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)

PLAINTIFF'S LCvR 7(h)(1) STATEMENT
OF GENUINE FACT ISSUES IN DISPUTE IN OPPOSITION TO
DEFENDANTS' MOTIONS TO COMPEL ARBITRATION AND STAY PROCEEDINGS

Plaintiff, US Airline Pilots Association ("USAPA"), pursuant to LCvR 7(h)(1), contends the following facts material to the motions to compel arbitration filed by defendants' US Airways, Inc. ("US Airways"), American Airlines, Inc. ("American") (collectively, "the Company") (Doc. # 27) and Allied Pilots Association ("APA") (Doc. # 26) are in dispute.

A. Issue # 1: Defendants contend that paragraph 10 of "[t]he 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," and that "[a]t all times, APA … [has] understood the provisions of the MOU to constitute an alternative method for dispute settlement under Section 13(b)" of the Allegheny-Mohawk Labor Protective Provisions incorporated in the McCaskill-Bond Amendment, 49 U.S.C. § 42112, Note 117. (APA Memo. To Compel Arb., Doc. 26-1 at 9; Stephens Decl. Doc. 26-2 at 8, ¶ 10; Co. Mot. To Compel Arb., Doc. # 27 at 8; Memo. Of Understanding ("MOU"), Doc. # 26-3 at 7-8) USAPA denies the legal conclusion that paragraph 10 of the MOU

constitutes an Allegheny-Mohawk §13(b) agreement and denies the factual claim that the parties understood it to be such an agreement. The facts supporting USAPA's position are:

1. The parties negotiated paragraph 10 of their Memorandum of Understanding in December 2012, prior to the merger of US Airways and American. During those negotiations, USAPA and US Airways were not able to agree on the issue of who the proper parties to the seniority list integration would be. USAPA contended that it was the only proper representative of US Airways pilots in the seniority integration process. US Airways asserted that the former pilots of America West Airlines were entitled under McCaskill-Bond to separate representation from USAPA in the seniority integration process. Because USAPA and US Airways could not agree on this central question of who would be the parties to the seniority list integration process, the parties agreed in Paragraph 10 of the Memorandum of Understanding that McCaskill-Bond would govern the seniority list integration dispute between the American and US Airways pilots and that the rights of the employees under McCaskill-Bond would be preserved under the MOU. (Szymanski Decl., ¶ 3)

2. This agreement is reflected in numerous subparagraphs of Paragraph 10 of the MOU which reference McCaskill-Bond, including Paragraph 10(e) which provides:

> The obligations contained in this Paragraph shall be specifically enforceable on an expedited basis before a System Board of Adjustment in accordance with Paragraph 20, provided that the obligations imposed by McCaskill-Bond may be enforced in a court of competent jurisdiction.

(MOU, APA Exh. 1, Doc. 26-3 at 7-8)

3. At no time during the negotiation of MOU Paragraph 10 did any representatives of APA, American or US Airways assert that Paragraph 10 constituted an Allegheny-Mohawk §13(b) agreement or an agreement under the McCaskill-Bond Section 117(a)(2) exception. In all discussions concerning MOU Paragraph 10, the parties stated that McCaskill-Bond governed the

seniority list integration dispute among the pilots of American and US Airways. The first time any party to the MOU asserted that Paragraph 10 constituted a McCaskill-Bond Section 117(a)(2) agreement or an Allegheny-Mohawk §13(b) agreement was on March 21, 2014 when the defendants filed their counterclaims against USAPA in this litigation. (Szymanski Decl., ¶ 4)

4. In March 2013, shortly after the MOU was ratified but before the merger was completed, a group of pilots employed by the former America West Airlines which had been merged into US Airways in 2005 (the "West Pilots"), on behalf of themselves and others similarly situated, filed a lawsuit alleging various claims against USAPA. US Airways was a party to the lawsuit, APA and American were not. One of the West Pilots' claims alleged "that they have party status and the right (but not the obligation) to participate fully (with counsel of their own choice) in the [McCaskill-Bond process]." (1/10/2014 Judgment Order, U.S.D.C. of Arizona, APA Exh. 11, Doc. # 26-13 at 1-2, 5)

5. Prior to the Judgment Order of the United States District Court for the District of Arizona in *Addington v. US Airline Pilots Ass'n,* Case No. CV-13-00471-PHX-ROS, holding that the West Pilots are not entitled to participate in the McCaskill-Bond seniority integration process (*Id.* at 12-13), on December 20, 2013, the Company and APA met with a "West Merger Committee" designated by the *Addington* class representatives to negotiate a seniority integration protocol agreement and discussed a proposal made by the West Merger Committee for a seniority integration protocol agreement. The USAPA Merger Committee refused to attend this negotiation on the ground that the West Merger Committee was not a proper party to the seniority list integration process absent court order establishing their right to participate under McCaskill-Bond and that defendants' action in negotiating with the West Merger Committee was contrary to Paragraph 10 of the MOU. (Szymanski Decl. ¶ 7)

