

1 **PATRICK J. SZYMANSKI** (*pro hac vice*)
2 **PATRICK J. SZYMANSKI, PLLC**
3 1900 L Street, NW, Ste 900
4 Washington, DC 20036
5 Telephone: (202) 721-6035
6 szymanski@msn.com

SUSAN MARTIN (AZ#014226)
JENNIFER KROLL (AZ#019859)
MARTIN & BONNETT, P.L.L.C.
1850 N. Central Ave. Suite 2010
Phoenix, Arizona 85004
Telephone: (602) 240-6900
smartin@martinbonnett.com
jkroll@martinbonnett.com

6 **BRIAN J. O'DWYER** (*pro hac vice*)
7 **GARY SILVERMAN** (*pro hac vice*)
8 **JOY K. MELE** (*pro hac vice*)
9 **O'DWYER & BERNSTIEN, LLP**
10 52 Duane Street, 5th Floor
11 New York, NY 10007
12 Telephone: (212) 571-7100
bodwyer@odblaw.com
gsilverman@odblaw.com
jmele@odblaw.com

13 Attorneys for US Airline Pilots Association

14 **IN THE UNITED STATES DISTRICT COURT**
15
16 **DISTRICT OF ARIZONA**

18 Don Addington, *et. al.*,
19)
20 *Plaintiffs,*)
21 v.)
22)
23 US Airline Pilots Association, *et. al.*,)
24 *Defendants.*)
25)
26)

Case No.: CV-13-00471-PHX-ROS
**US Airline Pilots Association's
Proposed Findings of Fact and
Conclusions of Law**

27
28

1 Pursuant to the First Amended Scheduling Order entered September 19, 2013,
2 Defendant US Airline Pilots Association (“USAPA”) submits the following proposed
3 findings of fact and conclusions of law in support of its position that the case should be
4 dismissed.¹ Based on the pleadings and submissions to the Court by the parties in this
5 case, the arguments and evidence to be submitted on summary judgment and/or to be
6 adduced at trial and as set forth herein, this case should be dismissed because:

7 A. The case is not ripe.

8 B. There is no standing and no case or controversy because an existing injury-
9 in-fact is required, which cannot be satisfied based upon future speculative contingent
10 events.

11 C. The claims asserted by Plaintiffs are barred by *res judicata* and collateral
12 estoppel.

13 D. This case presents a minor dispute under the Railway Labor Act (“RLA”)
14 and accordingly, the Court lacks jurisdiction.

15 E. The plaintiffs cannot sustain their burden of proving that entering into the
16 MOU that does not include the Nicolau Award was wholly irrational, discriminatory or in
17 bad faith and breached USAPA’s duty of fair representation (“DFR”). To the contrary,
18 USAPA’s actions and determinations were well within the discretion and wide range of
19 reasonableness accorded to USAPA in representing the interests of the entire bargaining
20 unit.
21

22 F. Plaintiffs have not shown any harm from any purported breach of the DFR.

23 G. Plaintiffs knowingly and voluntarily waived any alleged DFR claim by
24 their overwhelming approval of the MOU.
25

26 ¹ USAPA reserves the right to supplement its Proposed Findings of Fact and Conclusions
27 of Law and respectfully requests the right to supplement the Proposed Findings of Fact
28 and Conclusions of Law following receipt of Plaintiffs’ Proposed Findings of Fact and
Conclusions of Law and the trial.

1 H. USAPA is the exclusive bargaining representative certified by the National
2 Mediation Board (“NMB”) and there is no authority for allowing Plaintiffs a seat at the
3 table during the seniority integration proceedings.

4 I. Plaintiffs are not the prevailing parties and were not the prevailing parties
5 in any prior litigation and provided no benefit and are not entitled to attorneys’ fees.

6 **PROPOSED FINDINGS OF FACT²**

7 A. **Merger of America West and US Airways³**

8 1. In May 2005, two airlines, America West and US Airways, agreed to merge
9 to become a single airline known as US Airways (the “2005 Merger”).

10 2. At the time of the 2005 Merger, including pilots on furlough, there were
11 about 5,100 pilots employed by US Airways (“East Pilots”) and 1,900 pilots employed by
12 America West (“West Pilots.”).

