Marty Harper (#003416)
mharper@polsinelli.com
Andrew S. Jacob (#22516)
ajacob@polsinelli.com
Jennifer Axel (#023883)
jaxel@polsinelli.com
POLSINELLI SHUGHART, P.C.
CityScape
One East Washington St., Suite 1200
Phoenix, AZ 85004
Phone: (602) 650-2000
Fax: (602) 264-7033
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don ADDINGTON; *et al.*, *Plaintiffs*, vs. US AIRLINE PILOTS ASS'N, *et al.*, *Defendants.*	CASE NO. 2:13-CV-00471-PGR **Motion for a Preliminary Injunction Enjoining Defendants (and their Successors) From Integrating Pilot Seniority Without Using the Nicolau Award List to Define the Relative Seniority of US Airways Pilots.**

Plaintiffs file this motion for a preliminary injunction enjoining Defendants (and their successors) from integrating pilot seniority without using the Nicolau Award list to define the relative seniority of US Airways pilots. This motion is supported by the *Memorandum of Points and Authorities* that follows, a *Separate Statement of Facts*, and a declaration supporting exhibits to that statement.

Dated this 26th day of March, 2013.

POLSINELLI SHUGHART, PC

/s/ Andrew S. Jacob
By _____
Marty Harper
Andrew S. Jacob
Jennifer Axel
Attorneys for Plaintiffs

TABLE OF CONTENTS

I. Overview 1

II. Background 2

A. America West Merger 2

B. Seniority Integration 3

C. Creation and Misuse of a Union 4

D. Prior Litigation 6

E. American Airlines Merger 7

F. Breach of the Duty of Fair Representation 8

G. Union Intransigence 8

H. USAPA's Forum Shopping 9

III. Legal Argument 10

A. Legal Standard for Preliminary Injunction 10

B. Analysis 10

1. Plaintiffs are likely to succeed on the merits. 10

a. A union must have an objectively legitimate purpose to repudiate its duty to honor a final and binding resolution of a seniority dispute. 10

b. A legitimate union purpose seeks wage concessions or other benefits from the employer. 11

c. USAPA has no legitimate purpose for repudiating its duty to use the Nicolau Award to order seniority. 12

2. The West Pilots will suffer irreparable harm if there is no preliminary relief. 14

3. The balance of equities tips in Plaintiffs' favor. 17

4. Preliminary relief is in the public interest 18

C. The Court should enjoin integrating pilot seniority without using the Nicolau Award list. 18

IV. Conclusion 18

TABLE OF AUTHORITIES

Cases

Addington v. US Airline Pilots Ass'n,
2009 WL 2169164 (Jul. 17, 2009) 13

Addington v. US Airline Pilots Ass'n,
588 F. Supp. 2d 1051 (D. Ariz. 2008) 14

Air Wisconsin Pilots Protection Committee v. Sanderson,
909 F.2d 213 (7th Cir. 1990) 12

Alliance for the Wild Rockies v. Cottrell,
632 F. 3d 1127 (9th Cir. 2011) 10

Barrentine v. Arkansas-Best Freight System, Inc.,
450 U. S. 728 (1981) 11

Barton Brands, Ltd. v. NLRB,
529 F.2d 793 (7th Cir. 1976) 10, 11

Bautista v. Pan Am. World Airlines, Inc.,
828 F.2d 546 (9th Cir. 1987) 17

Bernard v. Air Line Pilots Assn., Int'l.,
873 F.2d 213 (9th Cir. 1989) 16

Chapman v. Deutsche Bank National Trust Co.,
651 F.3d 1039 (9th Cir. 2011) 17

DelCostello v. Int'l Bhd. of Teamsters,
462 U.S. 151 (1983) 14

Emporium Capwell Co. v. Western Addition Community Org.,
420 U.S. 50 (1975) 12

In re Curry & Sorensen, Inc.,
57 B.R. 824 (B.A.P. 9th Cir. 1986) 9

Johnson v. Archer-Daniels-Midland Co.,
203 F. Supp. 636 (D.C. Mich. 1962) 10

Laborers & Hod Carriers Loc. No. 341 v. NLRB,
564 F.2d 834 (9th Cir. 1977) 10, 11

Midwest Flight Attendants v. Bdh. of Teamsters,
662 F. 3d 954 (7th Cir. 2011) 8

NLRB v. Stephen Dunn & Assocs.,
241 F.3d 652 (9th Cir. 2001) 11

Peck Ormsby Const. Co. v. City of Rigby,
2012 WL 914915 (D. Idaho Mar. 15, 2012) 16

Peterson v. Airline Pilots Ass'n, Int'l,
759 F.2d 1161 (4th Cir. 1985) 15

Rakestraw v. United Airlines, Inc.,
981 F.2d 1524 (7th Cir. 1992) 11, 12

Robesky v. Oantas Empire Airways Ltd.,
573 F.2d 1082 (9th Cir.1978) 10

Steele v. Louisville & Nashville RR,
323 U.S. 192 (1944) 13

Stern v. Marshall,
564 U.S. ___, 131 S.Ct. 2594 (2011) 9

Voccio v. Gen. Signal Corp.,
732 F. Supp. 292 (D.R.I. 1990) 12

Winter v. Natural Res. Def. Council, Inc.,
555 U.S. 7 (2008) 10

Statutes

45 U.S.C. § 151a 18

McCaskill-Bond Amendment,
49 U.S.C. § 42112, note, § 117(a) 8

MEMORANDUM OF POINTS AND AUTHORITIES

I. Overview

In 2005, US Airways (then a bankruptcy debtor) and America West Airlines merged to form a new airline also called US Airways, one of the defendants in this action. This is the third round of litigation addressing whether the US Airlines Pilots Association ("USAPA"), the union representing US Airways pilots, is bound by its duty of fair representation ("DFR") to use a pilot seniority list ("Nicolau Award list") that was created by binding arbitration between the pilots from the old US Airways ("East Pilots") and those from America West ("West Pilots"). A certified class of more than a thousand West Pilots was adverse to USAPA in the first two rounds of litigation.