6. On December 24, 2013, USAPA filed a dispute under the Merger Transition Agreement ("MTA," formerly the MOU) captioned MTA Dispute #2 asserting that US Airways and American's dealing with a West Merger Committee in the seniority integration process without an order of the United States District Court violated Paragraph 10 of the MTA. (Szymanski Decl. ¶¶ 8, 9; USAPA Exh. 1)

7. On January 7, 2014, US Airways filed in the United States District Court for the District of Arizona a motion to enjoin arbitration of MTA Dispute #2. (Szymanski Decl. ¶ 10; USAPA Exh. 2) US Airways asserted in that motion

> the indisputable legal principle that participation in the seniority integration process is subject to the requirements of a federal statute (i.e., the McCaskill-Bond amendment), a point that is recognized by the MOU ***and, in any event, could not be circumvented by private agreement****…**A labor arbitrator has no authority to adjudicate rights arising under federal law.***

USAPA Exh. 2 at 2 (emphasis added). US Airways cited Paragraph 10(e) of the parties' MOU in support of its position that an arbitrator had no authority to adjudicate rights under McCaskill-Bond. *Id.* at 3. US Airways concluded that the court should enjoin arbitration of the dispute submitted by USAPA because the issue of the rights of former America West pilots to participate as a separate party in the seniority list integration proceeding required interpretation of federal law, not the MOU, and so was not within the jurisdiction of the adjustment board. *Id.* at 7-8. US Airways concluded that the MOU could not override the requirements of McCaskill-Bond. *Id.* at 9, n.2.

8. From approximately December 19, 2013 to February 18, 2014, the parties attempted to negotiate a seniority integration protocol agreement that would constitute a Section 13(b) agreement under the Allegheny-Mohawk Labor Protective Provisions. The APA and USAPA exchanged various proposals for a protocol agreement. Szymanski Decl., ¶ 12.

9. In the course of negotiations for a protocol agreement, APA passed to USAPA a proposal that, if agreed to, would have provided that if and when APA was certified by the National Mediation Board as representative of a single, post-merger bargaining unit of pilots, a "craft or class" in RLA vernacular, it would then have sole authority over representation of all pilots in the seniority integration process, including the ability to reconstitute the seniority integration committee representing US Airways pilots, control funding of the US Airways pilots' seniority integration committee, and renegotiating with the Company, in whole or in part, the seniority integration protocol agreement then under discussion without the agreement of USAPA. APA and USAPA did not reach agreement on a seniority integration protocol agreement because of APA's assertion of unilateral control over representation in the seniority integration process if and when it became the post-merger representative of US Airways pilots. (Szymanski Decl., ¶ 13)

10. After APA and USAPA failed to reach agreement on a Section 13(b) agreement, Paul Jones, Vice-President and General Counsel for American Airlines, wrote to the unions on February 19, 2014 and proposed a method for selection of arbitrators to resolve the pilot seniority list integration dispute. (*Id.*, ¶ 14) On February 20, 2014, USAPA submitted to the National Mediation Board a request under Allegheny-Mohawk Section 13(a) for a panel of arbitrators from which the parties would select an arbitrator to resolve their seniority list integration dispute. (*Id.;* APA Exhibit 12, Doc. 26-14) The defendants opposed USAPA's request by letters dated February 26, 2014. (APA Exhibit 13, Doc. 26-13) USAPA responded to the positions stated by the defendants on February 28, 2014. (APA Exhibit 14, Doc. 26-16) The NMB issued the list of arbitrators requested by USAPA on April 11, 2014. (APA Exhibit 15, Doc. 26-17) The Company and APA have refused to select an arbitrator from the list issued by the NMB. (Szymanski Decl., ¶¶ 14, 15)

11. APA contends that "[t]he timing of the JCBA [Joint Collective Bargaining Agreement] is … determined by when the National Mediation Board ("NMB") makes a finding that the two pre-merger airlines have become a 'single carrier' for labor relations purposes." (APA Memo. To Compel Arb., Doc. 26-1 at 5-6). The Company states that "[p]ursuant to MOU Paragraphs 10(a) and 27, the seniority integration arbitration hearing will not commence until a single labor organization is certified by the NMB." (Co. Mot. To Compel Arb., Doc. # 27 at 9, fn. 2) USAPA disputes the accuracy of these characterizations of the MOU's terms. Under the MOU, the JCBA can be resolved prior to a NMB single carrier determination. See MOU Attachment C, APA Exh. 1 at 20 ("JCBA negotiations shall begin as soon as practicable after the POR [Plan of Reorganization, December 9, 2013] and may be completed anytime between the POR and the deadline of 30 days past NMB Single Carrier finding." (emphasis added)) The seniority integration arbitration hearing may commence after the JCBA is ratified which may occur prior to a NMB single carrier determination. MOU Paragraph 10(a) states that "in no event, shall the seniority integration arbitration proceeding commence prior to final approval of the JCBA pursuant to the deadlines and procedures in Paragraph 27 below."(MOU, APA Exh. 1, Doc. # 26-3 at 7) USAPA contends that defendants' characterizations of MOU timelines is not material to defendants' motions to compel arbitration because the parties' agreements in Paragraph 10 do not amount to an Allegheny-Mohawk §13(b) agreement and, therefore, the Allegheny-Mohawk §13(a) timelines and procedures apply to the parties' seniority integration dispute.

