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 OPPOSITION TO DEFENDANTS'
MOTIONS TO COMPEL ARBITRATION AND STAY PROCEEDINGS

The US Airline Pilots Association ("USAPA") seeks to enforce the statutory rights of US Airways pilots under the McCaskill-Bond Amendment, 49 U.S.C. § 42112, Note 117, ("McCaskill-Bond"), to resolve their seniority list integration dispute with the pilots of American Airlines under the mandatory procedures of Section 13(a) of the Allegheny-Mohawk Labor Protective Provisions ("Allegheny-Mohawk"). USAPA's claim for relief does not assert any right under the 2013 Memorandum of Understanding ("MOU") entered among the parties and no interpretation of the terms of that agreement will resolve any part of USAPA's claim. The rights of US Airways pilots under McCaskill-Bond may only be adjudicated by this Court. The parties' MOU Paragraph 10(e) expressly recites that the rights of the pilots under McCaskill-Bond may be enforced in federal court. *See* Doc. 26-3 at 6 ("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.")

To the extent the MOU will be considered by the court in resolving USAPA's claim, only its status under McCaskill-Bond is at issue. The defendants' counterclaims under McCaskill-Bond contending that the MOU constitutes either an agreement triggering the exception of Section 117(a)(2) of the Amendment to withdraw the parties' dispute from the obligations of McCaskill-Bond, or an agreement for an alternative method of seniority integration under Allegheny-Mohawk Section 13(b), also present purely statutory disputes. Contrary to the defendants' assertions, the issue to be resolved is not whether the parties intended as a matter of contract that certain provisions of Paragraph 10 of their MOU would become null and void in the absence of a seniority integration protocol agreement. The issue presented by the Complaint is whether Allegheny-Mohawk Section 13(a) applies to the parties' seniority dispute, which requires a determination whether Paragraph 10 of the MOU as written removed the parties' dispute from Section 13(a) as a matter of law under McCaskill-Bond. Further, the defendants' motion presents an issue of substantive arbitrability whether the parties agreed to submit claims over rights under McCaskill-Bond to arbitration. Only the court has authority to adjudicate those questions of statutory compliance and substantive arbitrability. Disputes of material fact exist between the parties concerning these issues which require discovery. The defendants' motions should be denied.

STATEMENT OF FACTS

As required by Local Rule 7(h), USAPA submits with its opposition its separate statement of material facts in dispute ("Pl. 7(h)").

1. Negotiation of Paragraph 10 of the parties' Memorandum of Understanding in December 2012

The parties negotiated paragraph 10 of their Memorandum of Understanding in December 2012. During those negotiations, USAPA and US Airways disagreed on the issue of who the proper parties to the seniority dispute 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 that 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 MOU that McCaskill-Bond would govern the seniority dispute between the American and US Airways pilots and that the rights of the employees under McCaskill-Bond would be preserved under the MOU. Pl. 7(h) ¶ 1. The parties' agreement is reflected in Paragraph 10(e) of the MOU 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." *Id.* ¶ 2.

At no point in the negotiation of Paragraph 10 of the MOU did representatives of APA, American or US Airways assert that Paragraph 10 constituted an agreement under Section 117(a)(2) of McCaskill-Bond. Further, contrary to the Declaration of Mark Stephens submitted by the APA in support of its motion to compel arbitration, at no point in the negotiation of Paragraph 10 did representatives of APA, American or US Airways assert that Paragraph 10 constituted an agreement under Allegheny-Mohawk Section 13(b) establishing an alternative procedure for seniority integration. At all times, the parties recognized that Paragraph 10 left undisturbed McCaskill-Bond governing the seniority dispute among the pilots. The first time any party to the MOU asserted that

Paragraph 10 constituted an agreement under McCaskill-Bond Section 117(a)(2) or a Section 13(b) Agreement was on March 21, 2014 when the defendants filed their Counterclaims against USAPA. *Id.* ¶ 3.

