EXHIBIT B

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Don Addington, *et. al.*,

Plaintiffs,

v.

US Airline Pilots Association,

Defendant.

Case No.: CV-13-00471-PHX-ROS

US Airline Pilots Association's Response to US Airways' Motion for Summary Judgment Re: Claim Regarding McCaskill-Bond Statute

The standard of "fair and equitable" under Section 3 is directed to the outcome of the seniority integration. This conclusion is illustrated by the fact that the Civil Aeronautics Board ("CAB") reviewed seniority integration agreements under a duty of fair representation standard. It did not find that an agreement violated Section 3 merely because employees were not satisfied with the identity of their representative in the process, but only if the outcome was tainted by a breach of the DFR. *See e.g., Seaboard Acquisition,* 105 CAB 472, 476, 1983 WL 35470, at *4 (Dec. 15, 1983) ("an employee is bound by the resolution of the dispute by his authorized bargaining representatives, 'unless (he) can show that the resolution was tainted by the union's breach of its duty of fair representation.'"). This is consistent with the Ninth Circuit's holding that West Pilots have not been and cannot be injured in advance of a final seniority integration list incorporated in a final collective bargaining agreement. *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010).

The language of both the McCaskill-Bond statute and the labor protective provisions of Sections 3 and 13 incorporate the representational structure established by the RLA and make clear that where the employees are represented in collective bargaining, the collective bargaining agent is the only party participant in the process on behalf of the employees it represents. For example, the statute only applies in the event of the combination of RLA "crafts or classes" (the bargaining unit terminology utilized in the RLA, 45 U.S.C. § 152). 49 U.S.C. § 42112, note §117(a). Congress further identified its intent to respect the exclusive status of certified representatives under the RLA by providing that internal policies of a bargaining agent representing both groups "will not be affected by and will supersede the requirements" of the statute. 49 U.S.C. § 42112, note §117(a)(1). The language of this exemption makes clear that Congress, for purposes of McCaskill-Bond, adopted the familiar craft or class representational structure prescribed by the RLA. The choice of this language cannot be squared with US Airways'

assertion that McCaskill-Bond creates authority in this Court to designate a separate representative for a portion of the US Airways pilots in the seniority integration process agreed to by the four parties to the MOU. Rather, the statutory language demonstrates Congress' intent to recognize and leave undisturbed the affected employees' representation existing at the time of the covered transaction as determined under the RLA, not create a competing representational structure under McCaskill-Bond.

In addition, the language of the McCaskill-Bond statute also expressly provides that collective bargaining agreements "shall not be affected" by the statute so long as they are consistent with Sections 3 and 13 of the Alleghany-Mohawk provisions. 49 U.S.C. § 42112, note §117(a)(2). In turn, the language of Sections 3 and 13 make clear that it is the collective bargaining agents of the merging groups of employees together with the carrier that are to carry out the process. Section 3 expressly provides for agreement through collective bargaining between the carriers and the representatives of the employees affected. *See* 59 C.A.B. 45. The only parties to the collective bargaining process are the certified union and the carrier. There are no outside groups or employees permitted in that process. Further, the express language of Section 13 removes any doubt that only the respective unions of the two merging carriers are to participate along with the carrier. Thus, Section 13 expressly provides in the arbitration context that the fees "shall be borne equally by the carrier and (i) the organization or organizations representing employee or employees or (ii) *if unrepresented*, the employer or employees or group or groups of employees." (emphasis supplied). Clearly, under this language it is only where employees are unrepresented that they are contemplated to be participants in the process. Where they are represented, the provision refers only to the organizational representative. The only organization representing the pilots of US Airways in this case is USAPA. There is no other organization and no provision under Section 13 for including employees or groups of employees where the parties are represented in the

collective bargaining process. To do so would be inconsistent with McCaskill-Bond and violate the MOU. In short, there is nothing in the text of the McCaskill-Bond statute allowing separate representation of a part of a class or craft that is already represented. To the contrary, the language of both the statute and Sections 3 and 13 are clear that the bargaining representative is the only participant on behalf of employees within the class or craft it represents.

US Airways' contention that McCaskill-Bond's reference to the Section 3 and 13 provisions of the labor protective provisions established by the CAB supports the incorporation of CAB authority to interpret the requirements of McCaskill-Bond has been rejected by the only court of appeals to consider the statute. The Seventh Circuit Court of Appeals in *Committee of Concerned Midwest Flight Attendants v. Int'l Brotherhood of Teamsters,* 662 F.3d 954 (7th Cir. 2011), overturned a district court decision that had relied on interpretations of the labor protective protections ("LLPs") by the CAB to determine that the plaintiffs, former Midwest flight attendants, were not entitled to the protections of McCaskill-Bond.[2] On appeal, the Seventh Circuit rejected the district court's application of CAB precedent in its interpretation of the statute. It held that it is the language of the McCaskill-Bond statute itself that is controlling as to its application. 662 F.3d at 957-58.

Congress subjected the CAB to a "sunset" provision for its termination in the 1978 Airline Deregulation Act. Thereafter, the CAB's responsibilities for airline mergers, including the labor impact of such mergers, were transferred to the Department of Transportation ("DOT"). Following airline deregulation, the CAB, and later the DOT, adopted a policy that it would no longer impose labor protective provisions as a condition of transactions, but would instead leave the issue of labor protection to the collective

[2] *See Committee of Concerned Midwest Flight Attendants v. Int'l Brotherhood of Teamsters,* 2011 WL 94697 (E.D. Wisc. Jan. 10, 2011).

bargaining process. *See Air Line Pilots Assn. v. Department of Transp.*, 791 F.2d 172, 175 (D.C. Cir 1986). The CAB concluded that routine imposition of LPPs was inconsistent with a deregulated airline industry, and that the adverse impacts of transactions could be mitigated by collective bargaining. *Id.* at 175-76. Thus, decades before the passage of McCaskill-Bond, the agencies with regulatory authority over airline mergers had deferred to the collective bargaining process for labor issues in transactions.

Against this history of the LPPs following deregulation, US Airways offers nothing to support its contention that Congress vested this Court with authority to designate representatives in a Section 3 and 13 proceeding that the CAB itself had disclaimed decades earlier. As noted already, the statutory language of McCaskill-Bond reflects Congress' intent to *follow* the representational structure established for employees under the RLA. And it is the statutory language that is determinative of the application of McCaskill-Bond. US Airways' effort to enshrine McCaskill-Bond as an exception to the RLA should be rejected.

II. No CAB Decisions Undermined the Status of the Exclusive Bargaining Representative.

US Airways' reliance on CAB authority to manufacture a legal basis for overturning USAPA's exclusive representative status must fail. The CAB consistently recognized the representative of employees certified by the NMB, "Under the Railway Labor Act, the National Mediation Board (NMB) has exclusive jurisdiction to determine class or craft composition for airline employee bargaining units and representational rights." *National Acquisition,* 97 C.A.B. 565, 566, 1982 WL 35436, at *1 (Aug. 13, 1982). It refused the requests of groups of employees in a unionized craft or class for separate representation, holding that "[o]ur grant of independent arbitration rights to a group already covered by the LPPs and entitled to be represented in the seniority list integration proceedings would interfere with the established representation format and, in effect, set up another bargaining unit." *National Airlines Acquisition*, 84 C.A.B. at 476-