel of arbitrators if no agreement is reached on an alternative method for seniority integration or arbitrator selection.

USAPA contends that the Defendants are required by the McCaskill-Bond Amendment to participate with USAPA under Section 13(a) to select an arbitrator from a list of seven arbitrators that USAPA requested from the NMB on February 20, 2014 and the NMB issued on April 11, 2014 and then participate in arbitration before that arbitrator. The Defendants deny they are required to follow the procedures of Section 13(a) in resolving the American and US Airways pilots' seniority list integration dispute.

The parties entered in January 2013 a Memorandum of Understanding ("MOU") setting forth certain terms and conditions of employment that would apply to the American pilots and US Airways pilots following the merger of American and US Airways as a Merger Transition Agreement. Paragraph 10 of that MOU set forth certain provisions addressing the integration of

the American and US Airways pilots' seniority lists. The parties are in dispute concerning the legal effect of that Paragraph 10 on their rights under the McCaskill-Bond Amendment.

The Defendants assert that Paragraph 10 of the MOU controls the procedures the parties are to follow in combining the seniority lists covering the American and US Airways pilots. They assert in their answer and counterclaims that (1) the parties' dispute is exempt from the McCaskill-Bond Amendment because the parties' MOU qualified under an exception to the McCaskill-Bond Amendment for collective bargaining agreements addressing seniority integration procedures; and (2) alternatively, that the MOU qualified as a Section 13(b) agreement establishing alternative seniority integration procedures from those set forth in Section 13(a) of the Allegheny-Mohawk Labor Protective Provisions. In addition, the APA filed a counterclaim against USAPA seeking declaratory relief that if and when it was certified by the NMB as representative of the combined pilot groups of American and US Airways that it would be solely responsible for conducting the seniority list integration process with the airlines and USAPA would no longer be involved in that process. American and US Airways jointly filed a separate counterclaim alleging that USAPA has violated its duty under Section 2, First of the Railway Labor Act, 45 U.S.C. § 152, First, by asserting that LPP Section 13(a) applies to the parties' dispute and petitioning the NMB for a list of arbitrators under that provision.

USAPA denies the Defendants' contentions. It asserts that the parties' MOU did not qualify as a collective bargaining agreement establishing a seniority list integration process under the Section 117(a)(2) exception of the McCaskill-Bond Amendment and that the McCaskill-Bond Amendment governs the parties' seniority list integration dispute. USAPA further denies that the parties' MOU qualifies as an Allegheny-Mohawk LPP Section 13(b) agreement establishing an alternative method for seniority integration or arbitrator selection. USAPA denies that the

McCaskill-Bond Amendment grants to the APA control with the airlines over the seniority list integration process if and when the NMB certifies the APA as sole representative of a single, postmerger pilot craft or class covering the pilots of American and US Airways. Finally, USAPA denies American and US Airways allegations that it has violated Section 2, First of the RLA by asserting the rights of US Airways pilots under the McCaskill-Bond Amendment to resolution of their seniority list integration dispute with the American pilots under LPP Section 13(a) since Section 2, First of the RLA is not applicable to a dispute under LPP Section 13(a).

i. **Plaintiff's Statement of Facts**

American Airlines and US Airways are both "air carriers" regulated by the Federal Aviation Act, 49 U.S.C. § 40102(a)(2) and the Railway Labor Act, 45 U.S.C. 151, *et seq*. American employs approximately 10,000 pilots and US Airways employs approximately 5,500 pilots. The APA is the certified collective bargaining representative of the American pilots. USAPA is the certified collective bargaining representative of the pilots of US Airways. The pilots of US Airways consist of the combined pilots of the former America West Airlines and the former US Airways following the merger of those two airlines in 2005.

In January 2013, American, US Airways, the APA and USAPA concluded a "Memorandum of Understanding" to facilitate a merger of American and US Airways. The MOU set forth certain terms and conditions of employment applicable to the pilots of American and US Airways following the merger.

The merger of the two airlines would require a combination of the seniority lists covering the American pilots and the US Airways pilots under the McCaskill-Bond Amendment in order for the two airlines to ultimately combine their flight operations. Paragraph 10 of that MOU contains certain provisions addressing the integration of the pilot seniority lists. Paragraph 10(f)

stated that after the merger closing date, the airlines and the pilots' representatives would negotiate a seniority integration protocol agreement for negotiation of the seniority list integration and the selection of arbitrators to decide on the seniority list integration dispute if the parties did not reach an agreement on combining the seniority lists.