13 3. At the time of the merger between America West and US Airways in 2005,
14 America West was prepared to implement Project Zanzibar that would have taken
15 America West into bankruptcy if the merger did not occur.

16 4. At the time of the 2005 Merger, no West Pilots were on furlough.

17 5. At the time of the 2005 Merger, approximately 1,700 East Pilots were on
18 furlough. Of those, 213 were still employed by US Airways in the MidAtlantic division
19 of US Airways
20

21 6. At the time of the 2005 Merger, Air Line Pilots Association (“ALPA”)
22

23 _____
24 ² With respect to issues that are mixed questions of law and fact, USAPA has set forth its
25 proposed findings and conclusions in either its proposed findings of fact or conclusions
26 of law.

27 ³ While USAPA has included many background facts in its proposed findings of fact
28 because Plaintiffs have indicated in the Joint Proposed Pretrial Order that they intend to
litigate these issues, USAPA does not believe that all of these facts are relevant or
necessary to decide the limited issues in front of the Court regarding the MOU. See also
USAPA’s Motion for Summary Judgment. Doc. 211.

1 represented both pilot groups.

2 7. From the time of the 2005 merger through the present, the status quo with
3 respect to seniority for US Airways pilots is a two-list system, one for East Pilots and the
4 other for West Pilots.

5 8. The America West collective bargaining agreement provides for seniority
6 to be ordered based on date of hire.

7 9. Section 22(A)(1) of the West CBA states that “[s]eniority of a Pilot shall
8 begin on the Pilot’s Date of Hire.”

9 10. Prior to the merger with US Airways, and continuing to date, the West
10 Pilots’ respective positions on their seniority list have been determined solely by their
11 date of hire.

12 11. The 1998 US Airways Collective Bargaining Agreement (“CBA”), which
13 continues to govern the terms and conditions for East Pilots, provides that a pilot’s
14 seniority “shall begin to accrue on the date the pilot first reports to the Company’s Pilot
15 Training Program.”

16 12. In all of the major mergers that contributed to the formation of US Airways
17 prior to the 2005 merger with America West, the pilots of the merging carriers were
18 merged based on date of hire, including the mergers with Mohawk Airlines, Pacific
19 Southwest Airlines and Piedmont Airlines. Only two other mergers - with Empire
20 Airlines and the former Trump Shuttle—did not involve date-of-hire integration.

21 22. On September 23, 2005, ALPA and the two merging airlines entered into
22 the Transition Agreement (“TA”) that was approved by the Bankruptcy Court overseeing
23 US Airways bankruptcy.

24 25. Pursuant to the TA, the terms and conditions of employment of the East
25 Pilots are governed by the pre-merger US Airways collective bargaining agreement (and
26 extensions thereof) and the terms and conditions of employment of the West Pilots are
27
28

1 governed by the pre-merger America West collective bargaining agreement (and
2 extensions thereof).

3 15. The TA established certain terms and conditions that would apply after the
4 merger.

5 16. The TA provided that the two merging airlines and ALPA would negotiate
6 a “Single Agreement” that would govern the employment of both East and West Pilots.

7 17. The TA also provided that Merger Committees representing the pilots from
8 the two airlines would follow ALPA Merger Policy to create an integrated seniority list.

9 18. At the time of the seniority integration arbitration before Arbitrator
10 Nicolau, ALPA’s Merger Policy did not allow an arbitrator to consider date of hire or
11 longevity principles in integrating two airlines’ seniority lists. As noted by the arbitration
12 decision, for almost forty years, from 1952 until sometime in 1991, length of service was
13 “the governing factor” to be used in the construction of a seniority list (with some
14 consideration to other factors.) Inexplicably, at the time of the Nicolau arbitration, “all
15 references to date of hire or length of service had been removed.” Shortly after the
16 Nicolau award, in 2009, ALPA merger policy was amended to add back in date of hire as
17 a factor. Thus the Nicolau arbitration was conducted under the 2005 version of ALPA
18 Merger Policy states in full in Part G(5):
19

20 The merger representatives shall carefully weigh all the equities inherent in
21 their merger situation. In joint session, the merger representatives should
22 attempt to match equities to various methods of integration until a fair and
23 equitable agreement is reached, keeping in mind the following goals, in no
particular order:

- 24 a. Preserve Jobs.
- 25 b. Avoid windfalls to either group at the expense of the other.
- 26 c. Maintain or improve pre-merger pay and standard of living.
- 27 d. Maintain or improve pre-merger pilot status.
- 28 e. Minimize detrimental changes to career expectations.