The first round of litigation (in front of Judge Wake) ran from September 2008 to July 2009. It resulted in: (1) a jury verdict that USAPA was breaching its DFR by repudiating its duty to implement the Nicolau Award list; and (2) an injunction requiring USAPA to use the Nicolau Award list in any future pilot collective bargaining agreement ("CBA"). In 2010, however, The Ninth Circuit vacated that judgment on the basis that the DFR claim was not ripe and would not be ripe until USAPA agreed to a CBA that did not use the Nicolau Award.

US Airways filed the second round of litigation (in front of Judge Silver) in July 2010, soon after the Ninth Circuit issued its opinion. US Airways sought a declaratory judgment on the DFR issue. It argued this action was ripe because it raised different questions than the action addressed by the Ninth Circuit. The Court agreed (in part). It held that USAPA would breach its DFR if, without a legitimate union purpose, it agreed to a CBA that did not use the Nicolau Award. But, out of deference to the Ninth Circuit, the Court held it was theoretically possible that the terms of a yet-to-be negotiated CBA might provide USAPA a legitimate purpose. Consequently, it held it could not make an absolute ruling on DFR breach before such terms were contractually fixed.

Shortly after the December 4, 2012, final judgment in the second round of litigation, US Airways and USAPA entered into a contract with American Airlines, a Chapter 11

debtor, and the Allied Pilots Association ("APA"), the union representing the American pilots. This contract is called the "Memorandum of Understanding Regarding Contingent Collective Bargaining Agreement" ("MOU"). The MOU contractually fixes all material CBA terms that will apply to US Airways pilots after American Airlines and US Airways merge to form "New American." A motion to approve that merger is pending in the bankruptcy court in New York.

The CBA terms that are contractually fixed by the MOU do not implement the Nicolau award and do not (by any means) provide a legitimate reason for USAPA to repudiate its duty to implement the Nicolau Award seniority list. Yet, USAPA has repeatedly and unquestionably (but wrongly) stated that it can use the New American merger as a device to evade its duty to implement the Nicolau Award.

The West Pilot Class brings this third round of litigation to obtain preliminary relief, followed by a final ruling, ordering that the Nicolau Award must determine the relative seniority of the US Airways pilots in the New American pilot seniority list. It is important that the Court provides such relief early in the process of creating a New American pilot seniority list. US Airways (whose management will control New American) asked for a decision on the Nicolau Award dispute in June 2010, well before the New American merger was even contemplated. APA wants the dispute resolved well before it becomes the bargaining representative of all New American pilots (which is expected to occur within the next year). So do the West Pilots. Only USAPA wants delay.

This memorandum demonstrates that likelihood of success on the merits and other relevant factors all weigh heavily in favor of making a preliminary order enjoining Defendants (and their successors), in the course of the New American merger, from integrating pilot seniority without using the Nicolau Award.

II. Background

A. America West Merger

This litigation concerns a dispute over pilot seniority integration following the 2005 merger of two airlines: US Airways and America West. (*Plts.' Separate Statement of*

Facts ("SOF"), ¶ 1.) US Airways was in Chapter 11 bankruptcy for the second time in two years. *Id.* ¶ 2. Its reorganization plan called for it to merge with America West to form a new airline that would also be known as US Airways. (*Id.* ¶¶ 1, 3.)

At the time of the merger, there were significant differences between the two airlines and their pilot groups. (*Id.* ¶¶ 4-8.) Including pilots on furlough, the pilots from US Airways ("East Pilots") outnumbered the pilots from America West ("West Pilots"), 5,100 to 1,900. (*Id.* ¶¶ 4-6.) All West Pilots were active (had flying jobs). (*Id.* ¶ 7.) In contrast, approximately 1,700 East Pilots were inactive (on furlough). (*Id.* ¶ 8.) They would be recalled only if the airline needed to replace attrition or expand its operations.

B. Seniority Integration

At the time of the 2005 merger, Air Line Pilots Association ("ALPA") represented both airline pilot groups. (*Id.* ¶ 9.) Under ALPA governance, each pilot group was represented by its own Master Executive Council ("MEC"). (*Id.* ¶¶ 10-11.) The bankruptcy court ordered the post-merger US Airways to enter into a contract called the Transition Agreement with ALPA. (*Id.* ¶¶ 3, 12.) The chairmen of each of the MECs signed the Transition Agreement. (*Id.* ¶ 13.) Among other terms that impacted the transition from two separate airlines to one fully integrated airline, the Transition Agreement provided that the two pilot groups would create a single integrated seniority list according to "ALPA Merger Policy." (*Id.* ¶ 14.) That list would be incorporated into a contract, the "Single Agreement" that would be used to integrate pilot operations. (*Id.* ¶¶ 15-16.) Subject to conditions not at issue, US Airways agreed in advance to accept the outcome of the ALPA Merger Policy process as the final resolution of this seniority integration. (*Id.* ¶¶ 17-18.)