On December 9, 2013, American and US Airways closed on their merger after reaching agreement with the United States Department of Justice concerning certain objections raised to the proposed merger by the U.S. DOJ in an antitrust lawsuit against the airlines. After the merger closed, the parties negotiated until February 18, 2014 in an effort to agree on a seniority integration protocol agreement. They were not successful in reaching agreement.

On February 19, 2014, American and US Airways wrote to the APA and USAPA proposing a method for selecting arbitrators to decide the parties' seniority list integration dispute. On February 20, 2014, USAPA applied to the NMB under Section 13(a) of the Allegheny-Mohawk Labor Protective Provisions for a list of seven arbitrators from which the parties could select an arbitrator to decide their dispute. American and US Airways and separately the APA wrote the NMB on February 26, 2014 and objected to USAPA's request and asked the NMB not to issue the requested panel of arbitrators, stating that they were not obligated by Section 13(a) to select an arbitrator from that panel. On February 27, 2014, USAPA responded to the NMB that under Section 13(a), the NMB must issue the requested panel of arbitrators since 20 days had expired since the closing date of the merger.

Also on February 27, 2014, USAPA filed this lawsuit against American, US Airways and the APA to compel their compliance with Section 13(a) of the Allegheny-Mohawk Labor Protective Provisions. On March 21, 2014, the Defendants filed answers to the complaint and counterclaims against USAPA. On April 11, 2014, USAPA filed answers to the counterclaims.

Also on April 11, 2014, the NMB issued to the parties a list of seven proposed arbitrators upon USAPA's February 20, 2014 request. USAPA's position is that the parties are obligated by the McCaskill-Bond Amendment to select from the list provided by the NMB on April 11, 2014 an arbitrator to decide their seniority list integration dispute. It is the Company's and APA's position that, pursuant to MOU Paragraph 10(a), USAPA is required to participate in good-faith negotiations to designate three arbitrators, and they have filed a grievance/dispute under MOU Paragraph 20 to that effect.

2. **Defendants' Statement of the Case and Facts.**

In anticipation of the merger between US Airways and American (collectively, the "Company"), American, US Airways, APA, and USAPA entered into the MOU. The MOU set forth the terms and conditions of employment that would be applicable to legacy US Airways and legacy American pilots if there were a merger, including detailed procedures for the seniority integration of the two pilot groups. More particularly, in Paragraph 10(a), the MOU specifies that any arbitration hearing that may be necessary to resolve the pilot seniority-integration dispute will be conducted before a panel of three arbitrators designated by the parties and shall not commence until after the National Mediation Board ("NMB") has certified one labor organization to be the collective bargaining representative for all of the pilots of the Company, and a Joint Collective Bargaining Agreement has thereafter been achieved.

USAPA filed the instant lawsuit seeking to avoid the MOU's seniority-integration procedures, specifically including the provisions in Paragraph 10(a) governing the composition and designation of the arbitration panel and the timeline for the arbitration hearing. USAPA contends that because the four parties to the MOU did not execute a "Seniority Integration Protocol Agreement" under MOU Paragraph 10(f) by the applicable deadline, specifying a

process for selection of a three-arbitrator panel, McCaskill-Bond mandates that the US Airways/American seniority integration shall be governed not by MOU Paragraph 10, but instead by the arbitrator-selection, arbitration schedule, and other procedures in Sections 3 and 13 of the Allegheny-Mohawk Labor Protective Provisions ("*Allegheny-Mohawk* LPPs").

The Company and APA contend that the parties' failure to execute a Seniority Integration Protocol Agreement under MOU Paragraph 10(f) does not obviate the other seniority-integration provisions in MOU Paragraph 10, specifically including the arbitrator-designation and hearing scheduling provisions in Paragraph 10(a). They seek a declaration that, pursuant to McCaskill-Bond, the MOU's seniority-integration provisions are controlling with respect to the US Airways/American pilot seniority integration, because: (i) the MOU is a collective bargaining agreement, and the MOU seniority-integration provisions allow for the protections afforded by Sections 3 and 13 of the *Allegheny-Mohawk* LPPs, thereby triggering an exception in McCaskill-Bond to direct application of *Allegheny-Mohawk*, *see* 49 U.S.C § 42112, note § 117(a)(2); or, in the alternative, (ii) even if *Allegheny-Mohawk* is applicable, the MOU seniority-integration provisions are an "alternative method" for dispute settlement that is permissible under *Allegheny-Mohawk* Section 13(b) and takes precedence over the inconsistent provisions of Section 13(a) which USAPA is attempting to invoke by its lawsuit – namely, the provisions in *Allegheny-Mohawk* Section 13(a) that purport to require that a single arbitrator (rather than three) be used and that the arbitration hearing be "expedited" with a decision within 90 days after "the controversy arises."

