IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

US AIRLINE PILOTS ASSOCIATION	)	
Plaintiff,	)	
v.	)	Civil Action No. 14-0328 (BAH)
US AIRWAYS, INC., *et al*.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION
TO COMPEL ARBITRATION AND STAY PROCEEDINGS

Dated: May 2, 2014

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Defendant-Counterclaimant Allied Pilots Association ("**APA**") moves this Court to compel arbitration of the parties' dispute over the interpretation of their Memorandum Of Understanding Regarding Contingent Collective Bargaining Agreement ("**MOU**"), and to stay proceedings pending the result of that arbitration. In support of this motion, APA submits this Memorandum in Support of Motion and adopts the Motion and Memorandum submitted by American Airlines, Inc. ("**American**"), and US Airways, Inc. ("**US Airways**"), (collectively, the "**Company**").

INTRODUCTION

The underlying dispute in this case is how to integrate pilot seniority lists following the 2013 merger involving US Airways and American. The parties agree that the seniority integration dispute is subject to arbitration because negotiations have been unsuccessful, but they disagree over the procedures for that arbitration. Plaintiff US Airline Pilots Association ("**USAPA**"), the union which currently represents the pre-merger US Airways pilots, brought this action pursuant to the McCaskill-Bond Amendment, 49 U.S.C. § 42112, note § 117, seeking to compel arbitration of the seniority dispute under the procedures prescribed by Section 13(a) of the *Allegheny-Mohawk* Labor Protective Provisions ("***Allegheny-Mohawk* LPPs**" or "***Allegheny-Mohawk***"). APA and the Company filed counter-claims, seeking a declaration that, under McCaskill-Bond, the seniority dispute must be arbitrated in accordance with the procedures and schedule established by Paragraphs 10, 26 and 27 of the MOU.

This seniority integration dispute is not new. In the eight year period since its merger with America West in 2005, US Airways has been unable to obtain an integrated pilot seniority list from USAPA – and therefore unable to integrate its pre-merger flight operations. Indeed, the intensive negotiations between APA, USAPA, American and US Airways in this case were

prompted by a desire to ensure the finality of the seniority integration process and avoid such a stalemate. Accordingly, these four parties signed the MOU in January 2013 to provide a framework for the integration of the pilot seniority lists in the event of a merger involving US Airways and American. Declaration of Mark Stephens ("**Stephens Decl.**") ¶ 5, Ex. 1 MOU. To this end, MOU Paragraph 10(a) establishes a schedule and guidelines for negotiating and arbitrating the seniority integration dispute, and specifies that the arbitration shall be heard by a three-member panel and shall not commence until the parties have finalized a Joint Collective Bargaining Agreement ("**JCBA**"). *Id*. USAPA negotiated, agreed to and had its members ratify all of the MOU's seniority-integration provisions. *Id*. Yet USAPA now seeks to escape the procedures to which it agreed. USAPA claims that it is not bound by the MOU's seniority-integration provisions, because the parties could not reach agreement on the terms of the "Seniority Integration Protocol Agreement" ("**Protocol Agreement**") referenced in Paragraph 10(f) of the MOU. Because the deadline for finalizing a Protocol Agreement under Paragraph 10(f) has passed, USAPA argues, the rest of the seniority integration framework to which the parties agreed in MOU Paragraphs 10, 26 and 27 is no longer in effect.

The truth is that the parties *were* able to agree on all material aspects of a Protocol Agreement – which incorporated an agreement, pursuant to MOU Paragraph 10(a), concerning how to select the arbitrators for the seniority arbitration panel – save one: USAPA insisted on remaining a party to the seniority integration even after it ceased to be a collective bargaining representative for the pilots at US Airways. Stephens Decl. ¶¶ 33-34. According to Stephens:

> APA and [the American pilot merger committee] were unwilling to agree to [USAPA's insistence on] a reservation of rights, for the precise reason that USAPA had argued to the court in *Addington v. US Airline Pilots Ass'n*, No. 13-cv-00471, Doc. 298 (D. Ariz. Jan. 10, 2014), that only the certified bargaining representative is a proper party to the seniority list arbitration, albeit with separate committees representing the pre-merger seniority list pilots, and that APA would

> be that representative when the arbitration would occur under the MOU. The court held that it "has no doubt that—as is USAPA's consistent practice—USAPA will change its position when it needs to do so to fit its hard and unyielding view on seniority. . . . The Court's patience with USAPA has run out. . . . And when USAPA is no longer the certified representative, it must immediately stop participating in the seniority integration."