1 19. Neither the 2005 ALPA Merger Policy nor the amendment first removing
2 date of hire, age and length of service from the governing factors under ALPA merger
3 policy were ever ratified by its rank and file members. ALPA Constitution, Article V,
4 Section 2 (ALPA Executive Board “may establish or change policy to be followed by the
5 Association and its members” and “may change policies previously adopted by the Board
6 of Directors”).

7 20. In April 2009, after the ALPA/Nicolau Award was issued, ALPA amended
8 its Merger Policy to once again require longevity principles as factors that must be
9 considered in integrating pilot seniority lists.

10 **B. Events at US Airways Since 2005**

11 21. US Airways has operated separate East and West flight operations since
12 2005.

13 22. The separate 10-K filings for America West and US Airways for the 18
14 month period from January 1, 2006, through June 30, 2007 show a net operating loss of
15 \$13 million for America West.

16 23. The separate 10-K filings for America West and US Airways for the 18
17 month period from January 1, 2006, through June 30, 2007 show a net income of \$556
18 million for US Airways.

19 24. In 2008, US Airways announced a restructuring of its flight operations,
20 including the closure of the Las Vegas Domicile, a former America West domicile, citing
21 low yield and high fuel prices.

22 25. As part of that restructuring, US Airways announced the furlough of 300
23 pilots, 175 from the West and 125 from the East.

24 26. Due to offers of enhanced voluntary leaves of absence negotiated by
25 USAPA, only 144 West Pilots and 84 East Pilots were actually furloughed.
26
27
28

1 **C. Current Conditions at US Airways**

2 27. Twenty-four percent of block hours currently flown by West Pilots consist
3 of routes flown by East Pilots before the merger. This means that East-based work
4 equivalent to approximately 180 East Captain positions and 175 East First Officer
5 positions (or a total of 355 East pilot positions) is currently being performed by West
6 Pilots. It also means that if the East and West operations were operated separately,
7 without any ability to share routes, the number of positions available to West Pilots
8 would be substantially fewer, resulting in furloughs in the West and additional new hires
9 in the East.

10 28. During 2011, US Airways hired 47 new pilots.

11 29. As of the second quarter of 2011, there were 3,394 pilots on the East
12 seniority list and 1,658 on the West seniority list.

13 30. US Airways hired 116 new pilots during 2012 and 120 new pilots in 2013
14 through the date of this filing, all of whom were all assigned to the seniority list for
15 former US Airways pilots, sometimes known as the "East List."

16 31. US Airways currently operates 219 jet passenger aircraft in its East
17 operation including 26 wide-bodied aircraft (16 A330s and 10 767s).

18 32. US Airways currently operates 120 aircraft in its West operation, none of
19 which are wide-bodied.

20 **D. Nicolau Award**

21 33. The TA provided that the airline would integrate pilot operation within 12
22 months of three events: (a) obtaining a single operating certificate (which occurred in
23 2007); (b) creating a single seniority list according to ALPA Merger Policy; and (c)
24 negotiation of the Single Agreement.
25

26 34. The two Merger Committees tried but failed to negotiate or mediate a
27 single integrated seniority list.
28

1 35. Pursuant to ALPA Merger Policy, the two Merger Committees participated
2 in the arbitration process required by ALPA Merger Policy.

3 36. The arbitration board issued its award (the “Nicolau Award”) on May 1,
4 2007. As stated in that decision under that union’s unilaterally promulgated and
5 unratified merger policy then in effect (and since modified), ... “Date of Hire...is no
6 longer listed as a determinant or even stated as a integration criterion...” (Nicolau award
7 at p. 26)

8 37. The Nicolau Award placed about 500 senior East Pilots at the top of the
9 list.

10 38. It explained that it did so because West Pilots were not operating the wide-
11 body international aircraft generally flown by the most senior East Pilots at the time of
12 the 2005 Merger.

13 39. The Nicolau Award placed the approximately 1,700 East Pilots who were
14 furloughed at the time of the 2005 Merger at the bottom of the list below the most junior
15 America West pilot as of the date of the Merger.