Nor did any party propose during the Paragraph 10 negotiations that disputes over the obligations under McCaskill-Bond would be submitted to arbitration. *Id.* ¶ 17. USAPA did not agree to arbitrate disputes over McCaskill-Bond rights. *Id.* The parties expressly discussed and mutually understood that McCaskill-Bond rights would be enforceable in federal court. *Id.*

2. US Airways files a motion to enjoin arbitration of a dispute filed by USAPA under Paragraph 10 of the Memorandum of Understanding

On December 20, 2013, APA, American and US Airways met with a "West Merger Committee" designated by plaintiff class representatives in *Addington, et al v. US Airline Pilots Ass'n,* Case No. CV-13-00471-ROS,[1] to negotiate a seniority integration protocol agreement. *Id.* ¶ 5. The defendants discussed a proposal made by the West Merger Committee for a protocol agreement. *Id.* At the time the defendants met with the West Merger Committee, the plaintiffs' claim against USAPA under McCaskill-Bond for separate representation in the seniority integration dispute was pending decision by the United States District Court for the District of Arizona. *Id.*

The USAPA Merger Committee (the committee established by USAPA to represent all US Airways pilots in the seniority list integration) refused to attend the negotiation on the ground that the West Merger Committee was not a proper party to the seniority integration process absent court

[1] America West Airlines merged with US Airways in 2005 and the pilot seniority lists of the two pilot groups remain separate. A plaintiff class representing former America West pilots sued USAPA in the District of Arizona asserting claims arising from ratification of the MOU, including a claim that the former America West pilots were entitled to participate in the seniority integration process under McCaskill-Bond separately from USAPA. (Pl. 7(h) ¶) On January 10, 2014, the District Court issued its decision rejecting the plaintiffs' claim against USAPA under McCaskill-Bond. (APA Exh. 11, Doc. # 26-13)

order establishing their rights under McCaskill-Bond and the defendants' action was contrary to Paragraph 10 of the MOU. *Id.*

On December 24, 2013, USAPA filed a dispute under the Merger Transition Agreement (the designation for the MOU once the airlines' merger became effective) 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 MOU. *Id.* ¶ 6. 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. *Id.* ¶ 7. In its motion US Airways asserted that:

> 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 argued that the district court should enjoin arbitration of the MTA 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 and not the MOU, and so was not within the jurisdiction of the adjustment board. *Id.* at 7-8. US Airways also argued that the MOU could not override the requirements of McCaskill-Bond. *Id.* at 9, n.2.

3. The parties fail to reach agreement on a Section 13(b) seniority integration protocol agreement.

From 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. Pl. 7(h) ¶ 8. 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, then it would have sole authority over representation 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 renegotiate the seniority integration protocol agreement with the airlines, in whole or in part, without the agreement of USAPA. *Id.* ¶ 9. APA and USAPA did not reach agreement on a seniority integration protocol agreement because of APA's insistence on unilateral control over representation in the seniority integration process if and when it became the post-merger representative of US Airways pilots. *Id.*[2]

4. USAPA requests from the NMB a panel of arbitrators to resolve the seniority list integration dispute as provided by Section 13(a) of Allegheny-Mohawk

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.* ¶ 10. 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. The defendants opposed USAPA's request by letters dated February 26, 2014. USAPA responded to the positions stated by the defendants on February 28, 2014. The NMB issued the list of arbitrators required by the statute

[2] As APA concedes, its unfair treatment of former TWA pilots in the seniority integration dispute arising from the merger of American and TWA was the reason Congress adopted the McCaskill-Bond Amendment. *See* Document 26-1 at 18.

and requested by USAPA on April 11, 2014. The defendants refuse to select an arbitrator from the NMB panel. *Id.*

ARGUMENT

I. The defendants' motions to compel arbitration should be determined under Fed. R. Civ. P. 56

The defendants' motions to compel arbitration are properly evaluated under the standard of review for motions for summary judgment under Fed. R. Civ. P. 56(c). In evaluating a motion to compel arbitration under the Federal Arbitration Act, the United States District Court for the District of Columbia has held

> "the proper approach to employ in reviewing the defendant's motion to [] compel arbitration is to apply the same standard of review that governs *Rule 56* motions" for summary judgment. *Brown v. Dorsey & Whitney, LLP, 267 F. Supp. 2d 61, 67 (D.D.C. 2003)*. Accordingly, it is appropriate to grant a motion to compel arbitration when the pleadings and the evidence demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. Under that framework, the party seeking to compel arbitration bears the initial responsibility of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. In response, the non-moving party must "go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial.'" *Id. at 324*. The court should draw all inferences from the supporting records submitted by the non-moving party. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

PCH Mutual Ins. Co. v. Casualty & Surety, Inc., 569 F. Supp. 2d 67, 73-74 (D.D.C. 2008).