Each MEC appointed a Merger Committee with authority to create a single seniority list. (*Id.* ¶ 19.) These committees, unable to negotiate or mediate seniority integration, proceeded to "final and binding" arbitration to create a "fair and equitable" single seniority list. (*Id.* ¶¶ 20-24.) Lawyers made arguments and submitted extensive briefs to a nationally recognized pilot seniority arbitrator, George Nicolau. (*Id.* ¶¶ 25-26.)

The East Merger Committee argued that East Pilots who were on furlough at the time of the merger (some for many years) were entitled to seniority rights based upon their dates of hire at US Airways, even if that would put them ahead of West Pilots who were active at the time of the merger. (*Id.* ¶ 27.) The West Merger Committee disagreed. It argued that active pilots must be placed ahead of pilots who were on furlough. (*Id.* ¶ 28.)

Mr. Nicolau issued the decision of the arbitration board, the "Nicolau Award," on May 1, 2007. (*Id.* ¶ 29.) It placed some 500 of the most senior East Pilots at the top of the list because they flew wide-body aircraft and no West Pilot flew such aircraft at the time. (*Id.* ¶ 30.) At the other end, it placed the East Pilots who were on furlough when the airlines merged. (*Id.* ¶ 31.) Then, it blended the remainder of the two pilot lists in a ratio of approximately 2 to 1, East Pilots to West Pilots in their respective existing seniority orders. (*Id.* ¶ 33.) Mr. Nicolau, it should be noted, explained that "merging active pilots with furloughees, despite the length of service of some of the latter, is not at all fair or equitable under any of the stated criteria." (*Id.* ¶ 32.)

C. Creation and Misuse of a Union

The East MEC appealed to ALPA's Executive Committee to overturn the Nicolau Award. (*Id.* ¶ 35.) The Executive Committee rejected that appeal on the merits and ordered the East Pilots to implement the Nicolau Award. (*Id.* ¶¶ 36-38.) The East MEC also challenged the Nicolau arbitration in court. (*Id.* ¶ 39.) That claim was later dismissed. (*Id.* ¶ 40.) On December 20, 2007, US Airways accepted the Nicolau Award. (*Id.* ¶ 34.) That should have been the end of pilot seniority integration. But it was not.

As soon as the Nicolau Award was announced, East Pilot Stephen Bradford contrived a plan to create a new union (USAPA) to oust ALPA. (*Id.* ¶¶ 41-45.) He knew that East Pilots would control a single-airline union because they outnumbered the West Pilots. *Id*. He reasoned that with such control, a single-airline union would "protect" East Pilot interests over those of the West Pilots. (*Id.* ¶ 42.) He set out to create such a union.

As a first step, Mr. Bradford with other East Pilots sought legal advice. (*Id.* ¶¶ 43-46.) Lawyers cautioned them to avoid showing that their "sole reason for the new union

is to abrogate . . . the Nicolau award." (*Id.* ¶ 44.) These lawyers also advised that courts would enforce the Nicolau Award. (*Id.*)

East Pilots campaigned to elect USAPA to replace ALPA. Their campaign materials expressly equated USAPA's election with opposition to the Nicolau arbitration. (*Id.* ¶¶ 47-51.) In August 2007, for example, Mr. Bradford circulated a legal opinion asserting that, unlike ALPA, USAPA "would be free to negotiate with US Airways concerning the terms of any seniority integration." (*Id.* ¶ 46.) Other materials promised that USAPA would "re-negotiate" seniority and asserted that, in contrast, ALPA was "bound to defend" the Nicolau Award. (*Id.* ¶¶ 50-51.) Indeed, USAPA's constitution has a commitment to date-of-hire seniority integration that, in effect, repudiates the Nicolau Award. (*Id.* ¶ 69.)

At about the same time, the two ALPA MECs were negotiating a joint pilot contract with US Airways that would replace the existing collective bargaining agreements and would be used to implement integrated flight operations. (*Id.* ¶¶ 52-54.) On August 10, 2007, USAPA warned the East Pilots that it might not be able to stop implementation of the Nicolau Award if the joint contract negotiations were completed before it could oust ALPA and take over as the bargaining representative. (*Id.* ¶ 55.) Five days later, the East MEC refused to further participate in those negotiations. (*Id.* ¶¶ 56-59.) That action effectively blocked implementing the Nicolau Award.

A representation election between USAPA and ALPA was held in early 2008. (*Id.* ¶¶ 60-62.) As planned, the sizeable East Pilot majority was able to elect USAPA with virtually no West Pilot votes. (*Id.* ¶ 6.) USAPA began to represent the entire bargaining unit (comprised of both pilot groups) on April 18, 2008. (*Id.* ¶¶ 61-62.)