The Company further seeks a determination that, by failing and refusing to participate with the Company and APA in attempting to select a panel of three arbitrators in disregard of the MOU's seniority-integration provisions (in particular, MOU Paragraph 10(a)), by instead

unilaterally seeking a list of arbitrators from the NMB for use in selection of a single arbitrator, and by filing this lawsuit seeking to avoid the MOU's seniority-integration provisions in their entirety, USAPA has violated its duty under Section 2, First, of the RLA, 45 U.S.C. § 152 (First), to "exert every reasonable effort to make and maintain" a collective bargaining agreement (namely, the MOU).

The APA further seeks a declaration that, if and when USAPA is decertified by the NMB as the collective bargaining representative for the legacy US Airways pilots and APA is certified as the representative for all legacy US Airways and legacy American pilots, USAPA may only participate in the MOU seniority-integration process if and to the extent APA deems it appropriate as the certified representative for all of the Company's pilots.

As noted above, there are disputes between the Company/APA and USAPA regarding the interpretation and application of the MOU, and it is the position of the Company and the APA that the resolution of these disputes will be material to the Court's adjudication of the merits of the claims and counter-claims in this case. More particularly:

- The gravamen of USAPA's lawsuit is that the parties to the MOU intended that the seniority-integration provisions in MOU Paragraph 10, including but not limited to Paragraph 10(a), would be rendered ineffective in their entirety if a Seniority Integration Protocol Agreement specifying a process for selection of a three-arbitrator panel were not executed by the deadline in MOU Paragraph 10(f), whereas the Company and APA contend that the parties to the MOU intended for the provisions in MOU Paragraph 10, including but not limited to Paragraph 10(a), to remain in effect even if a Protocol Agreement with such arbitrator-selection provisions were not executed.

- USAPA contends that MOU Paragraph 10 did not establish a method for the selection of arbitrators, whereas the Company and APA contend that MOU Paragraph 10(a) does contain such a provision, namely: "If, on the date ninety (90) days following the Effective Date, direct negotiations have failed to result in a merged seniority list acceptable to the pilots at both airlines, a panel of three neutral arbitrators will be designated within fifteen (15) days to resolve the dispute, pursuant to the authority and requirements of McCaskill-Bond."
- USAPA contends that "Paragraph 10(f) [of the MOU] stated that after the merger closing date, the airlines and the pilots' representatives would negotiate a seniority integration protocol agreement for negotiation of the seniority list integration and the selection of arbitrators to decide on the seniority list integration dispute if the parties did not reach an agreement on combining the seniority lists" (*see* Plaintiff's Statement of Facts, *supra*), whereas the Company and the APA contend that MOU Paragraph 10(f) contains no reference to "the selection of arbitrators" and that it is MOU Paragraph 10(a) which addresses that subject.

It is the position of the Company and the APA that, under the RLA, the above contract-interpretation disputes can only be resolved by an arbitral board of adjustment established pursuant to Paragraph 20 of the MOU. To this end, the Company and APA have filed a grievance under MOU Paragraph 20 seeking, *inter alia*, resolution of the above-listed contract-interpretation disputes as well as a determination of whether USAPA breached the MOU by failing to participate in negotiations under MOU Paragraph 10(a) for the selection of three arbitrators and by instead unilaterally requesting a panel of arbitrators from the NMB for use in selection of a single arbitrator. The Company and the APA previously filed a separate grievance, limited to the

arbitrator-selection contract-interpretation issue described at the end of the preceding sentence, but USAPA has refused to submit this contract-interpretation issue to arbitration pending the outcome of this lawsuit.

D. LOCAL RULE 16.3(C) ISSUES

The parties are in agreement on items 1-13 below. They agree on a discovery schedule and that no additional limits on discovery are required beyond those established in the Federal Rules of Civil Procedure. The Defendants have raised the need for a protective order to address items identified in 8.d below; USAPA agrees to confer in good faith on that question. Concerning questions of privilege, the parties have stated separately under 8.f below the potential for issues of privilege to be raised in this case.

