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9 **IN THE UNITED STATES DISTRICT COURT**

10 **FOR THE DISTRICT OF ARIZONA**

11 Don ADDINGTON; John BOSTIC;  
12 Mark BURMAN; Afshin IRANPOUR;  
13 Roger VELEZ; Steve WARGOCKI;  
14 Michael J. SOHA; Rodney Albert  
15 BRACKIN; and George MALIGA, on  
16 behalf of themselves and all  
17 similarly situated former America  
18 West pilots,

*Plaintiffs,*

18 vs.

19 US AIRLINE PILOTS ASS'N, an  
20 unincorporated association; and  
21 US AIRWAYS, INC., a Delaware  
22 corporation,

*Defendants.*

CASE NO.

**COMPLAINT FOR  
DECLARATORY JUDGMENT ON  
DUTY OF FAIR  
REPRESENTATION AND ORDER  
ENJOINING PILOT  
INTEGRATION THAT DOES NOT  
USE THE NICOLAU AWARD  
SENIORITY LIST**

23 Plaintiffs Don Addington, John Bostic, Mark Burman, Afshin  
24 Iranpour, Roger Velez, Steve Wargocki, Michael J. Soha, Rodney Albert  
25 Brackin, and George Maliga file this complaint to enjoin Defendants from  
26 integrating the pilot operations in a manner that breaches Defendant  
27 USAPA's duty of fair representation.

28 For their Complaint, Plaintiffs allege as follows:

**INTRODUCTION AND PARTIES**

1  
2 1. In 2005, US Airways (a bankruptcy debtor) and America West  
3 Airlines merged to form a new airline also called US Airways.

4 2. The pilots on both sides of that merger (the “East Pilots” from  
5 US Airways and the “West Pilots” from America West) agreed to an  
6 arbitrated merger of their separate seniority lists.

7 3. That arbitration was conducted by George Nicolau and an  
8 award creating a merged seniority list (the “Nicolau Award”) was  
9 announced in May 2007.

10 4. The East Pilots immediately repudiated their agreement to treat  
11 the Nicolau Award as final and binding.

12 5. In mid 2007, the East Pilots formed a single-airline union,  
13 Defendant US Airline Pilots Association (“USAPA”), to oust the multi-  
14 airline union that was representing these pilots, the Airline Pilots  
15 Association (“ALPA”).

16 6. At the time, ALPA (which they could not control) was ordering  
17 the east Pilots to use the Nicolau Award list.

18 7. The East Pilots formed USAPA and ousted ALPA because their  
19 majority status in the post-merger airline allowed them to control a  
20 single-airline union that only represented US Airways pilots.

21 8. In April 2008, USAPA succeeded ALPA as the bargaining  
22 representative.

23 9. Under East Pilot control, USAPA also repudiated the agreement  
24 to honor the Nicolau Award.

25 10. The West Pilots have been engaged in litigation with USAPA  
26 since October 2008 to defend the Nicolau Award.

27 11. Most recently, USAPA entered into a contract with US Airways  
28 that further repudiates USAPA’s duty to honor the Nicolau Award.

1 12. This action seeks an order enjoining USAPA from taking any  
2 steps to integrate pilot operations that does not implement the seniority  
3 order set out in the Nicolau Award.

4 13. Plaintiff Don Addington is a resident of the State of Arizona, who  
5 at all times relevant to this Complaint, has been a West Pilot.

6 14. Plaintiff John Bostic is a resident of the State of Arizona, who at  
7 all times relevant to this Complaint, has been a West Pilot.

8 15. Plaintiff Mark Burman is a resident of the State of Florida, who  
9 at all times relevant to this Complaint, has been a West Pilot.

10 16. Plaintiff Afshin Iranpour is a resident of the State of Arizona,  
11 who at all times relevant to this Complaint, has been a West Pilot.

12 17. Plaintiff Roger Velez is a resident of the State of Arizona, who at  
13 all times relevant to this Complaint, has been a West Pilot.