Later in 2008, USAPA presented a proposal to US Airways to use date-of-hire instead of the Nicolau Award list to order pilot seniority in the joint contract. That date-of-hire ordering is substantially less favorable to the West Pilots than the Nicolau Award list. For example, it gives East pilots who were on furlough at the time of the merger far better seniority than hundreds of West Pilots who were active at the time of the merger.

(*Id.* ¶¶ 63-68.) USAPA has never withdrawn that proposal and US Airways has done nothing to withdraw or modify its acceptance of the Nicolau Award list. Rather, (as explained below) US Airways filed a declaratory judgment action to determine whether it was legally required to reject any attempt by USAPA to deviate form the Nicolau Award. (*Id.* ¶ 79.) To this day, USAPA continues to repeatedly repudiate its duty to use the Nicolau Award and avows that it will never do so. (*Id.* ¶¶ 69-71.)

D. Prior Litigation

On September 4, 2008, six of these Plaintiffs filed a class action in the District of Arizona, alleging that USAPA breached its DFR by repudiating its duty to use the Nicolau Award. (*Id.* ¶ 72.) After a 10-day trial, a jury found that USAPA's actions were intended to frustrate implementation of the Nicolau Award and that its sole objective was to benefit East Pilots, rather than to benefit the bargaining union as a whole. (*Id.* ¶ 73.) The District Court (Judge Wake) ruled: "The West Pilots remain entitled to a union that will not abrogate the Nicolau Award without a legitimate purpose. Any waiver of that right must be consensual." (*Id.* ¶ 74.) The Court permanently ordered USAPA to make all reasonable efforts to implement the Nicolau Award and enjoined it from negotiating a contract that would provide better wages that did not incorporate an unmodified Nicolau Award. (*Id.* ¶ 75(a)-(c).)

USAPA appealed. (*Id.* ¶ 76.) The Ninth Circuit vacated the District Court judgment, holding that the dispute was not ripe and would not be ripe before there was a ratified contract that repudiated USAPA's duty to use the Nicolau Award. (*Id.* ¶ 77.) Still, the Ninth Circuit cautioned USAPA that unless it "bargain[ed] in good faith pursuant to its DFR, with the interests of all members—both East and West—in mind," there would be "an unquestionably ripe DFR suit, once a contract is ratified." (*Id.* ¶ 78.)

On July 27, 2010, US Airways filed a declaratory judgment class action seeking guidance, *inter alia*, as to whether it could legally enter into a collective bargaining agreement with USAPA that did not implement the Nicolau Award. (*Id.* ¶¶ 79-80.) It is clear that the District Court wanted to settle this matter, but recognized that it was

constrained by the 2010 Ninth Circuit's ripeness ruling. (*Id.* ¶ 81.) It wrote, therefore, "the best 'declaratory judgment' the Court can offer is that USAPA's seniority proposal does not automatically breach its duty of fair representation." (*Id.* ¶ 82 (emphasis added).) Nonetheless, the Court ruled that USAPA would breach its DFR by entering into a contract that used date-of-hire seniority integration unless it had "a legitimate union purpose" for doing so. (*Id.* ¶ 83.)

The District Court ruled on other material points of law as follows:

a) "[D]ecertification of ALPA and the certification of USAPA did not change the binding nature of the Transition Agreement";

b) "Discarding the Nicolau Award places USAPA on dangerous ground"; and

c) "When the collective bargaining agreement is finalized individuals will be able to determine whether USAPA's abandonment of the Nicolau Award was permissible, *i.e.*, supported by a legitimate union purpose.".

(*Id.* ¶¶ 84(a)-(c).)

Incredibly, USAPA was not deterred.

E. American Airlines Merger

AMR (the parent company for American Airlines) filed Chapter 11 on November 29, 2011. (*Id.* ¶ 85.) Soon thereafter, US Airways began entertaining a merger with AMR. (*Id.* ¶ 86.) In February 2013, the airlines and their pilot unions (ALPA and USAPA) entered into an agreement called the "Memorandum of Understanding Regarding Contingent Collective Bargaining Agreement," (the "MOU") that sets the stage for that merger. (*Id.* ¶ 87.)

USAPA's constitution required that its members vote to ratify the MOU. To encourage a favorable vote, USAPA repeatedly told its members that their views on the Nicolau Award should not influence their vote. (*Id.* ¶¶ 88-90.) A majority of US Airways pilots voted to ratify the MOU. (*Id.* ¶ 91.) That ratification fixed, for years to come, all material contract terms for the US Airways pilots. (*Id.* ¶ 92.) As explained more fully below, it also satisfied the Ninth Circuit's 2010 ripeness standard. (*Id.* ¶ 77.)

The MOU becomes "null and void . . . if the Merger is not consummated." (*Id.* ¶ 93.) On February 22, 2013, AMR filed a motion in its Chapter 11 proceedings to have the bankruptcy Court approve the merger with US Airways. (Doc. 6800 in Case No. 11-15463-shl.)

F. Breach of the Duty of Fair Representation

The MOU, immediately upon ratification, provides US Airways pilots with substantially better pay. (*Id.* ¶ 94.) It recognizes that seniority integration in this merger (not the 2005 merger) is controlled (in part) by the McCaskill-Bond Amendment to the Federal Aviation Act, 49 U.S.C. § 42112, note, § 117(a). (*Id.* ¶ 95.) This means, unless there is a negotiated compromise, that an arbitration panel will create a fair and equitable integration of the seniority lists of the pilots that will be working for New American. (*Id.*) *See, generally, Midwest Flight Attendants v. Bdh. of Teamsters*, 662 F. 3d 954 (7th Cir. 2011) (enforcing McCaskill-Bond process). McCaskill-Bond, however, does not support re-doing a seniority arbitration (such as the Nicolau Arbitration) that was completed before Congress enacted McCaskill-Bond.