(1) Whether the case is likely to be disposed of by dispositive motion; and whether, if a dispositive motion has already been filed, the parties should recommend to the court that discovery or other matters should await a decision on the motion.

The parties have filed answers to the complaint and counterclaims. The case will therefore not resolve on Rule 12 dispositive motions. The parties address the likelihood of resolving the case under motions for summary judgment below.

(2) The date by which any other parties shall be joined or the pleadings amended, and whether some or all the factual and legal issues can be agreed upon or narrowed.

The parties do not believe that further parties are required for complete relief to be granted under either the complaint or the counterclaims. The parties propose that a period of discovery be permitted prior to a deadline for amendment of pleadings and suggest as a deadline to amend the pleadings July 1, 2014.

To the extent issues can be narrowed, the parties have done so through the Defendants' answer to the complaint and USAPA's answer to the counterclaims. Discovery may permit the parties to identify further factual or legal issues that may be agreed upon or narrowed.

(3) Whether the case should be assigned to a magistrate judge for all purposes, including trial.

The parties do not believe this case should be assigned to a magistrate judge for all purposes, including trial.

(4) Whether there is a realistic possibility of settling the case.

The parties continue to explore private discussions to determine if they can resolve their dispute.

(5) Whether the case could benefit from the Court's alternative dispute resolution (ADR) procedures (or some other form of ADR); what related steps should be taken to facilitate such ADR; and whether counsel has discussed ADR and their response to this provision with their clients.

The parties do not believe it is necessary to utilize the Court's ADR procedures to facilitate settlement discussions.

(6) Whether the case can be resolved by summary judgment or motion to dismiss; dates for filing dispositive motions and/or cross-motions, oppositions, and replies; and proposed dates for a decision on the motions.

The parties believe the case likely can be resolved by summary judgment, although the scope of material facts has not yet been determined. The parties suggest the following schedule:

Date for filing dispositive motions and/or cross-motions: **October 3, 2014**
Date for filing oppositions: **November 7, 2014**
Date for filing reply in support of motion: **November 21, 2014**
Proposed date for decision: **January 30, 2015**

(7) Whether the parties should stipulate to dispense with the initial disclosures required by Rule 26(a)(1), F.R.Civ.P., and if not, what if any changes should be made in the scope, form or timing of those disclosures

The parties agree to produce initial disclosures by May 5, 2014. No change in the scope or form of those disclosures is required.

(8) The anticipated extent of discovery, how long discovery should take, what limits should be placed on discovery; whether a protective order is appropriate; and a date for the completion of all discovery, including answers to interrogatories, document production, requests for admissions, and depositions

a. The parties anticipate discovery, both written and by deposition, on the counts identified in the complaint and counterclaim.

b. Date for completion of discovery: **August 29, 2014**

c. No limits on discovery are required beyond those established in the Federal Rules of Civil Procedure.

d. It is not known at this point if a protective order is appropriate. The Defendants believe that a protective order is appropriate to protect the parties' confidential information and, depending on the nature of the parties' discovery requests, to address issues related to the disclosure of sensitive information regarding collective bargaining and seniority-integration strategy. USAPA will confer in good faith with Defendants on the need for a protective order and the terms of such order if it agrees a protective order is necessary.

e. Rule 26(f)(3)(c): Any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.

The parties understand their duty to preserve records, including paper and electronic copies, and have taken steps to preserve documents in their possession which are potentially relevant to this action. The parties do not believe there are currently issues concerning electronically stored information that require the Court's attention.

f. Rule 26(f)(3)(D): Any issues about claims of privilege or of protection as trial-preparation materials, including - if the parties agree on a procedure to assert these claims after production - whether to ask the court to include their agreement in an order.

Defendants do not believe there are likely to be issues unique to this case regarding claims of privilege. Except for the item identified by USAPA in paragraph 14 below, it agrees that it is not likely unique issues of privilege will be presented by this case.

Defendants believe that standard provisions to address the inadvertent production of privileged materials should be included in the protective order Defendants identified as necessary in paragraph 8(d) above. The Plaintiff will discuss inclusion of provisions concerning inadvertent disclosure of privileged material as part of any discussions concerning a protective order.

(9) Whether the requirement of exchange of expert witness reports and information pursuant to Rule 26(a)(2), F.R.Civ.P., should be modified, and whether and when depositions of experts should occur.

