IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

APA REPLY BRIEF IN SUPPORT OF MOTION
TO COMPEL ARBITRATION AND STAY PROCEEDINGS

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INTRODUCTION

When USAPA, APA, US Airways and American Airlines (jointly, "**Company**") entered into the Memorandum Of Understanding Regarding Contingent Collective Bargaining Agreement ("**MOU**"), they agreed in Paragraph 10 to resolve any dispute regarding the integration of pilot seniority lists through arbitration before a panel of three arbitrators, with the arbitration hearing taking place once the parties had finalized a Joint Collective Bargaining Agreement ("**JCBA**"). They did so pursuant to the McCaskill-Bond Amendment, 49 U.S.C. § 42112, note § 117 ("**McCaskill-Bond**"), which permits parties covered by the statute to opt out of the default dispute resolution procedures prescribed by Section 13(a) of the *Allegheny-Mohawk* Labor Protective Provisions ("***Allegheny-Mohawk***"), by either entering into a collective bargaining agreement that allows for the same neutral arbitration protections afforded by *Allegheny-Mohawk* Sections 3 and 13, 49 U.S.C § 42112, note § 117(a)(2), or by mutually agreeing to an "alternative method for dispute settlement or an alternative procedure for selection of an arbitrator" under *Allegheny-Mohawk* Section 13(b). *See* Declaration of Wesley Kennedy ("**Kennedy Decl**."), Ex. A, ¶¶ 12, 14, 16.

Despite the fact that USAPA's own proposals when negotiating MOU Paragraph 10 described the process as a "McCaskill-Bond arbitration proceeding," Kennedy Decl. ¶ 13(b)-(d), and the fact that USAPA has taken the position in numerous court filings that Paragraph MOU 10 procedures govern seniority integration and are consistent with McCaskill-Bond,[1] USAPA

[1] Throughout the proceedings in *Addington v. US Airline Pilots Association*, CV-13-00471-PHX-ROS (D. Ariz 2013) ("***Addington III***"), USAPA – represented by the same counsel as in this action – consistently took the position that Paragraph MOU 10 procedures govern seniority integration and were consistent with the requirements of McCaskill-Bond. *See infra* at 13.

now argues that – in the absence of an executed Protocol Agreement pursuant to MOU Paragraph 10(f)[2] – the MOU's seniority integration provisions do *not* satisfy the requirements of

[2] USAPA itself bears responsibility for the parties' inability to execute a Protocol Agreement pursuant to MOU Paragraph 10(f). As APA stated its Memorandum in Support of Motion to Compel Arbitration ("**APA Mem.**"), Doc. 26-1, 6-7, in the negotiations over a Protocol Agreement, the parties reached agreement on nearly all aspects of the agreement, including a separate Paragraph 10(a) arbitration selection procedure proposed by USAPA. APA Mem. at 7. As USAPA emphasizes repeatedly in its Opposition to APA's Motion to Compel Arbitration, there was one outstanding dispute: USAPA would not agree that, when it ceases to have legal standing as a collective bargaining representative, APA would succeed as the collective bargaining representative for the pilots at the combined carrier and USAPA would cease to be a legal party to the Protocol. *See Plaintiffs' Opposition to Defendants' Motion to Compel Arbitration and Stay Proceedings* ("**Opp.**"), Doc. 28, at 3, 6, 13, 16.

The parties to this action have all acknowledged that, after the National Mediation Board decides that US Airways and American constitute a "single transportation system," APA will become the certified collective bargaining agent for all of the pilots of the merged airline. At that time, APA will be subject to a duty of fair representation toward all pilots, and USAPA will no longer have any such duty. Thus, it will fall to APA to determine how to ensure meaningful representation for the various disparate pilot groups. Accordingly, APA was unwilling to agree to a Protocol that would permit USAPA to block changes that APA may deem necessary to fulfill its duty of fair representation – particularly in light of the fraught history between USAPA and the America West pilots.