Stephens Decl., Ex. 11 (quoting *Addington v. U.S. Airline Pilots Ass'n*, CV-13-00471-PHX-ROS, 2014 WL 321349, *20-21 (D. Ariz. Jan. 10, 2014)).

If USAPA is correct that the failure to execute a Protocol Agreement invalidates the other seniority procedures and timelines established by the MOU, USAPA should win this case, and the seniority dispute should be arbitrated by a single arbitrator under the schedule and procedures prescribed by *Allegheny-Mohawk* Section 13(a). If, however, APA and the Company are correct and the MOU's other seniority integration provisions remain in effect, APA and the Company should win this case, and the seniority integration dispute should be arbitrated before a three-member panel pursuant to the schedule and other procedures agreed to by the parties in MOU Paragraphs 10, 26 and 27.

Which party is correct is a simple matter of contract interpretation: it turns on whether the parties intended that failure to execute a Protocol Agreement by the applicable deadline would render the rest of Paragraphs 10, 26 and 27 null and void. Under the Railway Labor Act, 45 U.S.C. §§ 151-188 ("**RLA**"), arbitration is the "mandatory, exclusive, and comprehensive system" for resolving disputes over the meaning of collective bargaining agreements such as the MOU, known as "minor" disputes. *Bhd. of Locomotive Eng's v. Louisville & Nashville R.R. Co*., 373 U.S. 33, 38 (1963); *Tice v. Am. Airlines, Inc*., 288 F.3d 313, 314 (7th Cir. 2002).

Through the procedures dictated by Paragraph 20 of the MOU, APA and the Company have therefore filed a grievance with the applicable arbitral tribunal to resolve the parties' dispute regarding the meaning of MOU Paragraphs 10, 26 and 27. This Paragraph 20 tribunal is

an entirely different tribunal than that which would resolve the underlying seniority-integration dispute (under any party's reading of the MOU and applicable statutes).[1] As required by the RLA, in the MOU, the parties agreed that a specially-convened one-member tribunal would hear all disputes over the interpretation and application of the MOU. MOU ¶ 20. Under the Paragraph 20 procedures, the arbitration is expedited and the arbitrator must render a decision within 30 days of the first day of hearing. *Id*. USAPA has flatly refused to participate in this process.

APA therefore respectfully requests that this Court compel arbitration of the parties' dispute regarding the meaning of MOU Paragraphs 10, 26 and 27. While the arbitration is pending, this "suit must be stayed until the dispute over the agreement is resolved by the only body authorized to resolve such disputes, namely an arbitral panel." *Tice*, 288 F.3d at 318. *Accord Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc*., 627 F.2d 272, 275 (D.C. Cir. 1980) ("the appropriate procedure is for the court to suspend its own proceedings until the end of the arbitral process or until it is clear that arbitration cannot be obtained").

FACTUAL BACKGROUND

A. THE MOU PROVIDES THE PROCEDURES AND SCHEDULE FOR THE PILOT SENIORITY INTEGRATION.

In anticipation of a merger involving US Airways and American, all four parties to this case – US Airways, American, USAPA and APA – entered into the MOU, a collective bargaining agreement that would govern the terms and conditions of employment for pilots

[1] As discussed below, the RLA prescribes and permits different arbitral mechanisms for different classes of disputes. The "interest" arbitration available under MOU Paragraph 27 permits an arbitrator to actually create new contract provisions. The seniority integration arbitration available under MOU Paragraph 10 is likewise a form of "interest" arbitration. This is distinct from the statutorily mandated "grievance" arbitration available under MOU Paragraph 20, in which an arbitrator resolves disputes over the meaning of the existing agreement. By its Motion, APA seeks MOU Paragraph 20 "grievance" arbitration, not "interest" arbitration.

following the merger.[2] The MOU establishes the framework and process through which the parties agreed to integrate the seniority lists of the US Airways pilots and the American pilots. *See* MOU ¶¶ 10, 26-27.