14 18. Plaintiff Steve Wargocki is a resident of the State of Arizona,  
15 who at all times relevant to this Complaint, has been a West Pilot.

16 19. Plaintiff Michael J. Soha is a resident of Washington State, who  
17 at all times relevant to this Complaint, has been a West Pilot.

18 20. Plaintiff Rodney Albert Brackin is a resident of Arizona, who at  
19 all times relevant to this Complaint, has been a West Pilot.

20 21. Plaintiff George Maliga is a resident of Arizona, who at all times  
21 relevant to this Complaint, has been a West Pilot.

22 22. Defendant USAPA is an unincorporated association with a  
23 principal place of business in Charlotte, North Carolina.

24 23. Defendant US Airways, Inc., is a Delaware corporation having  
25 its principal place of business in Tempe, Arizona.

26 24. The Allied Pilots Association (“APA”) is an unincorporated  
27 association with a principal place of business in Fort Worth, Texas.

28 25. APA is not named as a defendant.

1 26. AMR Corporation (“AMR”), a Delaware corporation with a  
2 principal place of business in Fort Worth, Texas, is currently a Chapter  
3 11 debtor.

4 27. AMR is not named as a defendant.

5 **JURISDICTION AND VENUE**

6 28. This Complaint asserts a claim arising under the Railway Labor  
7 Act, 45 U.S.C. § 151, *et seq.*, and seeks declaratory judgment pursuant  
8 to 28 U.S.C. § 2801, and injunctive relief pursuant to Federal Rule of  
9 Civil Procedure 65(b).

10 29. This Court has original federal question jurisdiction over the  
11 claim against Defendants USAPA and US Airways pursuant to 28 U.S.C.  
12 § 1331.

13 30. Venue is proper in the District of Arizona, pursuant to 28 U.S.C.  
14 § 1391(b), because:

15 a) A substantial part of the events or omissions giving rise to  
16 the claims occurred in that judicial district; or were  
17 directed at affecting one or more Plaintiffs residing in that  
18 district; and/or

19 b) The principal place of business of Defendant US Airways is  
20 situated in that judicial district.

21 31. Any requirement to exhaust intra-union hearing procedures is  
22 satisfied because internal union remedies here are inadequate or illusory  
23 and because exhaustion would be futile due to USAPA’s consistent  
24 position in opposition to Plaintiffs.

25 32. This action became ripe on or about February 13, 2013, when  
26 USAPA, APA, US Airways and AMR entered into the *Memorandum of*  
27 *Understanding Regarding Contingent Collective Bargaining Agreement in*  
28

1 which USAPA dishonors the Nicolau Award without any legitimate union  
2 purpose for doing so, in breach of its duty of fair representation.

3 **FACTUAL ALLEGATIONS**

4 33. In May 2005, the former US Airways was in Chapter 11  
5 bankruptcy for the second time in two years.

6 34. The US Airways reorganization plan called for it to merge with  
7 America West to form a new airline that would also be known as US  
8 Airways, pursuant to a contract referred to as the "Transition  
9 Agreement."

10 35. At the time of the merger, there were significant differences  
11 between the two airlines and their pilot groups.

12 36. US Airways was a larger airline; including pilots on furlough,  
13 East Pilots outnumbered West Pilots, approximately 5,100 to 1,900.

14 37. All of the West Pilots were active (had flying jobs).

15 38. In contrast, approximately 1,700 of the East Pilots were on  
16 furlough.

17 39. At the time of the merger, the Air Line Pilots Association  
18 ("ALPA") represented both pilot groups.

19 40. Under ALPA governance, each pilot group was represented by a  
20 Master Executive Council ("MEC").

21 41. The chairmen of each ALPA MEC signed the Transition  
22 Agreement on behalf of their pilot groups.

23 42. The Transition Agreement provided, among other things, that  
24 the pilot groups would create a single integrated seniority list according  
25 to defined procedures set out in detail in the ALPA constitution and  
26 called "ALPA Merger Policy."  
27  
28

1 43. Pursuant to ALPA Merger Policy, the single integrated seniority  
2 list would be created by two Merger Committees, appointed by each MEC  
3 and representing the pilot group governed by that MEC.