The parties do not presently anticipate the need for expert testimony in this matter. No modification to the requirements for disclosure under F.R.Civ.P. 26(a)(2) are required. The parties will confer in good faith to establish dates for disclosure and deposition of expert witnesses if either party later identifies a need for expert testimony.

(10) In class actions, appropriate procedures for dealing with Rule 23, F.R.Civ.P. proceedings, including the need for discovery and the timing thereof, dates for filing a Rule 23 motion, and opposition and reply, and for oral argument and/or an evidentiary hearing on the motion and a proposed date for decision.

Not applicable.

(11) Whether the trial and/or discovery should be bifurcated or managed in phases, and a specific proposal for such bifurcation.

No bifurcation of discovery or trial is necessary.

(12) The date for the pretrial conference (understanding that a trial will take place 30 to 60 days thereafter).

March 1, 2015.

(13) Whether the Court should set a firm trial date at the first scheduling conference or should provide that a trial date will be set at the pretrial conference from 30 to 60 days after that conference.

The parties believe the Court should set a trial date at the pretrial conference, and that the trial date should be 30-60 days after the pretrial conference.

(14) Such other matters that the parties believe may be appropriate for inclusion in a scheduling order.

(a) While not another matter for the Court's scheduling order, the Plaintiff brings to the Court's attention that it anticipates that lead counsel for each Defendant will be a deposed witness in this case since each was involved in negotiating the contractual provisions at issue in this litigation. Their status as witnesses may or may not raise issues of claims of privilege and disqualification of counsel. Plaintiff has notified Defendants of this fact so that the parties may evaluate the potential issues of privilege and disqualification early in this proceeding. By identifying these potential issues for the Court and to the Defendants, Plaintiff is not seeking to require Defendants to state their positions in this report.

(i) Defendants' response:

The Company and APA believe that it is premature and speculative to suggest that there will be unique issues of privilege and/or possible disqualification in this case. As to privilege, all parties' principal negotiators with respect to the contract provisions at issue in this case are attorneys, and the privilege issues (if any) will be the same whether those attorneys happen to also be involved as counsel in this lawsuit. As to potential disqualification, the applicable ethical rule is only triggered if the lawyer is a "necessary" witness at trial. It is far too early to know whether any attorney will be a witness, let alone a "necessary" witness at trial – especially since all parties have indicated, in item (6) above, that they "believe the case likely can be resolved by summary judgment."

(b) As explained above, the Company and APA now believe, based on the positions taken by USAPA in the Rule 16 process, that the resolution of disputed issues of MOU interpretation, which, pursuant to the RLA, is within the exclusive jurisdiction of an MOU Paragraph 20 arbitrator, will be material to the Court's disposition of the claims and/or counter-claims in this case, and they have filed a grievance under MOU Paragraph 20 to start the arbitration process. This is a principle which USAPA itself has embraced in the past. *See Addington v. US Airline Pilots Ass'n,* Case No. 2:13-cv-471-ROS, Doc. No. 211 (USAPA's MSJ) at ECF p. 17:6-9 (D. Ariz. Oct. 11, 2013) ("In any event, the seniority integration proceeding is not a pure McCaskill-Bond proceeding but arises under the terms negotiated by the four parties to the MOU and a dispute concerning that process is a minor dispute that must be resolved through the minor dispute [i.e., arbitration] process and not in Court."). Under the MOU, the arbitration process is expedited and generally contemplates the scheduling of a hearing within 30 days of service of the submission, and a decision by the arbitrator within 30 days after the first day of hearing, unless the parties agree otherwise. Because USAPA has indicated that it will not agree to submit the contract-interpretation issues to arbitration, as Defendants contend USAPA is required to do under MOU Paragraph 20 and the RLA, the Company and APA will file a motion to compel arbitration by no later than May 2, 2014, and, consistent with the purpose of the Rule 16 process, Defendants are hereby advising both the Court and USAPA that their motion to compel arbitration will include a request to stay these proceedings pending the arbitrator's decision.

The Company and APA believe a stay of this case pending expedited arbitration of the contract-interpretation issues is warranted because the arbitration ruling may serve as a basis for resolution of the statutory issues raised by USAPA in this case. USAPA's statutory claim, i.e., that the arbitrator-selection and hearing-schedule provisions of *Allegheny-Mohawk* Section 13 apply, is based on its contention that MOU Paragraph 10(a), regarding the hearing schedule for the seniority-integration arbitration and the selection of a three-arbitrator panel, is no longer in effect because the parties did not execute a Seniority Integration Protocol Agreement under MOU Paragraph 10(f). But if an arbitrator were to determine otherwise – namely, that the parties to the MOU intended that the provisions of Paragraph 10(a) would remain effective irrespective of whether the parties executed a Protocol Agreement under Paragraph 10(f) – such a ruling would bear directly on USAPA's statutory claim, and potentially be the basis for a dispositive motion by Defendants.