While the defendants' rely on the "minor dispute" process mandated in Section 204 of the Railway Labor Act, 45 U.S.C. § 184, in seeking to compel arbitration of USAPA's claim in this matter, the relief they seek is analogous to compelling arbitration under the Federal Arbitration Act. As such, the standard of review identified in *PCH Mutual Ins Co.* is appropriately applied here. The defendants therefore must demonstrate the absence of a genuine issue of material fact that Allegheny-Mohawk Section 13(a) does not govern the parties' dispute because Paragraph 10 of the

MOU constitutes a valid agreement under McCaskill-Bond Section 117(a)(2) or Section 13(b) of Allegheny-Mohawk, and that no disputed material fact exists concerning the substantive arbitrability question whether the parties agreed to submit issues of rights under McCaskill-Bond to arbitration.[3]

As reflected in the Fed. R. Civ. P. 56(d) declaration of Patrick J. Szymanski and USAPA's Rule 7(h) statement, disputes of material fact exist between the parties concerning the issues of Paragraph 10's status under McCaskill-Bond; the parties' intent that the seniority integration dispute be governed by McCaskill-Bond; why they did not resolve the issue of who the parties would be to the seniority list integration arbitration; why they did not agree on a seniority integration protocol agreement under Paragraph 10 including a method for selecting arbitrators; why they were not subsequently able to agree on a seniority integration protocol agreement; and whether the parties agreed to submit claims of right under McCaskill-Bond to arbitration. Discovery is required on these issues.[4] The defendants' motion should be denied since USAPA has not had an opportunity to conduct discovery. *Feldman v. Central Intelligence Agency*, 797 F. Supp. 2d 29, 43-44 (D.D.C. 2011) ("[S]ummary judgment is ordinarily appropriate only after the plaintiff has been given an adequate opportunity to conduct discovery."), *citing McWay v. LaHood,* 269 F.R.D. 35, 39 (D.D.C.2010).

3 The defendants did not submit a Local Rule 7(h)(1) statement of material facts not in dispute.

4 USAPA served on the defendants its first request for the production of documents under Fed. R. Civ. P. 34(b) on May 16, 2014.

II. USAPA's claim presents an issue of the US Airways pilots' rights under Allegheny-Mohawk Section 13(a) and whether MOU Paragraph 10 satisfies McCaskill-Bond's statutory standard for removing the parties' seniority dispute from Section 13(a); an arbitrator's interpretation of the meaning of Paragraph 10 is immaterial to that question of statutory compliance

A. Claims asserting rights under a federal statute not involving the application of a collective bargaining agreement are not subject to the minor dispute adjustment procedures of the Railway Labor Act

Hawaiian Airlines v. Norris, 512 U.S. 246 (1994), held that an employee's wrongful discharge claim, based on state law, was not preempted by or subject to the RLA's "minor dispute," compulsory system board arbitration requirement in 45 U.S.C. § 184, because the employee's whistleblower and public policy claims "involve[d] rights and obligations that exist independent of the CBA," *Id*. at 256, RLA "'minor disputes are those that involve duties and rights created or defined by the CBA," *Id*. at 258, and the resolution of the state law claims did not depend upon an interpretation of the CBA. *Id*. at 261. Claims based on federal statutes independent of the CBA are similarly treated. The Court of Appeals for the District of Columbia Circuit recently reconfirmed this principle, stating that "'non-frivolous statutory claim[s] under ERISA are not subject to RLA preclusion if they are 'independent of the correct construction of the [collectively bargained] pension plan'" *Oakey v. U.S. Airways Pilots Disability Income Plan,* 723 F.3d 227, 234, 406 U.S. App. D.C. 204 (D.C. Cir 2013), *cert. den.,* 134 S.Ct. 1513 (2014), quoting, *Air Line Pilots Ass'n v. Northwest Airlines, Inc.*, 627 F.2d 272, 277, 200 U.S. App. D.C. 219 (D.C. Cir. 1980).