4 44. Under ALPA Merger Policy, if the Merger Committees cannot  
5 negotiate or mediate seniority integration they proceed to arbitration.

6 45. The purpose of such arbitration is to determine a “final and  
7 binding,” “fair and equitable” seniority integration.

8 46. The two pilots groups, East and West, proceeded into  
9 arbitration.

10 47. The East Merger Committee argued in the arbitration that the  
11 East Pilots on furlough at the time of the merger were entitled to  
12 seniority rights based upon their dates of hire at US Airways, even if that  
13 would put hundreds of them ahead of West Pilots who were not on  
14 furlough.

15 48. The West Merger Committee argued that West Pilots who had  
16 been active at the time of the merger should be placed ahead of East  
17 Pilots who were on furlough at the time of the merger.

18 49. Subject to predefined conditions that protected its economic  
19 interests, US Airways agreed in advance to accept the outcome of the  
20 arbitration as the final resolution of this seniority integration dispute.

21 50. Mr. Nicolau issued his decision on May 1, 2007, in a document  
22 referred to as the Nicolau Award.

23 51. Mr. Nicolau rejected the date-of-hire integration advocated by  
24 the east Pilots because “merging active pilots with furloughees, despite  
25 the length of service of some of the latter, is not at all fair or equitable  
26 under any of the stated criteria.”

27 52. The Nicolau Award created an integrated seniority list that  
28 placed approximately 500 of the most senior East Pilots at the top of the

1 list because they flew wide-body aircraft and no West Pilot flew such  
2 aircraft.

3 53. At the other end, the Nicolau Award placed all East Pilots who  
4 were on furlough when the airlines merged at the bottom of the list  
5 because they did not bring jobs to the merger.

6 54. The Nicolau Award blended the remainder of the two pilot lists.

7 55. On December 20, 2007, the Airline accepted the Nicolau Award  
8 integrated seniority list.

9 56. The East MEC appealed to ALPA's Executive Committee to  
10 overturn the Nicolau Award.

11 57. ALPA's Executive Committee ordered the East Pilots to  
12 implement the Nicolau Award.

13 58. In May 2007, East Pilot Stephen Bradford began to plan to  
14 create a new union (USAPA) to oust ALPA.

15 59. Upon information and belief, Mr. Bradford envisioned that East  
16 Pilots would control USAPA because they were in the majority.

17 60. Upon information and belief, Mr. Bradford reasoned that  
18 USAPA, unlike ALPA, would "protect" East Pilot interests over those of  
19 the West Pilots.

20 61. A representation election between USAPA and ALPA was held in  
21 early 2008.

22 62. USAPA won the election and began to represent a bargaining  
23 unit comprised of both pilot groups on April 18, 2008.

24 63. Later in 2008, USAPA presented, and to this day has not  
25 withdrawn, a date-of-hire seniority proposal to US Airways—a proposal  
26 that would put hundreds of West Pilots below the East pilots who were  
27 on furlough at the time of the merger.

28

1 64. USAPA consistently expresses that it has no intention to ever  
2 consider implementing the Nicolau Award list.

3 65. On September 4, 2008, six West Pilots filed an action in the  
4 District of Arizona, alleging that USAPA breached the duty of fair  
5 representation (“DFR”) by refusing to implement the Nicolau Award list  
6 for improper reasons.

7 66. After a 10-day trial, a jury found that USAPA breached the DFR  
8 because its sole reason to frustrate implementation of the Nicolau Award  
9 was to benefit East Pilots, rather than to benefit the bargaining union as  
10 a whole.

11 67. The District Court (Judge Wake) ruled: “The West Pilots remain  
12 entitled to a union that will not abrogate the Nicolau Award without a  
13 legitimate purpose. Any waiver of that right must be consensual.”