The cornerstone of the MOU's seniority integration process is Paragraph 10(a), which provides in relevant part:

> If, on the date ninety (90) days following the Effective Date [of the merger], 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. That arbitration proceeding will commence no later than 60 days after the designation of the arbitrators . . ., provided that it is understood that, in no event, shall the seniority integration arbitration proceeding commence prior to final approval of the [Joint Collective Bargaining Agreement] . . . .

MOU ¶ 10(a). The MOU also imposes certain procedural requirements on the arbitration process, *see, e.g.,* MOU ¶ 10(d), requires the arbitration decision to comply with specific substantive requirements, *see* MOU ¶ 10(b), and provides that the award shall be final and binding on all parties, *see* MOU ¶¶ 2, 10(c).

The hearing schedule for the seniority integration arbitration is further determined by MOU Paragraphs 26 and 27. Under MOU Paragraph 10(a), the seniority arbitration cannot begin until the after parties have finalized a JCBA, *see supra* n. 2. The timing of the JCBA is in turn determined by when the National Mediation Board ("**NMB**") makes a finding that the two pre-

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[2] The MOU provides that the same collective bargaining agreement applies to both the pilots at American and the pilots at US Airways. At a time specified by Paragraph 27 of the MOU, the differences between how that single contract is applied at the two pre-merger air carriers will need to be reconciled, resulting in a new agreement known as the Joint Collective Bargaining Agreement ("**JCBA**"). Prior to the adoption of the JCBA, the MOU as applied at the two carriers is called the Merger Transition Agreement ("**MTA**"). Thus, disputes under the current MOU are called "MTA disputes."

merger airlines have become a "single carrier" for labor relations purposes.[3] Paragraph 26 provides that "APA shall file a single carrier petition with the NMB as soon as practicable after [the date of the merger]. . . . If and when the NMB makes a single-carrier finding, the single carrier acknowledged by the NMB and the certified representative shall be governed by this [MOU]." Paragraph 27 requires that the parties reach agreement on the JCBA within 30 days after the NMB makes a single carrier finding and certifies the collective bargaining representative for that carrier. If the parties are unable to reach agreement, they must submit the unresolved issues to "interest" arbitration on a compressed schedule. Accordingly, under Paragraph 10(a), the seniority integration arbitration may not commence until this process is complete.

B. THE US AIRWAYS/AMERICAN SENIORITY-INTEGRATION PROCESS

The US Airways and American merger closed on December 9, 2013, and the MOU became effective on that day. Stephens Decl. ¶¶ 3-4. The first procedural step contemplated by the MOU seniority-integration process was for the parties to negotiate a Seniority Integration Protocol Agreement. *See* MOU Paragraph 10(f) ("A Seniority Integration Protocol Agreement

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[3] The NMB has exclusive authority to investigate representation disputes at carriers pursuant to Section 2, Ninth, of the RLA. 45 U.S.C. § 152, Ninth; *see Switchmen's Union v. NMB,* 320 U.S. 297 (1943); *General Comm. Of Adjustment v. Missouri-Kan.-Tex. R.R.,* 320 U.S. 323 (1943); *General Comm. Of Adjustment v. Southern Pac*., 320 U.S. 338 (1943). APA filed an application on January 15, 2014, to have the two carriers determined to be a single carrier for labor relations purposes. Once the NMB finds that two or more carriers are operating as a single carrier for labor relations purposes, it will certify a union to represent the pilots and extinguish the other labor union certifications. *See generally,* Chris A. Hollinger, *The Railway Labor Act,* 601-615 (3d ed. 2012). The NMB's Representation Manual at § 19.601 requires that a party wishing to be certified have a showing of interest from 50 percent of the pilots. The Representation Manual (3/25/13) is available at http://www.nmb.gov/documents/representation/representation-manual.pdf. Given the vastly greater number of pre-merger American pilots relative to pre-merger US Airways pilots, two-thirds to one-third, all the parties to this case recognize that APA will be the certified representative.

(‘Protocol Agreement’) consistent with McCaskill-Bond and this Paragraph 10 will be agreed upon within 30 days of the Effective Date.”). There was agreement on virtually all issues for the Protocol Agreement – including, in particular, the procedure for the selection of arbitrators that was proffered by USAPA during the Protocol negotiations. Nevertheless, the parties were unable to finalize the agreement because they disagreed about what USAPA’s role would be in the seniority-integration process after the NMB certifies APA as the exclusive representative of pilots at the Company, and USAPA ceases to be a certified pilot representative. Stephens Decl. ¶¶ 33-34.