The position that APA now takes is precisely that which USAPA argued and won in *Addington III*. In that proceeding, USAPA argued that only the certified collective bargaining representative was the proper party to structure the seniority integration committees and that the "fair and equitable" standard from *Allegheny-Mohawk* is coincident with the duty of fair representation under the Railway Labor Act. *See* USAPA Response to US Airways Motion Regarding McCaskill-Bond, *Addington III*, Doc. 270 at 3, an excerpt of which is attached as Exh. B. After an intensive review of case law about the requirements of Allegheny-Mohawk and McCaskill-Bond, the *Addington III* Court agreed with USAPA that the certified collective bargaining representative would control the process. ECF No. 26-2, Stephens Decl., Exh. 11 (*Addington III*, 2014 WL 321349, *20-21 (D. Ariz. Jan. 10, 2014)).

In adopting USAPA's view, however, the court stated:

> "The Court 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. That is, having prevailed in convincing the Court that only the certified representatives should participate in seniority discussions, once USAPA is no longer a certified representative, it will change its position and argue entities other than certified representatives should be allowed to

McCaskill-Bond, were never intended to displace the Section 13(a) procedures, and thus have been effectively rendered inoperable. *See* Opp. at 5-6, 13-14, 18. USAPA therefore filed suit in this Court, seeking a declaration that *Allegheny-Mohawk* Section 13(a) (which prescribes an expedited hearing before a single arbitrator), and not the terms of the MOU, govern the seniority integration process. APA and the Company's counterclaims seek a declaration that the MOU's seniority integration provisions do satisfy McCaskill-Bond and therefore supersedes Section 13(a). Thus, it will ultimately fall to this Court to decide whether, pursuant to McCaskill-Bond and/or *Allegheny-Mohawk* Section 13(b), the MOU displaces the Section 13(a) procedure.

However, before the Court can evaluate whether the MOU affords the protections of *Allegheny-Mohawk* or constitutes an "alternative method for dispute settlement" and/or an "alternative procedure for selection of an arbitrator," it needs to know what the terms of the MOU provide. In particular, the Court needs to know what effect the absence of a signed MOU Paragraph 10(f) Protocol Agreement had on the operation of the other seniority integration provisions of MOU Paragraph 10. If, as a contractual matter, the absence of a signed Protocol Agreement or the failure to select arbitrators through a Protocol Agreement rendered ineffective the arbitrator-selection and hearing-schedule provisions of MOU Paragraph 10(a), that finding will fundamentally impact the analysis of whether the MOU satisfies the requirements of either McCaskill-Bond Section 117(a)(2) or *Allegheny-Mohawk* Section 13(b).

> participate. The Court's patience with USAPA has run out. . . . [W]hen USAPA is no longer the certified representative, it must immediately stop participating in the seniority integration."

Id. The court erred in only one respect: USAPA did not wait until it was no longer the certified representative to "change its position."

Though the above contractual questions are embedded in the parties' federal McCaskill-Bond claims, this Court lacks jurisdiction to construe the MOU. The Railway Labor Act ("**RLA**") makes arbitration the "mandatory, exclusive, and comprehensive system for resolving [so-called "minor"] disputes," *Bhd. of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 38 (1963), – that is, "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation," *Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246, 253 (1994) (quoting *Bhd. of R.R. Trainmen v. Chicago R. & I.R. Co.,* 353 U.S. 30, 33 (1957)). Thus, only the MOU's arbitral System Board has jurisdiction to interpret the MOU, and APA and the Company have accordingly submitted the questions of MOU construction to that body in the form of MTA Dispute No. 5. *See Oakey v. U.S. Airways Pilots Disability Income Plan*, 723 F.3d 227, 232 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 1513 (2014) (referral of minor disputes to arbitration is "a compulsory statutory obligation").