14 68. The District Court permanently enjoined and ordered USAPA to:

- 15 a) Make all reasonable efforts to negotiate and implement a  
16 single CBA that will implement the Nicolau Award seniority  
17 proposal;  
18 b) Make all reasonable efforts to support and defend the  
19 Nicolau Award in negotiations with US Airways; and  
20 c) Not negotiate for separate collective bargaining agreements  
21 for the separate pilot groups.

22 69. The Ninth Circuit vacated the District Court order on the basis  
23 that the dispute was not ripe.

24 70. Notwithstanding finding lack of ripeness, the Ninth Circuit  
25 cautioned USAPA that unless it “bargain[ed] in good faith pursuant to its  
26 DFR, with the interests of all members—both East and West—in mind,”  
27 there would be “an unquestionably ripe DFR suit, once a contract is  
28 ratified.”



1 71. On Jul 27, 2010, US Airways filed a declaratory judgment  
2 action, claiming that it required guidance, *inter alia*, as to whether it  
3 would be liable if it entered into a collective bargaining agreement with  
4 USAPA that did not implement the Nicolau Award.

5 72. The District Court (Judge Silver) certified a class with these  
6 Plaintiffs as class representatives.

7 73. The District Court found that the Ninth Circuit's ripeness ruling  
8 constrained it from providing US Airways full guidance, stating that  
9 "[p]ursuant to the Ninth Circuit's decision, any claim for breach of the  
10 duty of fair representation will not be ripe until a collective bargaining  
11 agreement is finalized."

12 74. Nonetheless, the District Court provided important guidance by  
13 ruling that USAPA's date-of-hire "seniority proposal" would "breach its  
14 duty of fair representation" unless it were "supported by a legitimate  
15 union purpose."

16 75. The District Court provided additional guidance with the  
17 following rulings:

- 18 a) "[D]ecertification of ALPA and the certification of USAPA did  
19 not change the binding nature of the Transition  
20 Agreement";
- 21 b) "Discarding the Nicolau Award places USAPA on dangerous  
22 ground"; and
- 23 c) "When the collective bargaining agreement is finalized  
24 individuals will be able to determine whether USAPA's  
25 abandonment of the Nicolau Award was permissible, *i.e.*,  
26 supported by a legitimate union purpose."

27 76. USAPA did not appeal.

28 77. AMR filed a Chapter 11 petition on November 29, 2011.

1 78. On or about February 14, 2013, the two Defendants, APA and  
2 AMR entered into the *Memorandum of Understanding Regarding*  
3 *Contingent Collective Bargaining Agreement* (the “MOU”) that set the stage  
4 for a merger between US Airways and AMR.

5 79. The MOU was ratified by 75% of USAPA’s membership on  
6 February 8, 2013.

7 80. The MOU provides substantially improved wages to the East  
8 Pilots.

9 81. The MOU provides that seniority integration between pilots of  
10 US Airways and American will be done according to the McCaskill-Bond  
11 Amendment to the Federal Aviation Act.

12 82. The MOU does not address the Nicolau Award or any aspect of  
13 East-West seniority integration.

14 83. Remaining aspects of the pilot collective bargaining agreement  
15 that will be used in the merger will be determined and implemented  
16 without requiring approval by USAPA or additional ratification by its  
17 members.

18 84. Upon information and belief, USAPA considers itself absolutely  
19 bound to repudiate the Nicolau Award by its constitutional date-of-hire  
20 agenda.

21 **CLASS ACTION ALLEGATIONS**

22 85. Plaintiffs bring this action, pursuant to Rule 23 of the Federal  
23 Rules of Civil Procedure, on their own behalf and on behalf of the West  
24 Pilot Class of all persons similarly situated.

25 86. The West Pilot Class is defined as: All pilots who are on the  
26 America West seniority list currently incorporated into the West CBA.

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1 87. Because the West Pilot Class has approximately 1600 members,  
2 the class is so numerous that joinder of all such persons is  
3 impracticable.