On February 18, 2013, the West Pilots sent letters to US Airways and APA, putting them on notice that USAPA breached its DFR because the MOU is a "single agreement" that does not provide for the integration of pilot operations using the Nicolau Award, as required by the Transition Agreement. (SOF ¶ 96.) The West Pilots also demanded, in those letters, that they be included in any discussion of implementing the MOU seniority integration process. (*Id.* ¶ 97.) On February 19, 2013, the West Pilots sent letters to USAPA, US Airways, and APA in which they explained that, if necessary, they would file an action to enjoin using anything other than the Nicolau Award list to define the relative seniority of the US Airways pilots. (*Id.* ¶ 98.) To date, none of these parties has responded with agreement to use the Nicolau Award list.

G. Union Intransigence

USAPA has claimed it has legitimate reasons to repudiate its duty to use the Nicolau Award. (*Id.* ¶ 99.) USAPA presented such reasons to the Addington jury. The jury rejected

them all. (*Id.* ¶ 73.) With the current merger and the MOU, USAPA continues to state that it will make every effort to ensure that the Nicolau Award is given no effect in the operation of New American. (*Id.* ¶¶ 100-102.) For example, USAPA promises that it will only advance a date-of-hire list for the former US Airways pilots. (*Id.* ¶ 100(c).) USAPA also promises that it will do "whatever it takes to see that there is no Nicolau" and that it will vigorously fight any attempt by the West Pilots to "participate in the merger process." (*Id.* ¶ 101.) Finally, USAPA promises that it will adhere to its "constitutionally mandated principles that reject the Nicolau Award in its entirety." (*Id.* ¶ 102.)

H. USAPA's Forum Shopping

In August 2007, West Pilots formed Leonidas, LLC, for the sole purpose of collecting voluntary West Pilot contributions to be used to defray the expense of defending the Nicolau Award in and out of litigation. (*Id.* ¶ 103.) On March 6, 2013, perhaps in an effort to avoid DFR litigation in this Court, USAPA filed an adversary proceeding against Leonidas, LLC, (not against these Plaintiffs or the West Pilot Class) in the AMR Chapter 11 proceedings ongoing in the Southern District of New York. (*Id.* ¶ 104.) USAPA is claiming that Leonidas, LLC, is threatening to file a lawsuit to stop the merger with American Airlines. (*Id.* ¶ 105.) That claim is flawed for many reasons.

First, Leonidas, LLC, is the wrong defendant. Leonidas, LLC, has never been a party to or threatened any litigation. (*Id.* ¶¶ 106-108.) Moreover, the West Pilots have merely stated that they would seek to enjoin parties other than Debtor AMR from illegal acts in the course of seniority integration. (*Id.* ¶¶ 97-98.) That is perfectly legitimate.

Second, the Bankruptcy Court does not have jurisdiction over USAPA's claim. *See, generally, Stern v. Marshall*, 564 U.S. ___, 131 S.Ct. 2594 (2011). Third, USAPA does not have standing to assert the Debtor's claims. Indeed, by doing so USAPA may be the one violating the automatic stay. *Cf. In re Curry & Sorensen, Inc.*, 57 B.R. 824, 827 (B.A.P. 9th Cir. 1986) (asserting debtor's avoidance claim violates the stay).

A telephonic hearing is scheduled for April 3, 2013. (*Id.* ¶ 109.)

III. Legal Argument

A. Legal Standard for Preliminary Injunction

To obtain a preliminary injunction, the movant must show that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A preliminary injunction is appropriate, for example, where "serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F. 3d 1127, 1134-35 (9th Cir. 2011).

B. Analysis

There is strong support here for a preliminary injunction.

1. Plaintiffs are likely to succeed on the merits.

a. A union must have an objectively legitimate purpose to repudiate its duty to honor a final and binding resolution of a seniority dispute.

Judges Wake and Silver ruled that USAPA must have a legitimate reason to use a date-of-hire seniority list rather than the Nicolau Award list. (SOF ¶¶ 74, 83.) Nothing has since occurred that leads to a different result. That alone is a strong showing of a high likelihood of success.

Judges Wake and Silver relied on sound legal authority, beginning with the general rule that union conduct "unrelated to legitimate union interests" is wrongful. *Robesky v. Oantas Empire Airways Ltd.*, 573 F.2d 1082, 1090 (9th Cir. 1978). This applies with particular force where unions "alter seniority rights." *Johnson v. Archer-Daniels-Midland Co.*, 203 F. Supp. 636, 638 (D.C. Mich. 1962). That is because altering seniority "favor[s] some members at the expense of others." *Laborers & Hod Carriers Loc. No. 341 v. NLRB*, 564 F.2d 834, 840 (9th Cir. 1977).