In *Oakey*, the pilot's disability claim solely involved the interpretation or application of the terms of the collectively bargained disability plan and, for this reason, the entire dispute was subject to the RLA's minor dispute arbitration requirement and the case was dismissed. *Id.* at 234. But in *Northwest Airlines*, "[a]ll agree that at least part of this suit seeks to enforce ALPA's understanding of the August 1975 amendments to the collectively bargained pension plan" 627 F.2d at 275, which

was subject to the exclusive jurisdiction of the RLA system board, while other alleged claims were statutory ERISA claims independent of the correct construction of the pension plan within the jurisdiction of the federal court. As to the latter category of claims, the court of appeals in *Northwest Airlines* held that "[t]he Railway Labor Act's arbitral provisions do not demand that such pure statutory, noncontractual claims be sent to arbitration; they can go directly to court. (citations omitted) It is doubtful that a Railway Labor Act arbitrator has any authority to consider such independent statutory claims. (citations omitted)" *Id.* at 277.

Because of the joinder of CBA interpretation claims and pure statutory claims in *Northwest Airlines,* the court of appeals concluded "[i]t [was] wise to await the completion of the arbitration process because the primary focus of the complaint though it does present independent statutory claims is on the alleged violation of the pension plan, and arbitration, if had, may either resolve the entire controversy or at least aid in the solution by the court of the statutory contentions." *Id.* at 277.[5] But, as set forth below, there is no joinder of contract interpretation claims and statutory claims in this case. USAPA's statutory claim does not depend on and its resolution will not be aided by answers to the questions that defendants seek to arbitrate since it rests solely on the interpretation of McCaskill-Bond's requirements.

B. The provisions of McCaskill-Bond Section 117(a)(2) and Section 13 of the Allegheny-Mohawk Provisions

The parties agree that McCaskill-Bond governs their seniority integration dispute. *See* Complaint ¶¶ 49-51, Document 1 at 10; APA Answer ¶¶ 49-51, Document 12 at 12; American/US Airways Answer, ¶¶ 49-51, Document 13 at 22. The merger of American and US Airways clearly is

[5] Similarly, in *Tice v. American Airlines, Inc.*, 288 F.3d 313, 318 (7th Cir. 2002), the employment discrimination suit was stayed pending arbitration "because the[] [plaintiffs] have no possible age discrimination claim if it turns out that the collective bargaining agreement expressly or by implication makes *all* disqualified captains, regardless of age, ineligible to become flight officers and is applied in a nondiscriminatory fashion in accordance with its terms."

a "covered transaction" involving "covered employees" as defined in the statute.[6] As with the question of when McCaskill-Bond's requirements apply, what McCaskill-Bond means concerning the ability of an air carrier in a covered transaction to avoid the requirements of Section 13(a) "is not hard to discern." *Concerned Committee of Midwest Flight Attendants v. Int'l. Bhd. of Teamsters,* 662 F.3d 954, 955 (7th Cir. 2011). The statute establishes only two provisions permitting parties to remove by agreement a dispute from coverage under Section 13(a).

Section 117(a)(2) of McCaskill-Bond provides as an exception to the statute's requirements:

> the requirements of any collective bargaining agreement that may be applicable to the terms of integration involving covered employees of a covered air carrier shall not be affected by the requirements of this section as to the employees covered by that agreement, so long as those provisions allow for the protections afforded by sections 3 and 13 of the Allegheny-Mohawk provisions.

49 U.S.C. § 42112, Note 117(a)(2). If a valid agreement exists under Section 117(a)(2), then McCaskill-Bond's requirements will not govern that dispute. But if that were the case here, the parties would not have "obligations under McCaskill-Bond" as recited in Paragraph 10(e) of the MOU. Moreover, in *Addington v. US Airline Pilots Association,* the United States District Court for the District of Arizona held that Paragraph 10 of the MOU did not constitute an agreement within Section 117(a)(2)'s exception. (APA Exh. 11, Doc. # 26-13 at 13) ("McCaskill-Bond utilizes numerous specialized definitions, contains various exceptions, and incorporates rules from the long-defunct Civil Aeronautics Board ("CAB"). Fortunately, everyone agrees the statute's provisions are