16 40. The Nicolau Award blended the remainder of the East Pilot list with the
17 West Pilot list by reserving the first active 423 positions (“equal to the number of
18 Captains and First Officers flying the A330 and B767 International” aircraft, i.e., “wide
19 bodies”) to the most senior US Airways pilots,⁴ (2) by integrating B757 Captains,
20 A320/B737 Captains, B757 First Officers and A320/B737 First Officers from US
21 Airways and America West by ratio starting at position 424 (immediately below the
22 reserved wide-bodied US Airways captains and first officers) and extending down
23 through the most senior US Airways pilot who was furloughed on the date of the merger
24
25

26
27 ⁴ The number 423 was determined after extracting inactive pilots from the seniority list.
28 Position 423 becomes position 517 once all the inactive pilots are reinserted into the list.
USAPA Exhibit 5 (Nicolau Award), at pp. 31, 32 n.5.

1 but who, along with 300 other US Airways pilots at the time of the Nicolau Award was
2 no longer on furlough (Pilot Colello, position 4770).

3 41. One member of the Board of Arbitration, Captain Brucia, dissented, noting
4 that “[t]he most senior furloughed US Airways pilot (Colello) was hired in 1988 and had
5 accrued 16.4 years of service as of the date of announcement of the merger. He was
6 furloughed in 2003. Below Colello, there were over 440 pilots on furlough with at least
7 15½ years of tenure and well over 12 years of credited length of service. The remaining
8 furloughees . . . had at between 5 years and 15 years of tenure and from 1½ to 6 years of
9 service.” Dissenting opinion of Capt. Brucia, p. 2.

10
11 42. Captain Brucia further stated:

12 The junior 305 pilots on the America West seniority list all had less than 2
13 years of service when the merger was announced on May 19,2005. In fact,
14 the bottom 150 pilots on the America West list were hired less than 1 year
15 before the announcement. I do not agree with the Board's decision, in the
16 particular circumstances of this case, to integrate only working pilots as of
17 the date announcement, leaving all those on furlough at that date on the
18 bottom of the combined seniority list. As a consequence of the Board's
19 decision, America West pilot Odell, who was hired less than 2 months
20 before the merger was announced, has been placed immediately senior to
21 US Airways pilot Colello who was hired more than 16 years earlier and
22 who had over 16 years of credited length of service. I disagree with this
23 placement, which disregards Colello's substantial service time.

24 There is no dispute in this case that the US Airways pilots as a group are
25 considerably older than the pilots on the America West list. The record is
26 replete with discussion by both committees relating to age-related attrition,
27 with both groups claiming entitlement to advance in seniority as a result of
28 age-based attrition. The Board did not adequately take into account the
realities of the "new" airline, the return of furloughees that has already
taken place and the much greater rate of age-based attrition at US Airways
as compared to the rate at America West. The vast amount of age-related
attrition that has occurred within the US Airways pilot group caused the
recall of over 300 US Airways pilots between March 2006 and the first
week of January of this year. The pace of recalls is brisk and has continued.
During the hearings we learned that additional recalls were taking place and
there was testimony that stated at the current pace it was possible that all
US Airways pilots would receive recall notices before the end of 2007.

1 Dissenting opinion of Capt. Brucia, pp. 2-3.

2 43. In fact, all the remaining US Airways pilots that had been on furlough
3 were recalled before the end of 2007.

4 44. On December 20, 2007, while a proceeding for certification of USAPA as
5 the exclusive bargaining representative was pending before the National Mediation
6 Board, ALPA requested and US Airways accepted, the Nicolau Award which could not
7 become effective until after the issuance of a single operating certificate, “completion of
8 the integrated pilot seniority list” and negotiation of a “single agreement” that was
9 required to be ratified by the former US Airways Pilots and the former America West
10 Pilots.

11 45. With respect to the merger between America West and US Airways, all
12 other crafts merged their seniority lists by date of hire.

13 46. In April 2009, after the Nicolau Award was issued, ALPA amended its
14 Merger Policy to again include longevity as a factor that must be considered in
15 integrating pilot seniority lists.

16 47. ALPA’s US Airways MEC and the East Pilots opposed the Nicolau Award.