In *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 800 (7th Cir. 1976), the Seventh Circuit held that a union must "show some objective justification" when it reorders

seniority. Sixteen years later, it affirmed *Barton Brands*, holding that "a union may not juggle the seniority roster for no reason other than to advance one group of employees over another." *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1537 (7th Cir. 1992). The Ninth Circuit also holds that a union must have a "legitimate purpose" to reorder seniority. *Laborers & Hod Carriers*, 564 F.2d at 840.

The law is well-settled. A union must have an objectively legitimate purpose—something other than a desire to satisfy a majority faction—to reorder seniority. It logically follows that a union must also have an objectively legitimate purpose to repudiate a duty to implement a final and binding resolution of a seniority dispute.

b. A legitimate union purpose seeks wage concessions or other benefits from the employer.

"A primary purpose of a labor union is to negotiate contracts on behalf of its members." *NLRB v. Stephen Dunn & Assocs.*, 241 F.3d 652, 673 (9th Cir. 2001). A legitimate union purpose, therefore, is to seek "increased benefits for workers in the bargaining unit as a whole." *See Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 742 (1981).

The nature of seniority is that a gain to one worker is offset by an equal loss to another. Where seniority is reordered, in other words, the sum of benefits gained and lost is zero. Absent unusual circumstances, therefore, reordering seniority does not provide an overall increased benefit for workers. Consequently, *Barton Brands* explained, a union's "seniority decisions may not be made solely for the benefit of a stronger, more politically favored group over a minority group." 529 F.2d at 798-99. There is no authority to the contrary.

USAPA made far too much of *Rakestraw* in the past and is likely to do so here again. *Rakestraw*, unlike this matter, had unusual circumstances that justified reordering seniority. The seniority change at issue in *Rakestraw* strengthened ALPA's leverage because it favored pilots who honored ALPA's picket lines in a past strike, and punished those who did not. *Rakestraw,* 981 F.2d at 1532. Strengthening ALPA's leverage, in turn,

benefitted the pilot group as a whole. *Id.* That makes it a legitimate union goal. ALPA, therefore, had an objectively legitimate purpose. USAPA does not.

In sum, a union has an objectively legitimate purpose if its action can reasonably result in an overall benefit to the represented workers. In contrast, a union has no objectively legitimate purpose if its action can only benefit some workers while causing an equal detriment to others.

c. USAPA has no legitimate purpose for repudiating its duty to use the Nicolau Award to order seniority.

USAPA has never been able to articulate a legitimate reason for repudiating its duty to use the Nicolau Award. It failed to do so in the 2008-09 jury trial. (SOF ¶ 75.) It failed to do so in the 2010-12 declaratory judgment action. It failed to do so a few months ago. (*Id.* ¶ 99(a)-(g) (enumerating seven purportedly legitimate reasons).) It cannot do so now.

First, USAPA cannot argue, as it has, that the DFR itself legitimizes its actions. (*Id.* ¶ 99(a).) That is circular reasoning because legitimacy cannot define the DFR and the DFR define legitimacy. Second, neither the legitimacy of date-of-hire seniority ordering (in other contexts), nor pre-merger expectations, nor changes in circumstances since 2005 justify making a collateral attack on the Nicolau Award. (*Id.* ¶ 99(b)-(d), (f), (g).) These may be valid reasons to order seniority by date-of-hire where a union is working with a clean slate. But, USAPA is not working with a clean slate. USAPA is working with a "slate" that has the Nicolau Award inscribed in what all agreed would be indelible ink.

Finally, the device of changing the identity of the union cannot justify taking action that could not be taken by the predecessor union. (*Id.* ¶ 99(e).) Allowing that would exalt form over substance and frustrate the reason for the DFR: "protection against the tyranny of the union majority." *Voccio v. Gen. Signal Corp.*, 732 F. Supp. 292, 295 (D.R.I. 1990); *see also Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 64 (1975) ("In vesting the representatives of the majority with this broad power Congress did not, of course, authorize a tyranny of the majority over minority interests."); *Air Wisconsin Pilots Protection Committee v. Sanderson*, 909 F.2d 213, 217 (7th Cir. 1990)

(regarding such a device in an analogous airline merger dispute as "a violation of the duty of fair representation by the union that the majority used as its tool.").

In the past, USAPA has also argued that unless it repudiates the Nicolau Award it cannot get the East Pilot majority to ratify a new CBA. *See Addington v. US Airline Pilots Ass'n*, 08-cv-1633-NVW-PHX, 2009 WL 2169164, at *16 (Jul. 17, 2009) (vacated on unrelated basis, 606 F.3d 1174 (9th Cir. 2010) (court calling this USAPA's "impasse" excuse). Judge Wake properly rejected impasse as illegitimate because an individual's wrongful intransigence cannot justify yielding to that intransigence. *Id.* (holding, "the so-called impasse could not, as a matter of law, justify USAPA's actions toward the West Pilots and the Nicolau Award").

Regardless, impasse is no longer an issue. MOU ratification was the East Pilots' last opportunity to be intransigent, to block a CBA that used the Nicolau Award. (SOF ¶ 92.) No further pilot ratification is required in the course of the pending merger with American Airlines. *Id.* USAPA, therefore, can no longer claim that there is an impasse.