Accordingly, USAPA and APA did not reach agreement on an integrated seniority list within the 90 days after the Effective Date set forth in MOU Paragraph 10(a). In the absence of a negotiated agreement, the MOU provides that the parties must select a panel of three arbitrators to resolve the seniority-integration dispute. Pursuant to MOU Paragraph 10(a), the Company made a proposal to APA and USAPA regarding the manner in which the three arbitrators would be selected. Stephens Decl. ¶ 38. APA indicated that it was willing to accept the Company’s proposal or, alternatively, that the parties should accept the arbitrator-selection proposal to which all parties – including USAPA – had agreed in the Protocol Agreement negotiations. *Id*. at ¶ 39. The Company responded to APA’s proposal, indicating that either proposal for selecting arbitrators was acceptable to the Company. USAPA never responded to either proposal. *Id*. at ¶ 41.

C. USAPA FILES THIS LAWSUIT.

Rather than responding to either of the arbitrator-selection proposals under Paragraph 10(a) of the MOU, USAPA filed a request with the NMB on February 20, 2014, seeking a panel of seven potential arbitrators for the seniority-integration arbitration pursuant to Section 13(a) of *Allegheny-Mohawk* LPPs. USAPA then filed this lawsuit seeking a declaratory

judgment that it need not comply with the MOU's seniority-integration procedures, including the provisions in MOU Paragraph 10(a) governing the composition and designation of the arbitration panel and the arbitration hearing schedule established by MOU Paragraphs 10, 26 and 27.

USAPA's Complaint alleges that, because there was no Protocol Agreement in place to govern the selection of arbitrators,[4] the US Airways/American seniority integration should be governed by the schedule and procedures in Sections 3 and 13 of the *Allegheny-Mohawk* LPPs, pursuant to the McCaskill-Bond Amendment to the Federal Aviation Act, Pub. L. 110–161, Div. K, Title I, § 117, 121 Stat 2382 (Dec. 26, 2007), codified at 49 U.S.C. § 42112, note § 117 ("**McCaskill-Bond**"). Under *Allegheny-Mohawk* Section 13(a), these procedures include a single arbitrator and an expedited arbitration schedule that is far more compressed than that agreed to by the parties in MOU Paragraphs 10, 26 and 27.

APA and the Company filed their Answers and Counterclaims on March 21, 2014 (ECF Nos. 12, 13). The Defendants contend that the parties' failure to finalize a Protocol Agreement does not void the MOU's other seniority-integration provisions, but rather the MOU's seniority-integration provisions are controlling with respect to the US Airways and American pilot seniority integration because the McCaskill-Bond Amendment – by its own terms – does not apply to collective bargaining agreements, like the MOU, that provide the protections afforded by Sections 3 and 13 of the *Allegheny-Mohawk* LPPs. *See* 49 U.S.C § 42112, note § 117(a)(2). Moreover, even if the *Allegheny-Mohawk LPPs* were applicable, the MOU seniority-integration provisions are an "alternative method for dispute settlement" under *Allegheny-Mohawk* Section 13(b) that takes precedence over inconsistent provisions of Section 13(a).

[4] As described above, there is no agreed upon procedure for the selection of arbitrators only because USAPA has refused to respond either to the Company's proposal arbitrator-selection proposal or APA's alternative proposal that the parties adopt the selection process proffered by USAPA and agreed to by all parties during the Protocol negotiations.

In addition, APA also seeks a separate declaration that, if and when USAPA is decertified by the NMB as the collective bargaining representative for the US Airways pilots and APA is certified as the representative for all of the Company's pilots, USAPA no longer has a right under McCaskill-Bond to participate in the MOU seniority-integration process.

D. THE DISPUTE OVER THE MEANING OF MOU PARAGRAPH 10.

In the course of preparing the Joint Rule 16 Report, USAPA made clear its intention to repudiate all of the seniority related provisions of the MOU on the basis that the parties' failure to reach a Protocol Agreement rendered them null and void. Rather than denying the existence of a dispute over the meaning of the MOU, USAPA argues that this Court has jurisdiction to interpret the MOU, and "[t]o the extent the parties' MOU will be subject to interpretation, the agreement will be interpreted under the statutory provisions of the McCaskill-Bond Amendment." ECF No. 25, at 3.