17 48. The USAPA Merger Committee again considered the Nicolau Award in
18 Spring 2013 and found that it still had serious adverse effects on the career expectations
19 of former US Airways Pilots and still gave former America West Pilots a significant
20 windfall in seniority and expected career compensation.

21 49. ALPA’s US Airways MEC determined that the East Pilots, who under
22 ALPA governance were entitled to a separate vote, would not ratify a collective
23 bargaining agreement that included the Nicolau list.

24 50. The seniority list contained in the Nicolau Award had a serious adverse
25 effect on the career expectations of East Pilots.

26 51. The Nicolau Award gave West Pilots a windfall gain in seniority and
27
28

1 therefore in expected career earnings.

2 52. On June 26, 2007, the US Airways MEC filed a complaint against the
3 America West MEC in the Superior Court for the District of Columbia to vacate the
4 Nicolau Award.

5 53. The Complaint alleged that the Nicolau Award violated ALPA Merger
6 Policy, in part, because it gave “windfalls (unwarranted and unexpected benefits) to the
7 pilots of America West at the expense of US Airways pilots, thereby permanently
8 depriving US Airways pilots of their career expectations, while affording gains in career
9 promotion to America West pilots which they could not have achieved absent the
10 Award.”

11 54. The America West MEC removed the case to federal court.

12 55. In opposing the motion to remand filed by the US Airways MEC, the
13 America West MEC asserted that the Nicolau Award was nothing more than a
14 “bargaining proposal” and that there therefore was no binding action to be vacated.
15

16 56. The United States District Court remanded the case, finding that the
17 complaint presented no federal question that would support removal. *US Airways MEC*
18 *v. America West MEC*, 525 F.Supp.2d 127 (D.D.C. 2007).

19 57. At the same time, it filed suit in Superior Court for the District of Columbia
20 to vacate the Nicolau Award, the US Airways MEC wrote to ALPA demanding that

21 ALPA refrain from sending the Nicolau seniority list to US Airways in order to
22 prevent US Airways from accepting the list while the litigation was pending.

23 58. The certification of USAPA as the new bargaining representative of the
24 merged pilot craft extinguished the existence of the US Airways MEC and the America
25 West MEC, and, because the parties were no longer in existence and a new union had
26 been certified, the suit to vacate the Nicolau Award that had been filed by the US
27 Airways MEC against the America West MEC was dismissed.
28

1 **E. Certification of USAPA as the Exclusive Bargaining Representative**

2 59. The East Pilots opposed the Nicolau Award.

3 60. In mid-2007, several pilots formed a new organization known as the US
4 Airline Pilots Association (USAPA).

5 61. On January 23, 2008, the NMB found that the merged carriers constituted a
6 single transportation system.

7 62. An election contest between ALPA and USAPA followed.

8 63. USAPA won the election.

9 64. The NMB certified USAPA as the exclusive collective bargaining
10 representative for the entire pilot craft or class (East and West) on April 18, 2008 (“craft
11 or class” is the RLA term for a “bargaining unit”).

12 65. USAPA is, and has been since April 2008, the NMB certified exclusive
13 representative of the single class or craft of US Airways pilots.

14 **F. USAPA’s 2008 Seniority Proposal**

15 66. In May 2007, before USAPA was certified as the exclusive bargaining
16 representative, US Airways made a comprehensive collective bargaining agreement
17 proposal, which is known as the “Kirby proposal.”

18 67. The West MEC said the Kirby proposal was inadequate.

19 68. USAPA polled its membership on the Kirby proposal and approximately 75
20 percent of the membership indicated they were dissatisfied with the proposal.

21 69. At the time of the Kirby proposal, USAPA was seeking an agreement that
22 included wages, benefits and working conditions that were equal to the “industry
23 standard.” The Kirby proposal was significantly below what USAPA considered was the
24 “industry standard.”

25 70. USAPA’s Constitution states that one of its objectives is “[t]o maintain
26 uniform principles of seniority based on date of hire and the perpetuation thereof, with
27
28

1 reasonable conditions and restrictions to preserve each pilot’s un-merged career
2 expectations.”

3 71. Conditions and restrictions specify how a particular seniority list operates.
4 They can afford pilots opportunities to bid and hold flying that would otherwise not be
5 available to someone in their seniority position and can restrict pilots from opportunities
6 that would otherwise be available to someone in their seniority position.