Lastly, USAPA has argued that its constitution requires that it "maintain uniform principles of seniority based on date of hire and the perpetuation thereof . . . ." (*Id.* at ¶ 102.) That too is a flawed excuse for illegal conduct. In *Steele v. Louisville & Nashville RR*, 323 U.S. 192 (1944), the Supreme Court recognized that it was no defense that a union's constitution required illegal racial discrimination. *Id.* at 194 (noting, "Negroes . . . by the [union] constitution . . . are excluded from its membership"). USAPA's DFR precludes the East Pilot majority from voting to repudiate the Nicolau Award. It again would exalt form over substance to allow the East Pilot majority to vote for a constitution that requires their union to do what they cannot do directly.

In sum, USAPA has never had an objectively legitimate purpose for repudiating its duty to order seniority according to the Nicolau Award. A jury rejected its purported reasons in 2009. Indeed, there is strong legal authority to reject those reasons as a matter of law. It is highly likely that this litigation will result in judgment that USAPA has no

objectively legitimate purpose for repudiating the Nicolau award. Because that will determine DFR breach, Plaintiffs are highly likely to prevail on the merits.

2. The West Pilots will suffer irreparable harm if there is no preliminary relief.

The MOU sets out a multi-step process to create an integrated New American pilot seniority list, beginning immediately after bankruptcy court approval of AMR's plan of reorganization. USAPA has made it crystal clear that it will breach its DFR by trying to foreclose implementation of the Nicolau Award at every step of the pilot integration process. (SOF ¶¶ 100-102.) Because there is a six-month limitation on a DFR claim, *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 172 (1983), the West Pilot Class must make a claim at each such point of breach. Otherwise, they risk losing their DFR claim.[1]

No one but the West Pilots will defend the Nicolau Award here. US Airways has stated that it has no legal right to compel USAPA to honor the Award.[2] Although APA wants the Nicolau Award dispute resolved before it becomes the exclusive bargaining representative for all New American pilots, it can take no action until then. (SOF ¶ 111.) Consequently, the West Pilot Class must once again take up the defense of Nicolau Award (as they have done for five and a half years).

The compulsory arbitration provision in the MOU will not keep this dispute out of the courts. (*Id.* ¶ 112.) The West Pilot Class is not a party to the MOU and USAPA is

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[1]The West Pilots are cautious because USAPA has used limitations and ripeness as a sword and a shield, arguing that it was too early and too late for a court to decide the DFR claim. *E.g.*, *Addington v. US Airline Pilots Ass'n*, 588 F. Supp. 2d 1051, 1062 (D. Ariz. 2008) ("USAPA argues that the Plaintiff West Pilots have sued too early and too late. . . ."); USAPA, *Mot. for Summary Judgment*, 19 (No. 10-cv-01570) (D. Ariz. Jan. 27, 2012) (Doc. 152) ("Any claim . . . based upon the duty of fair representation should also be dismissed as untimely."); *id.* at 22 ("issues are not yet fit for judicial decision").

[2] The West Pilots believe US Airways has the right, under the Transition Agreement, to insist on using the Nicolau Award list.

committed to excluding it from the MOU seniority integration process. Even if that were otherwise, DFR claims are not subject to CBA arbitration provisions. *Peterson v. Airline Pilots Ass'n, Int'l*, 759 F.2d 1161, 1169 (4th Cir. 1985). Moreover, USAPA rejected a proposal from the West Pilots to arbitrate the DFR claim in lieu of litigation, something that both APA and US Airways supported.

The first step in pilot seniority integration will be to negotiate a "Protocol Agreement" that sets out procedures for creating the New American pilot seniority list and allocates $4 million provided by the airlines to reimburse expenses incurred by pilot merger representatives. (SOF ¶¶ 113-14.) The West Pilot Class will assert the right to participate in making the Protocol Agreement, at least to the extent needed to ensure that the Agreement states that the US Airways seniority order used in the integration process must follow the Nicolau Award. USAPA will surely breach its DFR by arguing otherwise. (*Id.* ¶¶ 100-102.) USAPA will further breach its DFR by claiming all the MOU pilot integration funds allocated for US Airways pilots (some portion of the $4 million) and by using all such funds to advance the East Pilot interest in repudiating the Nicolau Award. (*Id.* ¶¶ 100(b) & 101.)

After the Protocol Agreement is made, there will attempt to negotiate a New American pilot seniority list. (*Id.* ¶ 95.) Such negotiations must recognize that the Nicolau Award list is the only US Airways list that can be integrated with the American Airlines pilot list. Surely, USAPA will oppose that. (*Id.* ¶¶ 100-102.) Any agreement resulting from such negotiations that fails to order the seniority of the US Airways pilots according to the Nicolau Award could expose APA to liability for acting in concert. (*Id.* ¶ 98(b) (letter advising APA of such).).

If negotiations fail, the pilot seniority integration matter will go to arbitration. (*Id.* ¶ 95.) Again, such arbitration must recognize that the Nicolau Award list is the only US Airways list that can be integrated with the American Airlines pilot list. Here too there will be a dispute because USAPA has unequivocally indicated (indeed, overtly promised)

that it will oppose all efforts to use the Nicolau Award in the process of integrating with the American Airlines pilots. (*Id.* ¶¶ 100-102.)

Given the bitter litigation history surrounding the Nicolau Award since 2008, it is highly likely that litigation will arise at every step of New American pilot seniority integration. It is impossible to see how that integration can be completed without judicial intervention. It is harder still to justify delaying such intervention longer than necessary.