With the exception of the deadline to amend the pleadings, the Company and APA do not believe a stay of this lawsuit pending arbitration, if granted, should impact the discovery deadlines proposed herein, because, even if the case were stayed, there would still likely be sufficient time between the arbitrator's decision and August 29, 2014 in which to complete whatever discovery may then be necessary. With respect to the deadline to amend the pleadings, if a stay were granted the Company and APA would agree to a modification of the July 1, 2014 deadline to ensure that USAPA had 60 days following the arbitrator's decision in which to conduct discovery before having to file a motion for leave to amend its complaint.

The Company and APA request that the Court's Scheduling Order include an interim provision staying all formal discovery in this matter until the Court issues a ruling on the motion to compel arbitration/stay that will be filed on May 2, 2014.

(i) USAPA's response:

USAPA opposes the Defendants' request that discovery be stayed pending their filing of a motion to compel arbitration/stay. This issue was raised for the first time on April 21, 2014. USAPA disagrees with the Defendants' untimely assertion that its claim is subject to arbitration and this action should be stayed while the Court orders USAPA to submit its claim to arbitration under the dispute resolution provisions of the parties' MOU. USAPA also disagrees with the Defendants' mischaracterization of its claim before the Court.

Neither Defendant asserted an affirmative defense of arbitration in answer to USAPA's claim, as required by Fed. R. Civ. P. 8(c)(1). All Defendants asserted counterclaims under the McCaskill-Bond Amendment that require the Court to interpret the parties' MOU under the statutory provisions asserted by the Defendants. American and US Airways asserted an affirmative defense of lack of subject matter jurisdiction. While USAPA asserts that contention is likewise without merit, such a defense cannot support a motion to stay this action. Adjudication of a defense of lack of subject matter jurisdiction is for the court, not an arbitrator, and the action should therefore proceed for adjudication of that defense along with the other claims before the court. Further, USAPA should be entitled to discovery concerning the airlines' asserted defense of lack of subject matter jurisdiction.

USAPA's claim asserts statutory rights under the McCaskill-Bond Amendment for resolution of the seniority list integration dispute between the pilots of American and US Airways. The Plaintiff's claim therefore arises under federal law. USAPA seeks the Court's adjudication of the rights of US Airways pilots under the McCaskill-Bond Amendment. Adjudication of rights under federal law is a matter for the federal courts, not an arbitrator. The parties' MOU in paragraph 10(e) expressly reserves the rights of employees to enforce their rights under McCaskill-Bond in federal court. Indeed, US Airways responded to a grievance filed by USAPA in January 2014 under paragraph 10 of the MOU concerning the seniority integration protocol agreement negotiations by moving to stay arbitration of the grievance on the ground that only a federal court has authority to adjudicate the rights of the employees under the McCaskill-Bond Amendment. *See Addington v. US Airline Pilots Association,* 13-cv-471-ROS, Doc. #297.

Defendants' request that the Court order in its scheduling order a stay of discovery pending their unfiled motion to stay this litigation is improper. The Defendants should file a motion for protective order seeking such relief.

E. PROPOSED SCHEDULING ORDER

1. Deadline for exchange of initial disclosures: **May 5, 2014.**
2. Deadline for filing motion to amend pleadings or add parties: **July 1, 2014**.
3. No discovery limitations beyond those imposed by the Federal Rules of Civil Procedure are required.
4. Deadline for completion of discovery: **August 29, 2014.**
5. Deadline for filing of dispositive motion or cross-motions: **October 3, 2014.**
6. Deadline for filing opposition to dispositive motion: **November 7, 2014.**
7. Deadline for filing reply brief in support of dispositive motion: **November 21, 2014.**
8. Proposed date for decision on motions for summary judgment: **January 30, 2015**.
9. Pretrial conference date: **March 1, 2015**.

F. CONFERENCE PRIOR TO ENTRY OF SCHEDULING ORDER

The parties do not think it is necessary for the court to hold a conference prior to entry of a scheduling order in this matter.

DATED this 21st day of April 2014.

Respectfully submitted,

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