12. APA's statement that "[t]here 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" (APA Memo. To Compel Arb., Doc. 26-1 at 5-6) is inaccurate and conclusory. The Company makes the same assertion and adds the observation

that "[t]he lack of an agreed procedure for the selection of arbitrators is, of course, largely a product of USAPA's own making, since it refused to respond to either of the proposals made by the Company and APA for selecting arbitrators pursuant to MOU Paragraph10(a) – including a proposal to which it had agreed during the parties' negotiations for the Protocol Agreement pursuant to MOU Paragraph 10(f). (Co. Mot. To Compel Arb., Doc. # 27 at 5, 6-7 fn.3) The parties' dispute concerning APA's right to control the seniority integration process following NMB certification of a representative for a single carrier impacted a number of issues in the seniority list protocol agreement that the parties attempted to negotiate and it was this position of APA that prevented a Section 13(b) protocol agreement from being reached. See paragraph 9. These disputed facts are immaterial, however, to defendants' motions to compel arbitration because Allegheny-Mohawk Section 13(b) explicitly provides, in pertinent part, that "[n]o party shall be excused from complying with the above condition [Section 13(a)] by reason of having suggested an alternative method or procedure unless and until the alternative method or procedure shall have been agreed to by all the parties."

13. APA's statement that "[i]n the absence of a negotiated [seniority list] agreement, the MOU provides that the parties must select a panel of three arbitrators to resolve the seniority-integration dispute" (APA Memo. To Compel Arb., Doc. 26-1 at 11) is conclusory and misleading. The Company makes the same assertion. (Co. Mot. To Compel Arb., Doc. # 27 at 9) MOU Paragraph 10 does not prescribe any method of arbitrator selection.

14. APA's statement that "[i]n 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" (APA Memo. To Compel Arb., Doc. 26-1 at 11) is argumentative and misleading. Similarly

argumentative and inaccurate is the Company's allegation that "[i]n the course of preparing the Joint Report of Parties Under L.R. 16.3(D) (Dkt. 25, "Joint Rule 16 Report"), it became clear that the central dispute in this case turns on the interpretation of the MOU, specifically, whether the parties to the MOU intended that the seniority-integration provisions in MOU Paragraph 10, including the arbitrator-selection and arbitration schedule provisions in Paragraph 10(a), would become null and void if a Protocol Agreement were not executed by the applicable deadline." (Co. Mot. To Compel Arb., Doc. # 27 at 12) USAPA denies these characterizations concerning USAPA's "repudiation" of MOU Paragraph 10's provisions and that the "central dispute in this case" concerns the parties' contractual intentions. USAPA's claim only seeks to enforce Allegheny-Mohawk §13(a) incorporated into McCaskill-Bond. USAPA asserts that MOU Paragraph 10's terms do not apply to the seniority integration dispute in the absence of a §13(b) agreement as a matter of McCaskill-Bond law, and that the parties' contractual intent regarding the "nullity" of MOU Paragraph 10 terms if a §13(b) agreement is not concluded is immaterial. USAPA has not "repudiated" the terms of MOU Paragraph 10. It is USAPA's position that those terms do not govern the seniority integration process in the absence of a 13(b) agreement as a matter of McCaskill-Bond law.

15. In addition to the above facts of record, it is USAPA position, pursuant to Fed. R. Civ. P. 56(d), that it requires discovery to obtain additional facts concerning disputed Issue # 1. Szymanski Decl. ¶ 17.

B. Issue # 2: Defendants' motions make the contention that the parties agreed to arbitrate the issue whether the parties intended, as a contractual matter, that MOU paragraph 10's seniority integration provisions would continue to apply even if the parties failed to agree upon an Allegheny-Mohawk §13(b) protocol agreement. USAPA denies that the parties' contractual intentions are

material to USAPA's claim. It is USAPA's position that the MOU Paragraph 10 seniority integration provisions do not apply, as a matter of law under McCaskill-Bond, because the parties failed to agree upon an Allegheny-Mohawk §13(b) protocol agreement, and that the parties' contractual intent is immaterial. As a matter of fact, USAPA claims it did not agree to arbitrate any disputes arising under McCaskill-Bond. The facts in support of this disputed issue are:

16. USAPA incorporates paragraphs 1 through 14 above.

17. No party proposed at any point during the MOU Paragraph10 negotiations that disputes arising under McCaskill-Bond would be submitted to arbitration. The parties discussed and explicitly agreed that McCaskill-Bond rights would be enforceable in federal court. (Szymanski Decl. ¶ 5; MOU ¶10(e), APA Exh. 1, Doc. 26-3 at 7)

18. In addition to the above facts of record, it is USAPA position, pursuant to Fed. R. Civ. P. 56(d), that it requires discovery to obtain additional facts concerning disputed Issue # 2. (Szymanski Decl. ¶ 17)

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Respectfully submitted,

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