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[6] 49 U.S.C. § 42112, Note 117(a)(" With respect to any covered transaction involving two or more covered air carriers that results in the combination of crafts or classes that are subject to the Railway Labor Act"); 49 U.S.C. § 42112, Note 117(b)(2)-(4)(" (2) Covered air carrier. The term 'covered air carrier' means an air carrier that is involved in a covered transaction. (3) Covered employee. The term 'covered employee' means an employee who (A) is not a temporary employee; and (B) is a member of a craft or class that is subject to the Railway Labor Act (45 U.S.C. § 151, *et seq.*). (4) The term 'covered transaction' means (A) a transaction for the combination of multiple air carriers into a single air carrier; and which (B) involves the transfer of ownership or control of— (i) 50 percent or more of the equity securities (as defined in section 101 of title 11, United States Code) of an air carrier; or (ii) 50 percent or more (by value) of the assets of the air carrier.)

triggered and no exception applies. Therefore, the present dispute depends entirely on the meaning of McCaskill-Bond's incorporation of CAB rules.") US Airways was a defendant in that litigation.

Allegheny-Mohawk Section 13 provides:

> Section 13(a). In the event that any dispute or controversy (except as to matters arising under section 9) arises with respect to the protections provided herein which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for consideration and determination. The parties shall select the arbitrator from such panel by alternatively striking names until only one remains, and he shall serve as arbitrator. Expedited hearings and decisions will be expected, and a decision shall be rendered within 90 days after the controversy arises, unless an extension of time is mutually agreeable to all parties. The salary and expenses of the arbitrator shall be borne equally by the carrier and (i) the organization or organizations representing the employee or employees or (ii) if unrepresented, the employee or employees or group or groups of employees. The decision of the arbitrator shall be final and binding on the parties.
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> (b) The above condition shall not apply if the parties by mutual agreement determine that an alternative method for dispute settlement or an alternative procedure for selection of arbitrator is appropriate in their particular dispute. No party shall be excused from complying with the above condition 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.

C. USAPA's claim does not present a "minor dispute" under the RLA since it seeks only to enforce rights under McCaskill-Bond, not a collective bargaining agreement, and interpretation of the MOU is not material to resolving that statutory claim

USAPA's claim for relief asserts that US Airways pilots retain their right under McCaskill-Bond to pursue the mandatory dispute resolution procedures of Allegheny-Mohawk Section 13(a) in the parties' seniority list integration dispute. Doc. 1 at 12. The plaintiff satisfied the requirements of Section 13(a) when it made its request for an arbitrator panel to the NMB since more than 20 days had passed from the date the parties' seniority dispute arose on December 9, 2013. Under the plain terms of Section 13(a), the parties were required to strike from the list of arbitrators issued by the NMB on April 11, 2014 and proceed to arbitration.

USAPA also contends that Paragraph 10 of the parties' MOU neither constitutes an agreement withdrawing the seniority dispute between American and US Airways pilots from the obligations of McCaskill-Bond through its Section 117(a)(2) exception nor is an agreement under Section 13(b) for alternative dispute resolution procedures removing the dispute from Section 13(a). These two provisions are the only ways McCaskill-Bond permits parties to remove a seniority integration dispute from the mandatory procedures of Section 13(a). And whether MOU Paragraph 10 complied with these statutory provisions is for the court to decide. There are no "embedded contractual disputes" in USAPA's claim; it only presents issues of statutory rights and statutory compliance.

When the parties failed to conclude a Section 13(b) agreement due to APA's insistence it could unilaterally renegotiate the agreement and reconstitute the USAPA seniority integration committee if and when it became the post-merger representative of US Airways pilots, USAPA remained free to exercise the rights of US Airways pilots to arbitration under Section 13(a). Section 13(b) states, "No 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." USAPA's claim is not based on an assertion, for example, that the parties agreed as a matter of contract that the provisions of MOU Paragraph 10(a) would become void absent a seniority integration protocol agreement. Rather, it claims that absent a Section 13(b) agreement, the dispute proceeds as a matter of law under Section 13(a) of Allegheny-Mohawk and Paragraph 10(a) has no application to the dispute.