7 72. Conditions and restrictions that apply to a pilot group before a merger may
8 or may not carry forward in a seniority integration proceeding with another pilot group.

9 73. USAPA’s leaders have consistently stated that USAPA has a valid legal
10 right to not agree to implement the Nicolau Award.

11 74. USAPA has never proposed a “strict” date-of-hire seniority system. Rather,
12 its seniority proposals have always included conditions and restrictions.

13 75. In *US Airways v. Addington et. al*, No. 2:10-cv-01570-ROS, the Court
14 granted USAPA’s motion for summary judgment on Count II and held that USAPA “is
15 free to pursue any seniority position it wishes” (2:10-cv-01570-ROS, Doc. 193, p. 1) and
16 that a seniority proposal other than the Nicolau Award “does not automatically breach its
17 duty of fair representation.” *Id.* at p. 8.

18 76. In September 2008, USAPA proposed a date-of-hire seniority system that
19 included conditions and restrictions placed West Pilots on a merged seniority list
20 according to their original dates of hire with America West and included extensive
21 conditions and restrictions that prevented East Pilots from displacing West Pilots from
22 their customary West assignments while allowing West Pilots to bid their DOH seniority
23 system-wide.

24 77. The 2008 USAPA seniority proposal allowed West Pilots to bid into East
25 flying, including wide-body aircraft and international routes, as vacancies were created as
26 the result of growth, retirements, and other normal attrition among East Pilots.
27
28

1 78. US Airways has never responded to the September 2008 proposal and
2 USAPA has never withdrawn this seniority proposal.

3 79. At the time of USAPA's September 2008 seniority proposal there were no
4 pilots on furlough.

5 80. USAPA's September 2008 seniority proposal combines the existing East
6 and West lists by date-of-hire, without regard to whether a pilot was on furlough in 2005
7 at the time of the merger.

8 81. At the time it was made in September 2008, USAPA's seniority proposal, if
9 immediately implemented, would have made 63 senior West Pilots eligible to bid and
10 hold wide body Captain positions.

11 82. At the current time, approximately 89 active West Pilots would be eligible
12 to bid and hold wide body Captain positions if USAPA's seniority proposal were in
13 effect.

14 83. USAPA has been unable to engage US Airways in negotiations
15 concerning its seniority proposal.

16 84. In a November 28, 2012, letter to the NMB, US Airways asserted that
17 it would not conclude a separate collective bargaining agreement with USAPA
18 until there is a judicial resolution of the seniority issue.

19
20 **G. The Declaratory Judgment Action**

21 85. On July 27, 2010, US Airways filed a declaratory judgment action,
22 claiming that it required guidance, *inter alia*, as to whether it would be liable if it entered
23 into a collective bargaining agreement with USAPA that did not implement the Nicolau
24 Award.

25 86. In the Declaratory Judgment action, the Court granted USAPA's motion
26 for summary judgment on Count II and held that USAPA "is free to pursue any seniority
27 position it wishes" (2:10-cv-01570-ROS, Doc. 193, p. 1) and that a seniority proposal
28

1 other than the Nicolau Award “does not automatically breach its duty of fair
2 representation.” *Id.* at p. 8.

3 87. In the *Declaratory Judgment action*, the Court held that, “It is undisputed
4 that the Transition Agreement can be modified at any time ‘by written agreement of
5 [USAPA] and the [US Airways].’” 2:10-cv-01570-ROS, Doc. 193, p. 7.

6 88. Plaintiffs did not file an appeal.

7 **H. Merger with American Airlines**

8 89. On November 29, 2011, AMR Corporation and its subsidiaries (the
9 “Debtors”) commenced a voluntary Chapter 11 case in the United States Bankruptcy
10 Court for the Southern District of New York, *In re AMR Corp.*, Case No. 11-15463.

11 90. On or about February 13, 2013, US Airways and American entered into an
12 Agreement and Plan of Merger (“Merger Agreement”).

13 91. On or about February 22, 2013, US Airways and American filed a joint
14 motion in the AMR bankruptcy proceeding seeking approval of the Merger Agreement.