In order to give full effect to both the RLA's mandatory arbitration provisions and the parties' rights to adjudicate their statutory McCaskill-Bond claims in federal court, "the appropriate procedure is for the court to suspend its own proceedings. . . . [and] await the completion of the arbitration process because … arbitration, if had, may either resolve the entire controversy or at least aid in the solution by the court of the statutory contentions." *Air Line Pilots Ass'n v. Northwest Airlines, Inc.,* 627 F.2d 272, 278 (D.C. Cir. 1980)). *See also Tice v. Am. Airlines, Inc.*, 288 F.3d 313, 318 (7th Cir. 2002) (where "the meaning of the collective bargaining agreement bears tangentially though materially on the issue in the federal suit" 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.").

USAPA seeks to shirk its "compulsory statutory obligation" to arbitrate the embedded contract disputes presented by MTA Dispute No. 5, *Oakey*, 723 F.3d at 232, by arguing that it did not agree to arbitrate its statutory rights under McCaskill-Bond, that the McCaskill-Bond claims present no minor disputes, that the Court should determine arbitrability under the standards applicable to the Federal Arbitration Act and Fed. R. Civ. P. 56, and that the parties' statutory claims can and should be resolved on grounds unrelated to the proper construction of the MOU. Each of these contentions fails.

ARGUMENT

I. THE RLA MANDATES THAT EMBEDDED MOU CONTRACT DISPUTES BE RESOLVED THROUGH ARBITRATION BEFORE THE COURT DECIDES THE PARTIES' McCASKILL-BOND CLAIMS.

A. APA seeks to arbitrate only narrow questions of MOU interpretation, not statutory questions that arise under McCaskill-Bond.

USAPA contends that arbitration before the MOU's System Board is inappropriate here because, variously, the RLA does not preempt the parties' ability to enforce their respective McCaskill-Bond rights in federal court, Opp. at 9-10, the parties did not agree to submit McCaskill-Bond claims to arbitration, *id*. at 18-19, and it is the exclusive province of the Court to decide whether the MOU is valid under McCaskill-Bond, *id*. at 15-16. USAPA argues against a straw man. APA and the Company have not moved to compel arbitration of any statutory questions, nor do they challenge this Court's jurisdiction to decide the parties' McCaskill-Bond claims. APA Mem. at 16-18.

Rather, APA and the Company seek to arbitrate only the narrow questions set forth in MTA Dispute No. 5 regarding the proper construction and interpretation of the MOU. *See* APA

Mem. at 9-10, 16-18. Those questions are indisputably "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation," therefore, "minor disputes" subject to mandatory arbitration under the RLA. *Hawaiian,* 512 U.S. at 253 (1994). Once these underlying contract disputes are resolved, however, the task of interpreting and applying McCaskill-Bond in light of the arbitrator's findings will fall to this Court. *See Tice*, 288 F.3d at 318 ("[I]f the resolution of the [contract] dispute [through arbitration] does not resolve the issues in the suit, the suit can resume."). As such, USAPA's argument that only this Court has authority to decide whether the MOU displaces *Allegheny-Mohawk* Section 13(a) has no bearing on whether this action should be temporarily stayed pending resolution of the embedded MOU contract disputes by the MOU System Board.

B. The McCaskill-Bond claims contain embedded contract disputes that must be resolved by the MOU System Board.

USAPA also argues that the RLA's minor dispute provisions do not apply here because its claims "seek[] to enforce rights under McCaskill-Bond, not a collective bargaining agreement." Opp. at 12. USAPA articulates the wrong standard for determining the existence of a minor dispute.

Under the RLA, the mandatory minor dispute mechanism applies to any "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Hawaiian*, 512 U.S. at 253 (1994); 45 U.S.C. § 184. In *Consolidated Rail Corp. v. Railway Labor Execs. Ass'n* ("***Conrail***"), 491 U.S. 299, 307 (1989), the Supreme Court articulated a strong presumption of arbitrability for RLA disputes. *See Nat'l R.R. Passenger Corp. v. United Transp. Union*, 832 F. Supp. 7, 10 (D.D.C. 1993) (applying *Conrail*) ("There is a strong presumption in favor of finding the dispute to be "minor," and therefore subject to mandatory