4 88. There exist common questions of law and fact affecting the  
5 members of the putative West Pilot Class.

6 89. The standing of the named Plaintiffs to enjoy and protect the  
7 seniority rights established by the Nicolau Award arise from their status  
8 as West Pilots and is, therefore, the same as that for any other West  
9 Pilot.

10 90. The named Plaintiffs will fairly and adequately represent the  
11 interests of the putative West Pilot Class because:

12 a) They have moral and financial support from many West  
13 Pilots;

14 b) One or more of them will suffer the kind of injuries that  
15 will be suffered by other West Pilots if seniority  
16 integration is done using USAPA's date-of-hire seniority  
17 list;

18 and

19 c) They each have a good understanding of the issues  
20 underlying this litigation and have demonstrated a  
21 willingness to invest the necessary time and efforts to  
22 fulfill their duties as representative parties.

23 91. Material questions of law and fact arising from this action are  
24 common to the named Plaintiffs and other members of the putative West  
25 Pilot Class; these include the following:

26 a) Whether the named Plaintiffs and other West Pilots have  
27 standing to obtain the relief requested in this action;

28

- 1           b) Whether the MOU violates USAPA’s duty of fair
- 2           representation;
- 3           c) Whether USAPA and US Airways are subject to
- 4           injunctive remedy to prevent seniority integration that
- 5           does not implement the Nicolau Award list; and
- 6           d) Whether under common benefit doctrine USAPA must
- 7           pay Plaintiffs’ reasonable litigation expenses that have
- 8           been incurred enforcing USAPA’s duty of fair
- 9           representation, including attorneys’ fees?

10           92. All West Pilots have the right, under the RLA, to fair union

11           representation.

12           93. All West Pilots have an interest in USAPA adhering to its duty of

13           fair representation by adopting and promoting the arbitrated compromise

14           of a seniority dispute that all had agreed would be final and binding.

15           94. Plaintiffs have retained counsel experienced in class action

16           litigation to prosecute these claims.

17           95. This action merits class action treatment because the factors

18           enumerated herein satisfy the requirements of Rule 23(a) and Rule

19           23(b)(1)(A).

20   **CAUSES OF ACTION**

21           **I.    Claim One: Breach of the Duty of Fair Representation**

22           96. Plaintiffs re-allege each and every allegation set forth above as

23           if fully set forth herein.

24           97. Pursuant to the duty of fair representation, USAPA must have a

25           legitimate union purpose to use anything other than the Nicolau Award

26           list to integrate East Pilots and West Pilots.

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1 98. USAPA does not have a legitimate union purpose to use  
2 anything other than the Nicolau Award list to integrate East Pilots and  
3 West Pilots.

4 99. USAPA, therefore, breached the duty of fair representation by  
5 entering into the MOU with the firm intention of using a date-of-hire  
6 seniority list rather than the Nicolau Award list.

7 100. Plaintiffs are entitled to a declaratory judgment to that effect  
8 and to other remedy sought below.

9 **II. Claim Two: Breach of Transition Agreement by US Airways**

10 101. Plaintiffs re-allege each and every allegation set forth above as if  
11 fully set forth herein.

12 102. The Transition Agreement had an implied covenant of good faith  
13 and fair dealing.

14 103. The Transition Agreement envisioned a "Single Agreement" that  
15 would be made by US Airways and USAPA that would replace material  
16 terms in the separate contracts governing the employment of the West  
17 Pilots (the West CBA) and the East Pilots (the east CBA).

18 104. That implied covenant constrained the terms of the Single  
19 Agreement such that it could not provide materially improved wages for  
20 US Airways pilots (East and West) without also providing terms needed to  
21 integrate pilot operations consistent with the Transition Agreement.

22 105. The MOU is a single agreement that provides materially  
23 improved wages for US Airways pilots (East and West).

24 106. The MOU fails to provide terms needed to integrate pilot  
25 operations.