15 92. On March 27, 2013, the Bankruptcy Court approved the motion to merge.
16 *In Re AMR*, No. 7587, Case No. 11-15463 (SHL) (S.D.N.Y. filed Apr. 11, 2013).

17 93. On April 15, 2013, US Airways and American filed a joint Plan of
18 Reorganization (“POR”) in the AMR bankruptcy proceeding seeking approval of AMR’s
19 emergence from bankruptcy.
20

21 **I. The DOJ Lawsuit**

22 94. In or around May 2013, the United States Department of Justice filed
23 objections to the Merger Agreement.

24 95. On August 13, 2013 the United States Department of Justice and the
25 Attorneys General of six states and the District of Columbia filed an action (“DOJ
26 Action”) to enjoin the merger on the United States District Court for the District of
27 District of Columbia, 1:13-cv-01236 (D.D.C.), alleging, *inter alia*, that the merger
28

1 violates antitrust statutes. (Michigan has since joined the suit and Texas has since
2 withdrawn.)

3 96. Trial in the DOJ Action is scheduled to commence on November 25, 2013.

4 **J. The MOU**

5 97. From December 10, 2012, through January 2, 2013, US Airways,
6 American, USAPA and APA engaged in negotiations for a memorandum of
7 understanding that would govern the terms and conditions of US Airways pilots and
8 American pilots in the event of a merger between US Airways and American.

9 98. Representatives of the Unsecured Creditors Committee (“UCC”) from the
10 AMR Bankruptcy participated in the negotiations.

11 99. The UCC favored a merger between the two airlines because they believed
12 it would give them the most value for the debts they were owed by American.

13 100. USAPA was represented in these negotiations by President Gary Hummel,
14 USAPA General Counsel Brian O’Dwyer, the members of the USAPA Negotiating
15 Advisory Committee (NAC), attorney Roland Wilder who served as USAPA’s
16 Professional Negotiator, and others depending on the specific subject matter under
17 consideration.

18 101. The negotiations consisted of both general sessions that included
19 representatives of all of the parties and numerous sub-meetings that included only some
20 of the parties and some of their representatives depending on the subject matter under
21 discussion.

22 102. USAPA President Hummel was involved in all of the general sessions.

23 103. USAPA President Hummel was directly involved in transmitting to the
24 NAC both the initial and revised wording of the provision that became paragraph 10.h of
25 the MOU.

26 104. USAPA President Hummel spoke with members of the NAC including
27
28

1 West members Ken Holmes and Rocky Calveri concerning what became paragraph 10.h.

2 105. Holmes and Calveri told Hummel that they were opposed to the originally
3 proposed wording of paragraph 10.h.

4 106. President Hummel subsequently gave the NAC a second version of
5 paragraph 10.h and spoke with Holmes and Calveri about the revised proposal telling
6 them that although the wording was different, it meant the same as the original proposal,
7 namely that the MOU would not be considered the Single Agreement referred to in the
8 2005 Transition Agreement. Holmes and Calveri said they understood and that they
9 agreed to the revised proposal.

10 107. On January 2, 2013, the NAC approved the tentative MOU and presented
11 it to the USAPA BPR with its recommendation for approval.

12 108. The BPR asked the parties to the MOU to increase the retroactive pay
13 provided for in the MOU by agreeing that, if the merger was approved, all US Airways
14 pilots would be paid at the American rates as of the date the MOU was ratified by US
15 Airways pilots (likely early February 2013) instead of a relatively short time prior to the
16 Effective Date of the POR as was then currently provided.

17 109. On January 4, 2013, the UCC, American, and US Airways agreed to the
18 proposed change.

19 110. There are a number of contingencies and events that must take place before
20 the MOU is effective and before there is an Integrated Seniority List, including, but not
21 limited to a favorable outcome to the litigation brought by the Antitrust Division of the
22 Justice Department, a petition to and determination made by the National Mediation
23 Board for Single Carrier Status, and negotiation and/or arbitration of the JCBA.

24 111. The MOU is “seniority-neutral,” that is, it does not make any changes to
25 the current two-list seniority regime at US Airways, one for the former America West
26 pilots and one for the former US Airways pilots.
27
28

1 112. The neutrality of the MOU on the seniority dispute ensures that the
2 economic benefits of a future agreement can become effective without being hindered by
3 any ongoing seniority dispute.