In order to resolve the parties' dispute regarding the proper interpretation of MOU Paragraph 10, APA and the Company filed identical grievances submitting issues for the Board of Adjustment's consideration and decision, including the following:

> (c) Whether, as a contractual matter, the parties' failure to execute a Seniority Integration Protocol Agreement, referenced in MOU Paragraph 10(f), renders ineffective any of the other provisions of MOU Paragraph 10, specifically including the arbitrator-selection and hearing-schedule provisions in MOU Paragraph 10(a).
>
> (d) Whether, as a contractual matter, the parties' failure to select arbitrators, pursuant to either the arbitrator-selection provision in MOU Paragraph 10(a) or through a Seniority Integration Protocol Agreement under MOU Paragraph 10(f), renders ineffective any of the other provisions of MOU Paragraph 10, specifically including the hearing-schedule provisions in MOU Paragraph 10(a).

Stephens Decl., Ex.19 MTA Dispute No. 5 at 2.

The RLA mandates that grievances over the interpretation and application of collective

bargaining agreements, like the MOU, must be resolved by final and binding arbitration before an adjustment board established by the parties. 45 U.S.C. § 184. Consistent with the RLA's mandate, the MOU provides that "any dispute over the interpretation or application of this [MOU] . . . shall be arbitrated on an expedited basis directly before a specially-created one-person System Board of Adjustment consisting of arbitrator Richard Bloch or Ira Jaffe, whoever shall be available to hear the dispute earliest." MOU ¶ 20 ("**Paragraph 20 Arbitration**"). Paragraph 20 Arbitration 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. MOU ¶ 20.

In accordance with the provisions of Paragraph 20, APA and the Company submitted their identical grievances (known as "**MTA Dispute No. 5**"), and the Company's system board coordinator requested arbitration dates from both the arbitrators agreed on by the parties, Mr. Bloch and Mr. Jaffe.

USAPA has refused to participate in arbitration of these disputes over the meaning of the MOU. Rather than select any of the offered dates, USAPA sent letters to both arbitrators declaring that it is "unwilling to submit any of the issues identified by the Company or APA to the System Board," based on its belief that "the issues raised by the captioned grievance, including its arbitrability, are to be adjudicated by the Court." Stephens Decl., Ex. 20. USAPA thus "decline[d] to appear and arbitrate this matter." *Id.*

ARGUMENT

A. THE RLA MANDATES THAT QUESTIONS OF MOU INTERPRETATION BE RESOLVED EXCLUSIVELY THROUGH ARBITRATION.

The RLA, which governs relations between air carriers and their employees, was intended "to promote stability in labor-management relations by providing a comprehensive

framework for resolving labor disputes." *Oakey v. U.S. Airways Pilots Disability Income Plan*, 723 F.3d 227, 230 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 1513 (2014) (quoting *Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246, 252 (1994)) (citing *Air Line Pilots Ass'n, Int'l v. Delta Air Lines, Inc.,* 863 F.2d 87, 88 (D.C. Cir. 1988); 45 U.S.C. § 181); *Int'l Ass'n of Machinists v. Cent. Airlines, Inc.,* 372 U.S. 682, 685–86 (1963)). "To realize this goal, the RLA establishes a mandatory arbitral mechanism for 'the prompt and orderly settlement'" of certain classes of disputes. *Hawaiian,* 512 U.S. at 252 (quoting 45 U.S.C. § 151a). In particular, the RLA requires the arbitration of all so-called "minor" disputes – *i.e.*, disputes that "gro[w] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 184; *see also Hawaiian,* 512 U.S. at 256. Minor disputes involve "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Hawaiian,* 512 U.S. at 253 (quoting *Bhd. of R.R. Trainmen v. Chicago R. & I.R. Co.,* 353 U.S. 30, 33 (1957)).[5]

To effect the minor dispute mechanism, the RLA requires air carriers and unions to establish arbitration panels, known as "board[s] of adjustment," 45 U.S.C. § 184, and makes the statutory procedure the "mandatory, exclusive, and comprehensive system for resolving [minor]

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[5] "Minor" disputes are so-named to distinguish them from "major" disputes, which are subject to a distinct dispute resolution procedure under the RLA. As the Supreme Court has explained:

> Major disputes relate to the formation of collective [bargaining] agreements or efforts to secure them. The second class of disputes, known as 'minor' disputes, grow out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. Minor disputes involve controversies over the meaning of an existing collective bargaining agreement in a particular fact situation. Thus, major disputes seek to create contractual rights, minor disputes to enforce them.