arbitration…."). Furthermore, as *Conrail* explained, the party seeking to invoke the RLA's minor dispute mechanism has only a "'relatively light burden … [to] bear' in establishing exclusive arbitral jurisdiction under the RLA." *Conrail*, 491 U.S. at 307 (quoting *Bhd. of Maint. of Way Emps., Lodge 16 v. Burlington N. R. Co.*, 802 F.2d 1016, 1022 (8th Cir. 1986)). Thus, "the default position for courts is to deem a dispute minor [that is, arbitrable] if it even remotely touches on the terms of the relevant collective bargaining agreement. '[W]hen in doubt,' the courts are to 'construe disputes as minor [thus, arbitrable].'" *Bhd. of Maint. of Way Emps. v. Burlington N. Santa Fe Ry.*, 596 F.3d 1217, 1223 (10th Cir. 2010) (second alteration original) (quoting *Bhd. of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe Ry.,* 768 F.2d 914, 920 (7th Cir. 1985)).

In cases that require courts to balance the RLA's compulsory minor dispute mechanism with parties' rights to litigate federal claims in federal court, the D.C. Circuit has explained that arbitration is appropriate where the federal claim "involv[es] 'the application and interpretation of [a collective bargaining agreement],' for which arbitration [i]s compulsory under the RLA." *Oakey*, 723 F.3d at 233 (quoting *Northwest*, 627 F.2d at 274). In contrast, litigation can proceed in the judicial forum only where the statutory claims are "independent of … the meaning of [RLA agreement]." *Id*. (quoting *Northwest*, 627 F.2d at 274). *See also Tice*, 288 F.3d at 318 (where "the meaning of the collective bargaining agreement bears tangentially though materially on the issue in the federal suit," 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"); *Northwest,* 627 F.2d at 278 (staying federal proceedings pending the results of arbitration where

"arbitration, if had, may either resolve the entire controversy or at least aid in the solution by the court of the statutory contentions").

Here, while the parties' rights under McCaskill-Bond arise independently of the MOU, the resolution of statutory questions in this action will necessarily involve the interpretation of that agreement. As described above, to evaluate whether the MOU satisfies the requirements of either McCaskill-Bond Section 117(a)(2) or *Allegheny-Mohawk* Section 13(b), the Court needs to know the contractual effect of the parties' failure to execute a Protocol Agreement under MOU Paragraph 10(f). For example, USAPA contends that, in the absence of an executed Protocol Agreement, the MOU's seniority integration provisions are insufficient under McCaskill-Bond because they do not specify the identity of the three arbitrators who will serve on the seniority integration arbitration panel, and thus do not provide the protections afforded by Section 13(a) of the *Allegheny-Mohawk* LPPs. Opp. at 16. This argument rests on a disputed interpretation of the contract: APA and the Company do not agree that the MOU requires the arbitration panel to be identified exclusively through the Protocol Agreement, particularly given that arbitrator selection is addressed in Paragraph 10(a), not Paragraph 10(f). Under the RLA, only the MOU System Board has jurisdiction to decide the contractual significance of the parties' failure to select arbitrations through the Protocol Agreement mechanism – which is precisely why that question is one of the subjects of MTA Dispute No. 5.

Particularly in light of *Conrail*'s presumption of abitrability, this showing more than satisfies APA's "relatively light burden" to establish the existence of a minor dispute. Thus, jurisdiction over the contract disputes and statutory claims in this action is bifurcated. "In that situation the appropriate procedure is for the court to [order arbitration and] suspend its own

proceedings until the end of the arbitral process." *Northwest*, 627 F.2d at 278; *see also Tice*, 288 F.3d at 318.