Until there is judicial intervention, there will be intolerable uncertainty. At each step in the process of making a New American pilot seniority list, the West Pilot Class must file litigation or risk losing its DFR claim, which is subject to a six-month limitations. It would be far more orderly if this Court provides preliminary relief (followed later by a final order). That way, all of the parties would know from the start that the seniority of the US Airways pilots must be ordered according to the Nicolau Award. Subject to that legitimate constraint, the interests of the East and West pilot groups would then be more aligned. With uncertainty eliminated, pilot seniority integration should go much faster with far less discord.

The irreparable harm factor is satisfied where the remedy would relive a party from having to "endure unnecessary litigation expenses." *Peck Ormsby Const. Co. v. City of Rigby*, No. 10–cv-545, 2012 WL 914915, at *4 (D. Idaho Mar. 15, 2012). It should be particularly satisfied where, as here, the party seeking to avoid litigation expenses must rely on voluntary contributions to defray those expenses (while compelled under the RLA to pay union dues that fund its opposition's expenses). Without preliminary relief, litigation will cause delay at every step of the New American pilot seniority integration. That could unintentionally delay the ultimate operational integration of New American. That, in turn, would further deny the West Pilots long overdue seniority rights. *See Bernard v. Air Line Pilots Assn., Int'l*, 873 F.2d 213, 217 (9th Cir. 1989) (recognizing that "pilots may suffer irreparable harm" when denied seniority rights). The Court, therefore, should find that the irreparable harm factor is satisfied.

3. The balance of equities tips in Plaintiffs' favor.

No adverse effects would flow from preliminary relief. As explained above, such relief would only expedite integrating New American flight operations. The "innocent" parties to this merger—the airlines, APA, and the West Pilots—recognize that truth and want this dispute resolved early, ideally before the bankruptcy court approves the reorganization plan (which is expected to happen in the fall of 2013). APA, for example, states that it "has no wish to inherit this dispute" when, as expected, it becomes the bargaining representative for all New American pilots. (SOF ¶ 111.) US Airways sought a resolution in 2010 when it filed the declaratory judgment action. Only USAPA wants to delay resolution.

In any number of contexts, "waiver must be clear and unequivocal." *Chapman v. Deutsche Bank National Trust Co.*, 651 F.3d 1039, 1045, n.2 (9th Cir. 2011). There is no basis here to find such waiver by the West Pilots. If anything, it was clearly understood that voting for the MOU did not waive the right to Nicolau implementation. Indeed, throughout the ratification process, USAPA stated that ratification of the MOU did not waive the right to enforce the Nicolau Award. (SOF ¶¶ 88, 90.) Ratifying the MOU, therefore, does not give USAPA the right to repudiate the Nicolau Award.

Yet, after the MOU was ratified, USAPA asserted that the MOU negates the Transition Agreement (the agreement that establishes the finality of the Nicolau Award). (*Id.* ¶ 100(a).) If that were true (which it is not) then USAPA breached its DFR by misleading the West Pilots to persuade them to ratify the MOU. *See Bautista v. Pan Am. World Airlines, Inc.*, 828 F.2d 546, 550 (9th Cir. 1987) ("Intentionally misleading statements by union officials designed to persuade members to join in collective action, such as a strike or ratification of a newly negotiated agreement, can supply the bad faith necessary to a DFR violation.").

USAPA is mistaken if it thinks that unwarranted delay will exhaust West Pilot resolve and resources or provide a basis to argue that limitations expired by the DFR claim. *See* n.2, *supra.* Moreover, even if that were so, USAPA has no legitimate right to

such benefits. Denying USAPA the opportunity to benefit from unwarranted delay, therefore, is not a cognizable hardship. Consequently, there is no hardship to balance against the benefits of providing preliminary relief.

4. Preliminary relief is in the public interest.

Once the Bankruptcy Court determines (as it will) that the New American merger is in the public interest, anything that promotes the timely and efficient integration of flight operations at New American will logically be in the public interest. As explained, the preliminary relief at issue here will do just that. See § III.B.2, *supra*. Moreover, preliminary relief here would be consistent with one of the "general purposes" of the Railway Labor Act ("RLA"): "to provide for the prompt and orderly settlement of all disputes growing . . . out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a. The Nicolau Award and Transition Agreement are such agreements. This Court, therefore, should find that the preliminary relief requested here is in the public interest.

C. The Court should enjoin integrating pilot seniority without using the Nicolau Award list.

Because all material contract terms are now fixed by the ratified MOU, nothing can occur that might create a hypothetical justification for repudiating the Nicolau Award. Ripeness, therefore, is no longer an issue. Because all material factors favor preliminary relief, the Court should enjoin integrating pilot seniority without using the Nicolau Award list.

IV. Conclusion

Plaintiffs respectfully ask the Court to enjoin Defendants (and their successors) from integrating pilot seniority without using the Nicolau Award list to define the relative seniority of the US Airways pilots.

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Dated this 26th day of March, 2013.

POLSINELLI SHUGHART, PC
/s/ Andrew S. Jacob
By _____
Marty Harper
Andrew S. Jacob
Jennifer Axel
One East Washington St., Ste. 1200
Phoenix, AZ 85004
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March 2013, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the ECF System for filing and transmittal.

/s/ Andrew S. Jacob
By _____