Hawaiian, 512 U.S. at 252-53 (citations and quotation marks omitted).

disputes." *Bhd. of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.,* 373 U.S. 33, 38 (1963); *see also Oakey*, 723 F.3d at 230; *Delta Air Lines,* 863 F.2d at 88. As such, the Supreme Court has explained that "[a]ny party to a labor agreement can insist that a minor dispute be resolved through an Adjustment Board," and "the other party may not defeat this right by resorting to some other forum." *Trainmen*, 353 U.S. at 34; *Locomotive Eng'rs,* 373 U.S. at 38 (citing *Trainmen*). *See also Andrews v. Louisville & N. R. Co*., 406 U.S. 320, 322 (1972) ("[T]he notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law.").

Here, the MOU is an "agreement[ ] covering rates of pay, rules, or working conditions," 45 U.S.C. § 184, and, accordingly, through Paragraph 20, establishes a System Board of Adjustment for arbitrating minor disputes over the interpretation of the agreement. Stephens Decl. ¶ 44; MOU ¶ 20. Moreover, the MOU specifically provides that disputes over the parties' seniority integration obligations under Paragraph 10 are to be resolved and "enforce[d] on an expedited basis … in accordance with Paragraph 20['s]" arbitral mechanism. Stephens Decl. ¶ 7; MOU ¶ 10(e). Matters of MOU interpretation and application are therefore minor disputes subject to the exclusive jurisdiction of the MOU's System Board. *Oakey*, 723 F.3d at 230; *Delta Air Lines,* 863 F.2d at 88; *Hawaiian,* 512 U.S. at 252-53; *Trainmen*, 353 U.S. at 34; *Locomotive Eng'rs,* 373 U.S. at 38; *Andrews*, 406 U.S. at 322.

B. McCASKILL-BOND DOES NOT DISPLACE THE SYSTEM BOARD'S EXCLUSIVE JURISDICTION OVER MINOR DISPUTES.

The bulk of the claims at issue in this action arise under McCaskill-Bond Amendment, 49 U.S.C § 42112, note § 117, and APA does not dispute the Court's jurisdiction to interpret and

apply that statute.[6] Nevertheless, McCaskill-Bond does not in any way modify or alter the RLA's requirement that embedded questions of contract interpretation be resolved exclusively through arbitration.

It is well-settled that "courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (emphasis added) (citing *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)). As such, the RLA's mandatory arbitration provisions are given full effect absent a "clearly expressed Congressional intent to override [that] requirement of the RLA." *Brown v. Illinois Cent. R.R. Co.*, 254 F.3d 654, 663 (7th Cir. 2001) (Americans with Disabilities Act ("ADA") did not displace RLA's mandatory arbitration provisions); *Northwest*, 627 F.2d at 276 (the Employee Retirement Income Security Act ("ERISA") did not displace RLA's mandatory arbitration provisions); *Tice v. Am. Airlines, Inc.*, 288 F.3d 313, 318 (7th Cir. 2002) (Age Discrimination in Employment Act did not displace RLA's mandatory arbitration provisions).

Here, McCaskill-Bond contains no express modification of the RLA. Indeed, the language of the statute specifically contemplates that air carriers and employees governed by the enactment will be "subject to the Railway Labor Act." 49 U.S.C § 42112, note § 117(a).

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[6] The jurisdiction of the MOU's arbitration panel is limited to the construction, interpretation, application, and enforcement of the MOU. *Accord Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974) ("As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties …. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties[.]"); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 264 (2009) (explaining that *Gardner-Denver* stands for the proposition that an arbitrator lacks the authority to adjudicate statutory claims in the absence of an agreement to arbitrate such claims).