26 107. The Transition Agreement requires that pilot seniority will be  
27 implemented using to the integrated seniority list created according to  
28 ALPA Merger Policy and accepted by US Airways – the Nicolau Award list.

1 108. The MOU fails to provide that pilot seniority will be  
2 implemented using the Nicolau Award list.

3 109. Based on the forgoing, adopting the MOU is a breach of the  
4 Transition Agreement implied covenant.

5 110. Despite vigorous protests by the West Pilots, USAPA refuses to  
6 assert breach of the Transition Agreement implied covenant.

7 111. This Court, consequently, has hybrid jurisdiction to hear this  
8 implied covenant claim that would otherwise be a minor dispute subject  
9 to system board arbitration.

10 112. Plaintiffs are entitled to a declaratory judgment that the MOU is  
11 a breach of the Transition Agreement implied covenant by US Airways.

12 **III. Claim Three: Attorneys' Fees**

13 113. Plaintiffs re-allege each and every allegation set forth above as  
14 if fully set forth herein.

15 114. USAPA has several million dollars in reserve collected as dues  
16 and agency fees from all US Airways Pilots.

17 115. Plaintiffs brought this action and the 2008 action and appeared  
18 as defendants in the 2010 action to vindicate the right of all US Airways  
19 pilots to fair representation by USAPA.

20 116. By obtaining the rulings in the 2008 and 2010 actions and by  
21 prevailing in this action, Plaintiffs conferred a substantial benefit on all  
22 US Airways Pilots.

23 117. Under common benefit doctrine, the expenses of achieving  
24 those benefits should, in all fairness, be spread among all those who so  
25 benefitted.

26 118. The expenses of achieving those benefits would be fairly spread  
27 among all US Airways Pilots if paid by USAPA.

28

1 119. The Court should, therefore, make an award in favor of  
2 Plaintiffs and against USAPA for all reasonable litigation expenses,  
3 including attorneys' fees incurred bringing this action, incurred by  
4 Plaintiffs in the actions noted above.

5 **IV. Prayer for Relief**

6 Plaintiffs respectfully ask the Court for the following relief:

7 120. Judgment that USAPA violated the duty of fair representation  
8 by, among other things, entering into a contract, the MOU, that provided  
9 substantially better wages for East Pilots without requiring their  
10 agreement to implement the Nicolau Award list;

11 121. Judgment that USAPA is continuing to violate the duty of fair  
12 representation by insisting that it will use a date-of-hire seniority list  
13 rather than the Nicolau Award list;

14 122. Judgment that US Airways, with the consent of USAPA, is in  
15 breach of the implied covenant of the Transition Agreement;

16 123. An injunction requiring Defendants to conduct seniority  
17 integration according to the MOU procedures but using the seniority  
18 order in the Nicolau Award list to order the US Airways pilots; and

19 124. Judgment awarding Plaintiffs the reasonable litigation  
20 expenses, including attorneys fees, incurred since 2008 protecting the  
21 fair representation rights of the US Airways Pilots.

22 Dated this 6th day of March, 2013.

23 **POLSINELLI SHUGHART, PC**

24 */s/ Andrew S. Jacob*

25 By \_\_\_\_\_

26 Marty Harper

27 Andrew S. Jacob

28 Jenifer Axel

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*Attorneys for West Pilots*

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**VERIFICATION**

STATE OF ARIZONA    )  
                                  ) ss  
County of Maricopa    )

Roger Velez, a Plaintiff In this action, being first duly sworn, upon his oath, deposes and says:

I, Roger Velez verify this Complaint on behalf of the other named Plaintiffs in this matter and declare, under penalty of perjury, pursuant to A.R.S. § 13-2702, that I have read the foregoing Complaint, and know the contents thereof; and the matters set forth therein appear to be true to the best of my own knowledge and information, except to the matters stated herein on information and belief, and that as to those matters, I believe the complaint to be true.

Dated this 6th day of March, 2013.



SUBSCRIBED AND SWORN TO before me this 6th day of March, 2013.

  
Notary Public

My commission expires:

7/3/2015