Defendants, of course, deny they are obligated to strike from the Section 13(a) panel issued by the NMB and proceed to arbitration. But that can be so only if the parties entered an agreement as permitted by McCaskill-Bond under Section 117(a)(2) or Section 13(b) to withdraw

their dispute from Section 13(a)'s procedures and that issue is for the court to decide. Section 13(a) itself does not permit parties to modify its requirements by agreement; the parties must instead make an agreement under Section 13(b) to create procedures different than those mandated by Section 13(a) but equally protective of employee seniority rights. Defendants may not argue therefore that although MOU Paragraph 10 fails to qualify as an agreement under Section 13(b), it nonetheless modifies the procedures of Section 13(a). The question presented by USAPA's claim is: Does McCaskill-Bond require the parties to proceed to arbitration under Section 13(a) or is the parties' dispute removed from the coverage of Section 13(a) by the statute?

Resolution of these issues under McCaskill-Bond concerning application of Section 13(a) to the parties' dispute is independent of the correct interpretation of MOU Paragraph 10 on the questions submitted by the defendants. The issue before this Court is not, as the defendants assert, whether "as a contractual matter" the parties agreed that certain terms in Paragraph 10 would be void if a seniority integration protocol agreement was not reached - that is, whether the MOU becomes void by its own terms. Rather, the only question that concerns the MOU is whether Paragraph 10 failed to satisfy McCaskill-Bond's requirements for removing the parties' dispute from Section 13(a), thereby requiring the parties' dispute to proceed to arbitration under Section 13(a).[7] The defendants' first and second counterclaims therefore raise the purely statutory questions

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[7] The airlines submitted a dispute to arbitration designated MTA Dispute #5 identifying these issues:

> (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)?
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> (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

whether the MOU complied with McCaskill-Bond's requirements for removing a dispute from coverage under Allegheny-Mohawk Section 13(a).[8] The extraneous questions that the defendants assert must be arbitrated, and supposedly would be helpful to the court's decisional process in resolving USAPA's claim, are actually immaterial to the statutory dispute before the court.[9]

The question of MOU Paragraph 10's compliance with the requirements of McCaskill-Bond to remove the parties' dispute from Section 13(a) is akin to a dispute over contract validity under the Railway Labor Act. Whether a contract entered by parties covered by the RLA is valid under the statute or is void for some reason of noncompliance is well-settled to be an issue within the jurisdiction of the federal courts. *See, e.g., Bhd. of R.R. Trainmen v. Howard*, 343 U.S. 768, 774 (1959) ("The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board under our holding in *Slocum* v. *Delaware, L. & W. R. Co.,* 339 U. S. 239. This dispute involves the validity of the contract, not its meaning."). *See also Felter v. Southern Pacific Co.*, 359 U.S. 326, 327-329 (1959); *Airline Pilots Assoc. v. UAL Corporation,* 874 F.2d 439, 444-45 (7th Cir. 1989); *United Transp. Union v. Cuyahoga Valley R.R. Co.,* 979 F.2d

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ineffective any of the other provisions of MOU Paragraph 10, specifically including the hearing-schedule provisions in MOU Paragraph 10(a)?

Doc. # 27 at 8-9.

[8] Indeed, the issues set forth in Footnote 6 that the defendants wish to arbitrate need only be arbitrated if the defendants first win one of their counterclaims by proving up the existence of an agreement under either Section 117(a)(2) or Section 13(b). But until such an agreement is proven to exist removing the dispute parties' dispute from Section 13(a), there can be no need to arbitrate a question under it. The defendants' motions put the cart before the horse, as the saying goes.

[9] For example, the defendants assert that "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." Doc. # 26-1 at 16.

431 (6th Cir. 1992), *cert. denied*, 507 U.S. 1005 (1993); *Bro. of Railroad Trainmen v. Smith*, 251 F.2d 282, 285-86 (6th Cir. 1958), *cert. denied*, 356 U.S. 937 (1958); *United Transp. Union v.* CSX *Transportation*, 2008 U.S. Dist. LEXIS 106167, at *20-23 (N.D. Ohio 2008).

These issues of statutory rights and statutory compliance presented by USAPA's claim unquestionably arise under McCaskill-Bond by its imposition of the Allegheny-Mohawk Section 3 and 13 provisions on covered disputes between air carriers in a covered transaction like the American and US Airways merger and are not dependent on an interpretation of the parties' MOU. *Norris*, 512 U.S. at 256. USAPA's claim is controlled by the holding in *Oakey* that statutory claims independent of the correct construction of a collective bargaining agreement are not subject to RLA preclusion. 723 F.3d at 234. This Court therefore has jurisdiction over this case because it is a civil action arising under federal law. 28 U.S.C. § 1331. Venue pursuant to 28 U.S.C. § 1391(b)(3) is undisputed. (Company Ans., Doc. # 13, p. 5, ¶ 6; APA Ans., Doc. # 12, p. 2, ¶ 6).