II. FEDERAL ARBITRATION ACT STANDARDS AND RULE 56 DO NOT APPLY TO MOTIONS TO COMPEL ARBITRATION UNDER THE RLA.

USAPA contends that, in deciding whether to compel arbitration here, this Court should apply the standards applicable to voluntary arbitration agreements enforceable under the Federal Arbitration Act ("**FAA**"), 9 U.S.C. §§ 1-16, utilize the Fed. R. Civ. P. 56 standard of review applied in *PCH Mutual Insurance Co., Inc. v. Casualty and Surety, Inc.*, 569 F. Supp.2d 67 (D.D.C. 2008),[3] and deny Defendants' motions to compel arbitration given that the parties have not yet conducted discovery. Opp. at 7-8, 19-20. USAPA knows better: it routinely litigates cases seeking to compel arbitration under the RLA without invoking the strictures of Rule 56. *See, e.g., Addington III,* Doc. 44, 10-12, attached as Exh. C at 10-11 (excerpt from USAPA's Motion to Dismiss pursuant to Fed. R. Civ. P. 12 on the basis that Plaintiff's claim was a minor dispute committed to the exclusive jurisdiction of the MOU System Board).

The FAA cases on which USAPA relies are inapposite to the pending motions to compel arbitration under the RLA. As a preliminary matter, the FAA, by its terms, does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," including airline employees. 9 U.S.C. § 1; *Circuit City*

[3] USAPA also contends that, in making their motions to compel, APA and the Company were required to comply with LCvR 7(h), the local rule governing the form of motions for summary judgment motion in this Court. *See* Opp. at 8, n. 3. Because APA's motion to compel arbitration is not a motion for summary judgment – nor is it required to be, *see infra* – the strictures of LCvR 7(h) do not apply.

Stores, Inc. v. Adams, 532 U.S. 105, 121 (2001). Furthermore, the standard applied in FAA cases fundamentally differs from that which governs the RLA's mandatory minor dispute mechanism. Because the requirement to arbitrate in such cases derives solely from contract, the FAA permits a court to compel arbitration based on a voluntary agreement only "upon being satisfied that the making of the agreement for arbitration ... is not in issue." 9 U.S.C. § 4. Accordingly, in *PCH Mutual*, the court applied the summary judgment standard to a motion to compel arbitration under the FAA, and held the motion in abeyance pending discovery, because it could not determine on the existing record whether the parties had contracted to make arbitration mandatory, or merely permissive. *5*69 F. Supp.2d at 75.[4]

In contrast, an RLA System Board's exclusive jurisdiction over minor disputes is a function of statute: arbitration is the "mandatory, exclusive, and comprehensive system for resolving [minor] disputes." *Locomotive Eng'rs,* 373 U.S. at 38. Thus, as described above, the critical inquiry for determining arbitrability under the RLA is whether a dispute is deemed "minor" under the statutory standard, *i.e.*, whether it involves "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Hawaiian,* 512 U.S. at 253 (1994). Moreover, because mandatory RLA arbitration presents a threshold jurisdictional question frequently raised in Fed. R. Civ. P. 12(b)(1) motions to dismiss, *see Oakey*, 723 F.3d at

[4] In its Opposition, USAPA relies on *PCH Mutual* for proposition that Defendants have the burden to demonstrate the absence of genuine issues of material fact on the merits of the parties' statutory claims – *i.e.*, 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." Opp. at 7-8. In fact, *PCH Mutual* applied the Rule 56 standard only to the limited question of whether there are material facts in dispute regarding the parties' agreement to commit the underlying dispute to arbitration. *5*69 F. Supp.2d at 72-73. Thus, USAPA both invokes the wrong standard and misapplies it.

237, courts routinely evaluate the existence of a minor dispute well before any discovery has taken place, without applying the Rule 56 standard of review. *See*, *e.g.*, *Northwest*, 627 F.2d at 274 (finding a minor dispute subject to mandatory arbitration on a motion to dismiss); *Oakey*, 723 F.3d at 231 (same). Likewise, here, no additional discovery is necessary to resolve the motions to compel arbitration currently before the Court.

III. USAPA'S McCASKILL-BOND ARGUMENTS ARE WRONG AND DEMONSTRATE THAT MOU PARAGRAPH 10 MUST BE INTERPRETED PRIOR TO ADJUDICATION OF THE PARTIES' STATUTORY CLAIMS.