Nor does anything in the statute's legislative history evince any intent to modify the RLA's mandatory arbitration provisions. Rather, "McCaskill-Bond 'was enacted in December 2007 as a last-minute amendment to an unrelated budget bill, and was never considered in committee'" and thus has almost "no meaningful legislative history" at all. *Addington v. U.S. Airline Pilots Ass'n*, CV-13-00471-PHX-ROS, 2014 WL 321349, *10 (D. Ariz. Jan. 10, 2014) (quoting *Seniority Integration in Airline Mergers Under the McCaskill–Bond Act,* Airline and Railroad Labor and Employment Law: A Comprehensive Analysis, American Law Institute (October 11–13, 2012)). The "limited information available establishes the statute 'grew out of American Airlines' acquisition of Trans World Airlines [TWA],'" was "sponsored by two senators who believed the … merger had been unfair to the TWA employees," and was "meant to 'ensure workers in the future don't suffer the same fate as the TWA workers.'" *Id*. (quoting *Comm. of Concerned Midwest Flight Attendants for Fair and Equitable Seniority Integration v. Int'l Bhd. of Teamsters Airline Division,* 662 F.3d 954, 957 (7th Cir. 2011); *Seniority Integration in Airline Mergers Under the McCaskill–Bond Act,* Airline and Railroad Labor and Employment Law: A Comprehensive Analysis, American Law Institute (October 11–13, 2012). This broad intent to protect workers betrays no evidence showing " that Congress … wanted to change, repeal, or modify a prior Congressional enactment, like the Railway Labor Act, which expressly made arbitration mandatory." *Northwest*, 627 F.2d at 276 (citing *Universal Interpretive Shuttle Corp. v. Washington Metro. Area Transit Comm'n*, 393 U.S. 186, 193 (1968) for the "normal canon repeals by implication are not favored").

In the absence of any clearly expressed congressional intent in McCaskill-Bond to limit the application of the RLA's mandatory arbitration provisions, those requirements of the RLA remain in full force and effect. *Accord Brown*, 254 F.3d at 664 ("Without clearer guidance from

Congress, we must conclude that Congress did not intend for the ADA to displace the RLA's mandatory arbitration provisions.”).

C. TO HARMONIZE THE RLA AND McCASKILL-BOND, THE COURT SHOULD STAY JUDICIAL PROCEEDINGS PENDING ARBITRATION OF THE EMBEDDED CONTRACT DISPUTES.

As the D.C. Circuit has explained, to harmonize the RLA’s mandatory arbitration provisions with a right of action under another federal statute, such statutory claims should be permitted to proceed in federal court only if they are genuinely “independent of the correct construction” of the applicable collective bargaining agreement. *Oakey*, 723 F.3d at 234 (evaluating jurisdiction over an ERISA claim) (quoting *Northwest*, 627 F.3d at 277 (same)); *Everett v. USAir Group*, 927 F. Supp. 478, 482 (D.D.C. 1996) (same), *aff’d*, 194 F.3d 173 (D.C. Cir. 1999). *See also Atchison, Topeka & Santa Fe Ry. Co. v. Buell,* 480 U.S. 557, 565 (1987) (RLA did not preclude employee’s claim under the Federal Employers' Liability Act, where the action sought to vindicate “substantive protection[s] against negligent conduct that [were] *independent of the employer's obligations under its collective-bargaining agreement*”) (emphasis added).

In contrast, where a statutory claim “cannot be adjudicated without interpreting the CBA [collective bargaining agreement], or … can be conclusively resolved by interpreting the CBA,” the RLA precludes the parties from proceeding in the judicial forum. *Oakey*, 723 F.3d at 234 (quoting *Brown*, 254 F.3d at 668); *see also Everett*, 927 F. Supp. at 482 (“RLA's mandatory arbitration procedures apply ... to issues arising out of the interpretation of the collective bargaining agreement and not to independent statutory claims[.]”). Thus, where the vitality of a statutory claim hinges – even in part – on a question of contract interpretation, the claim must either be dismissed for lack of subject matter jurisdiction, *see Oakey*, 723 F.3d at 234, 238,

or "the suit must be stayed until the dispute over the agreement is resolved by the only body authorized to resolve such disputes, namely an arbitral panel," *Tice v. Am. Airlines, Inc*., 288 F.3d 313, 318 (7th Cir. 2002). Likewise, "the appropriate procedure is for the court to suspend its own proceedings until the end of the arbitral process" where "arbitration, if had, may either resolve the entire controversy or at least aid in the solution by the court of the statutory contentions." *Northwest*, 627 F.2d at 278. Thereafter, "if the resolution of the [contractual] dispute [through arbitration] does not resolve the issues in the suit, the suit can resume." *Tice*, 288 F.3d at 318.