D. *The record will establish that MOU Paragraph 10 did not satisfy either the requirements of Section 117(a)(2) or Section 13(b)*

MOU Paragraph 10 did not satisfy the requirements of Section 117(a)(2) to take the parties' dispute out from under from the obligations of McCaskill-Bond since it did not provide employees the "protections afforded by sections 3 and 13" of Allegheny-Mohawk. Paragraph 10(a) expressly states that the parties' seniority dispute will be processed "consistent with McCaskill-Bond." It acknowledges in Paragraph 10(e) that the parties have obligations under McCaskill-Bond and that those obligations may be enforced in court. Neither would be true if the Section 117(a)(2) exception removed the obligations of McCaskill-Bond from the parties' dispute. Paragraph 10 failed to identify the parties to the seniority integration dispute and did not establish a method of arbitrator selection, but only provided that three arbitrators would be selected. It also did not assure the protection for employees under Section 3 and 13 to have their seniority integration dispute decided

by a neutral arbitrator without further agreement from the other parties, as Section 13(a) permits. Section 117(a)(2) only excepts a seniority dispute from McCaskill-Bond, as the statute plainly states, if all protections of Sections 3 and 13 are afforded employees. And, as discovery will establish, in negotiating Paragraph 10, the parties repeatedly stated their intent that McCaskill-Bond would apply to the seniority dispute and that they were not removing the dispute from the obligations of the statute. The parties' failure to conclude an agreement under Section 117(a)(2) was quite deliberate because they could not agree on the crucial question of who would participate in the seniority dispute and so relied on McCaskill-Bond to govern the dispute. That is why US Airways agreed already that neither McCaskill-Bond exception applied to the parties' seniority dispute. *Addington Order,* APA Exh. 11, Doc. #26-13 at 14.

MOU Paragraph 10 fails to qualify as a Section 13(b) agreement because a Section 13(b) agreement may only be made by "the parties by mutual agreement" and the MOU did not settle the question of the identity of the parties to the seniority dispute. It also did not establish a method for arbitrator selection and Section 13(b) requires that "the above condition [Section 13(a)] shall not apply if the parties by mutual agreement … an alternative procedure for selection of an arbitrator is appropriate in their particular dispute." It also did not provide an alternative method of dispute resolution since the MOU designated arbitration as the method for dispute resolution. "Alternative method of dispute resolution" under Section 13(b) refers to a method other than arbitration given that Section 13(b) separately addresses arbitration in the disjunctive in the following clause, stating "or alternative procedure for selection of an arbitrator." Paragraph 10 expressly left agreement on that material term to another day. The terms identified by the defendants in Paragraph 10(a) concerning the number of arbitrators to hear the dispute and timing of the arbitration hearing are not material to the requirements of Section 117(a)(2) and Section 13(b) and so are insufficient to

establish an agreement removing the parties' dispute from Section 13(a). Defendants' assertion that the MOU satisfied either Section 117(a)(2) or Section 13 is belied by the MOU's explicit provision in Paragraph 10(f) that the parties would agree on a seniority integration protocol agreement, which would set forth the process for conducting negotiations and arbitration to resolve the seniority dispute. In short, Paragraph 10 was the parties' deliberate choice in the MOU bargaining to get past their differences over seniority integration by "agreeing to agree" at a later point on a seniority integration process agreement (the failed protocol agreement), while setting forth certain terms that would be incorporated into a Section 13(b) agreement assuming one were later reached.

Moreover, the Supreme Court has held that it "will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable." *Metropolitan Edison Co. v. N.L.R.B.*, 460 U.S. 693, 708 (1983); *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 79-80 (1998); *Chevron Mining, Inc. v. N.L.R.B.*, 684 F.3d 1318, 1330, 401 U.S. App. D.C. 393 (D.C. Cir. 2012) (quoting *Metropolitan Edison Co.*)).