A. USAPA's arguments that the MOU does not satisfy the requirements of McCaskill-Bond Section 117(a)(2) or Allegheny-Mohawk Section 13(b) rest on disputed interpretations of the MOU.

USAPA asserts that arbitration of MTA Dispute No. 5 is unnecessary, because the parties' McCaskill-Bond claims can be resolved as a statutory matter without resolving the underlying contract disputes. USAPA's statutory arguments, however, are either without merit or themselves rest on contested assertions regarding the proper construction of the MOU.

USAPA argues that MOU Paragraph 10 was not an agreement pursuant to McCaskill-Bond Section 117(a)(2) because it does not include a method of arbitration selection and therefore fails to provide for the protections of *Allegheny-Mohawk*. Opp. at 16-17. As described above, however, *see supra* at 8, this assertion is based on a contested issue of contract interpretation: whereas USAPA claims that arbitrator selection was to occur only by means of an MOU Paragraph 10(f) Protocol Agreement, APA and the Company contend that arbitrator selection was also addressed in MOU Paragraph 10(a), and that a Paragraph 10(f) Protocol Agreement is not a necessary pre-requisite for selection of the three-arbitrator panel. That dispute is among the subjects of MTA Dispute No. 5.

USAPA also contends that the phrase in MOU Paragraph 10(a) indicating that the seniority-integration process will be "consistent with McCaskill-Bond," and the reference in Paragraph 10(e) to the "obligations imposed by McCaskill-Bond," confirm that the parties to the MOU did not intend for the MOU Paragraph 10 procedures to supersede those of *Allegheny-Mohawk* Section 13(a). APA and the Company disagree with that interpretation of the MOU. Rather, they contend that MOU Paragraph 10's references to McCaskill-Bond were included because the parties agreed that that the American-US Airways merger would be a "covered transaction" involving "covered employees" within the meaning of the statute. Kennedy Decl. ¶ 12. Thus, yet again, what USAPA asserts is a purely statutory claim rests on a disputed contractual matter reserved for the exclusive jurisdiction of the MOU's System Board.

USAPA also argues that MOU Paragraph 10 does not constitute an "alternative method of arbitrator selection" under the meaning of *Allegheny-Mohawk* Section 13(b). Opp. at 17. As discussed above, however, the question of what the MOU requires with respect to arbitrator selection is a disputed matter of contract. Accordingly, the Court cannot evaluate USAPA's statutory argument until the underlying contract dispute is resolved by the MOU System Board.

Finally, USAPA also argues that MOU Paragraph 10 cannot be "alternative method for dispute settlement" because, according to USAPA, the "alternative method for dispute settlement" must be something other than arbitration. Opp. at 17. This position, for which USAPA cites no authority, directly conflicts with past practice in airline merger cases arising under McCaskill-Bond and/or *Allegheny-Mohawk* Sections 3 and 13: all Section 13(b) agreements establishing an "alternative method for dispute settlement" consist of an arbitration process, albeit on terms from those prescribed by *Allegheny-Mohawk* Section 13(a). Kennedy

Decl. ¶¶ 6-7. Here, the MOU provides just such an alternative method to the *Allegheny-Mohawk* Section 13(a) procedures, namely a three-arbitrator panel on an alternative hearing schedule.

The above amply demonstrates why, in this circumstance, it is appropriate for this Court to compel the parties to arbitrate the minor disputes embedded within their McCaskill-Bond claims and stay these proceedings pending the results of that arbitration.

B. Before it filed this suit, USAPA itself took the position – including in numerous court filings – that MOU Paragraph 10 governed the seniority integration process and was consistent with McCaskill-Bond.

USAPA asserts that "[t]he 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 [under *Allegheny-Mohawk*] was on March 21, 2014 when the defendants filed their Counterclaims against USAPA." Opp. 3-4. This is curious given that USAPA itself, represented by the same counsel as in this action, took that very position in *Addington III*. Indeed, USAPA's court filings in that proceeding belie its current position that the MOU did not and was never intended to displace the *Allegheny-Mohawk* Section 13(a) procedures:

- In USAPA's Reply Memorandum in Support of Motion for Summary Judgment, USAPA contended that "the procedures in [MOU] ¶ 10 provide the exclusive means for integrating seniority" and that disputes over the MOU are subject to mandatory arbitration under the RLA. *Addington III*, Doc. 279 at 4 and n.6 (11/19/13). An excerpt from USAPA's Reply Memorandum is attached as Exh. D.