Here, the primary claims in this action concern whether McCaskill-Bond requires the parties to utilize the seniority integration procedures prescribed by *Allegheny-Mohawk* Section 13(a) (*i.e*., an expedited hearing before a single arbitrator) or those procedures set forth in the MOU (*i.e*., an alternative hearing schedule before a three-member panel). Under McCaskill-Bond, the Section 13(a) procedures would not apply if: (i) the MOU is a collective bargaining agreement "applicable to the terms of integration" that allows for the protections afforded by *Allegheny-Mohawk* Sections 3 and 13, *see* 49 U.S.C § 42112, note § 117(a)(2); or (ii) the MOU provides for an "alternative method" for dispute settlement under *Allegheny-Mohawk* Section 13(b). To evaluate whether either of those exceptions apply in this case, the Court must first know whether or not the MOU's seniority integration provisions, including the arbitrator-selection and hearing-schedule provisions in MOU Paragraph 10(a), remain in effect in the absence of an executed Protocol Agreement. Under the RLA's mandatory arbitration provisions, that question – which is the subject of APA and the Company's MTA Dispute No. 5, *see* Stephens Decl. ¶ 47 – can only be resolved only by the MOU's System Board. *Oakey*, 723 F.3d

at 230; *Delta Air Lines,* 863 F.2d at 88; *Hawaiian,* 512 U.S. at 252-53; *Trainmen*, 353 U.S. at 34; *Locomotive Eng'rs,* 373 U.S. at 38; *Andrews*, 406 U.S. at 322.

If, as a contractual matter, USAPA is correct that the other seniority integration procedures of MOU Paragraphs 10, 26-27, have been rendered ineffective, that would be a basis for this Court to decide that the MOU no longer constitutes collective bargaining agreement "applicable to the terms of integration" under McCaskill-Bond, and/or no longer provides an "alternative method" for dispute settlement under *Allegheny-Mohawk* Section 13(b). This question of contract interpretation therefore has the potential to be dispositive in nearly all of the claims and counterclaims in this action, "or at least aid in the solution by the court of the statutory contentions." *Northwest*, 627 F.3d at 278.[7] Thus, those statutory claims are not "independent of the correct construction" of the MOU, and "cannot be adjudicated without interpreting the [MOU]." *Oakey*, 723 F.3d at 234 (quoting *Northwest*, 627 F.3d at 277; *Brown*, 254 F.3d at 668).

Accordingly, the parties' McCaskill-Bond claims concerning the applicability of *Allegheny-Mohawk* Section 13(a) cannot proceed in the judicial forum until the embedded questions of contract interpretation are resolved before the only body with jurisdiction to decide the matter: the MOU arbitration panel. *Tice*, 288 F.3d at 318; *Northwest*, 627 F.3d at 278. This

[7] APA's final counterclaim, which concerns whether, under McCaskill-Bond, USAPA is entitled to continue to participate in the seniority integration process after it is decertified as the collective bargaining representative of the legacy US Airways pilots, is a pure statutory question that does not turn on the construction of the MOU. In *Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc*., 627 F.2d 272, 278 (D.C. Cir. 1980), the D.C. Circuit was confronted with a comparable procedural posture in which "the contractual sections of [the] case [could] not be heard in the District Court but only before the [Railway] Labor Act's arbitral body, while the independent statutory claims … [we]re properly before the court." The D.C. Circuit explained that, "[i]n that situation the appropriate procedure is for the court to suspend its own proceedings until the end of the arbitral process." *Id*. This solution is likewise appropriate here.

Court should therefore compel the arbitration of MTA Dispute No. 5, and stay judicial proceedings pending the result of that arbitration. *Id*.

CONCLUSION

For all the reasons stated above, APA respectfully moves this Court to compel arbitration of the parties' dispute over the interpretation of the MOU and to stay these proceedings pending the result of that arbitration.

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Respectfully submitted,

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