By entering into the MOU, USAPA did not waive its right to invoke the Section 13(a) process to resolve the seniority list integration dispute. The rights of US Airways pilots and USAPA under Section 13(a) are not subject to a presumption of arbitrability. *Wright*, 525 U.S. at 79. The broad arbitration clause relied upon by defendants in paragraph 20 did not constitute a waiver of statutory rights under McCaskill-Bond especially in light of paragraph 10(e)'s language that "the obligations imposed by McCaskill-Bond may be enforced in a court of competent jurisdiction." Doc. # 26-3, MOU, ¶10(e). That the MOU fails to contain a "clear and unmistakable" waiver of Section 13(a) is fatal to defendants' motions.

III. The defendants' motions raise an issue of substantive arbitrability that only the court may decide

The defendants' motions to compel arbitration necessarily assert that the parties agreed to submit claims concerning McCaskill-Bond rights to arbitration. The motions present an issue of substantive arbitrability – whether the parties agreed to submit McCaskill-Bond disputes to arbitration. This issue must be resolved by the court. "[U]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Technologies, Inc. v. Communications Workers of America,* 475 U.S. 643, 649 (1986). This is so because "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *Id. at 648-49*. The Supreme Court explained that "the duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." *Id. at 649* (quoting *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 546-47 (1964) (citations omitted)). These are well-settled points of federal law. *Air Line Pilots Ass'n v. Federal. Express Corp*., 402 F.3d 1245, 1248, 365 U.S. App. D.C. 266 (D.C. Cir. 2005); *Air Line Pilots Association v. Delta Air Lines, Inc.,* 863 F.2d 87, 91, 274 U.S. App. D.C. 181 (D.C. Cir. 1988), *cert. denied* 493 U.S. 821 (1989) (principles applicable to RLA).

The arbitration provision relied on by the defendants to compel arbitration expressly excludes enforcement of McCaskill-Bond rights from arbitration. Paragraph 10(e) 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." There are also disputed material facts whether the parties agreed to submit claims of right under

McCaskill-Bond to arbitration. Pl. 7(h) ¶ 17. Discovery is also appropriate on this issue of arbitrability. *Id.* ¶ 18.

IV. Staying this litigation will not aid the decisional process

As set forth above, the claim asserted by USAPA is not subject to arbitration under the Railway Labor Act and no stay of this litigation should be ordered. Moreover, the issue raised by APA's third counterclaim -- its assertion that APA will control the seniority list integration process if and when the National Mediation Board certifies it as representative of a single post-merger pilot craft or class -- is in fact the issue that caused the parties' negotiations to fail. APA will doubtless rely on dicta from the January 10, 2014 decision of the District of Arizona in *Addington*, opining about USAPA's right under McCaskill-Bond to continue representing US Airways pilots in the parties' seniority dispute if and when APA is certified as the pilots' post-merger representative. APA Exh. 11, Doc. 26-13 at 20-21. That dictum, however, is not controlling of the rights of US Airways pilots and USAPA under McCaskill-Bond. *See, e.g.. Patent Office Prof. Ass'n. v. Federal Labor Rel. Auth.,* 37 Fed. Appx. 540, 541-42, 2002 U.S. App. LEXIS 11842 (D.C. Cir. 2002). Since defendants assert that the seniority list integration arbitration may not proceed until after a single representative is certified, resolving without delay APA's meritless claim will aid the decisional process. No purpose is served by a stay of this litigation.

CONCLUSION

For the foregoing reasons, the defendants' motions to compel arbitration should be denied.

REQUEST FOR ORAL ARGUMENT

The plaintiff requests oral argument on the defendants' motions.

Dated: May 19, 2014.

Respectfully submitted,

/s/ William R. Wilder
William R. Wilder
BAPTISTE & WILDER, P.C.
1150 Connecticut Avenue, N.W., Suite 315
Washington, D.C. 20036
Telephone: (202) 223-0723
Facsimile: (202) 223-9677
wwilder@bapwild.com

Gary Silverman (*pro hac vice*)
Joy K. Mele (*pro hac vice*)
O'DWYER & BERNSTIEN, LLP
52 Duane Street, 5th Floor
Paul O'Dwyer Way
New York, New York 10007
Telephone: (212) 571-7100
Facsimile: (212) 571-7124
gsilverman@odblaw.com
jmele@odblaw.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing with supporting documents was served on counsel for the Defendants via the Court's Electronic Case Filing System on May 19, 2014.

/s/William R. Wilder
William R. Wilder