- In its "Controverting Statement of Facts and Additional Statement of Undisputed Facts," USAPA disputed the suggestion that "the process is anything other than a collectively bargained process set forth [in Paragraph 10] in the MOU that is consistent with McCaskill-Bond. It is a contractual seniority integration process." *Addington III*, Doc. 269, ¶ 12 at 5-6; ¶ 8 at 4-5 (citing testimony in the record). An excerpt from USAPA's Controverting Statement of Facts and Additional Statement of Undisputed Facts is attached as Exh. E.[1]

- USAPA's Separate Statement of Facts Pursuant to Local Rule 56.1 quotes at length from US Air's Statement of Undisputed Facts that "The [MOU] Paragraph 10 process provides for seniority-list integration in accordance with the standards and procedures of the federal McCaskill-Bond law, and that process will not even begin until after the merger has been consummated." *Addington III*, Doc. 213, ¶ 101 at 20. USAPA's Separate Statement is attached as Exh. F. USAPA's Statement further recites the timeline for the seniority arbitration to which USAPA had agreed, ¶¶70-71, as well as its agreement that arbitration proceed "before a panel of three neutral arbitrators[,]" ¶ 69.

Given that, before filing this action, USAPA repeatedly and consistently took the position that MOU Paragraph 10, and not *Allegheny-Mohawk* Section 13(a), governed the seniority integration process, and that the MOU's seniority integration provisions were consistent with McCaskill-Bond, USAPA's revisionist history regarding the parties' intent in agreeing to MOU Paragraph 10 cannot be credited.

C. The negotiating history of the MOU confirms that the parties intended MOU Paragraph 10 to displace the default procedures of Allegheny-Mohawk Section 13(a).

Despite USAPA's assertions to the contrary, *see* Opp. at 3, 16-18, the MOU's negotiating history confirms that the parties intended the MOU Paragraph 10 procedures to displace those of *Allegheny-Mohawk* Section 13(a). Throughout the negotiations over the text of MOU Paragraph 10, every proposal for the arbitration of seniority list integration contemplated a different procedure from that provided in *Allegheny-Mohawk* Section 13(a). Kennedy Decl. ¶ 14. In particular, every proposal contemplated a panel of more than one arbitrator, and every proposal provided for an arbitration schedule that commenced more than 20 days following the onset of the dispute and ended more than 90 days following the onset of the dispute. *Id*. If, as USAPA suggests, the MOU was merely an "agree[ment] to agree," Opp. at 18, and the parties understood that the *Allegheny-Mohawk* Section 13(a) timelines and arbitration panel structure would govern

unless they executed an additional "seniority integration process agreement" at some later point, *id*., there would have been no reason to negotiate and include an alternative procedures in the MOU.

Indeed, in the course of the MOU negotiations, "no negotiator for USAPA or any other party ever suggested that the MOU did not constitute an 'alternative method of dispute settlement' under [Allegheny-Mohawk] Section 13(b)…, or that in the absence of a further 'protocol' the procedures of Section 13(a) … would apply instead." Kennedy Decl. ¶ 16. Indeed, USAPA's own proposals for the arbitration of seniority list integration describe such arbitration as a "McCaskill-Bond arbitration proceeding," *id*. at ¶ 13(b)-(d), confirming that USAPA itself understood such alternative arrangements to be consistent with the requirements of McCaskill-Bond.

CONCLUSION

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

Dated: May 30, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2014 a copy of the foregoing was electronically filed via the Court's ECF System. Notice of this filing will be sent to all parties of record by operation of the Court's electronic filing system.

/s/ Edgar N. James
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