4 113. The MOU provides that pilot seniority integration between pilots of US
5 Airways and American Airlines will be governed by a process consistent with McCaskill-
6 Bond.

7 114. The MOU provides, in Paragraph 10(h): “US Airways agrees that neither
8 this Memorandum nor the JCBA shall provide a basis for changing the seniority lists
9 currently in effect at US Airways other than through the process set forth in this
10 Paragraph 10.”

11 115. The MOU does not change the East and West seniority lists.

12 116. Over its lifetime, the MOU will provide about \$1.6 Billion increase of
13 wages and other benefits above the current East and West CBAs.

14 117. The MOU contains substantial economic improvements for US Airways
15 pilots.

16 118. The MOU establishes terms and conditions that are the same for all US
17 Airways, including identical wages, defined contribution plan rates, vacation, and “no
18 furlough” guarantees.

19 119. These improvements were discussed with the pilots of US Airways at the
20 NAC roadshows in January 2013.

21 120. These improvements were also described in a publication from the NAC
22 entitled “What the Memorandum of Understanding Means to You,” which was
23 distributed at the NAC roadshows and made available electronically to all pilots in good
24 standing.

25 121. The MOU includes an industry average pay parity adjustment effective on
26 January 1, 2016, which would bring pay for all the pilots of New American (the name of
27
28

1 the carrier that will exist if there is a merger between US Airways and American) into
2 line with the two other major domestic carriers – Delta Airlines and United Airlines.

3 122. If a merger occurs with American in bankruptcy, the economic effects of
4 the MOU will result in substantial pay raises for all US Airways pilots upon the effective
5 date of the POR.

6 123. The existing East CBA contains lower pay rates than the West CBA (e.g.
7 approximately \$20,000 less annually under the East CBA for 12-year captains on the
8 A320).

9 124. The immediate pay increase on the Effective Date of the POR for 12-year
10 captains operating the Airbus A320 aircraft would be more than \$40,000 annually for
11 those pilots flying under the East CBA, and more than \$20,000 annually for those pilots
12 flying under the West CBA.

13 125. As of the Effective Date of the POR, the defined contribution rate (made by
14 US Airways to a defined contribution plan on behalf of each eligible pilot) will increase
15 from the current rate of 10% to 14% for all US Airways pilots in addition to the pay
16 increases.

17 126. On January 1, 2014, the pay rates for all pilots will increase an additional
18 8% and the defined contribution rate will increase to 16%.

19 127. A January 7, 2013, side letter to the MOU provides (in a separate
20 agreement) for a \$40 million lump sum payment to be distributed to US Airways pilots
21 shortly after the Effective Date of the POR.

22 128. The MOU also provides that the pay increases implemented upon the
23 Effective Date of the POR would be retroactive to February 8, 2013.

24 129. The estimated total economic impact of the MOU and the JCBA after the
25 Effective Date of the POR is projected to be approximately \$1.6 billion for the US
26 Airways pilots over the next six years.
27
28

1 130. After the Effective Date of the POR and implementation of the MOU,
2 disputes regarding the interpretation or application of the MOU are subject to the dispute
3 resolution procedure found in paragraph 20 therein (except for those paragraphs in the
4 MOU that specifically provide for interest arbitration or another dispute resolution
5 process).

6 131. The MOU provides that as of the Effective Date of the POR, the pay rates
7 and retirement plan defined contribution amounts for all pilots employed by the merged
8 operation will be as set by the December 2012 CBA between American and APA as
9 modified by the terms of the MOU itself. The MOU further provides that the other terms
10 of the 600-page December 2012 CBA between American and APA “shall be applicable
11 to all US Airways pilots at the earliest practicable time for each such term.”
12

13 132. The MOU further provides that the parties will commence negotiations for
14 a Joint Collective Bargaining Agreement and that those negotiations are to be completed
15 no later than 30 days after the NMB determines that the combined operation constitutes a
16 “single carrier” and certifies the bargaining representative for the pilots of the single
17 carrier. Under the timeline adopted by the parties, this date is estimated to be 11-13
18 months after the POR becomes effective..

19 133. In the meantime, the MOU provides that the seniority integration process
20 will proceed but that any arbitration hearing cannot begin until the JCBA is final.

21 134. The seniority integration process in the MOU (Paragraph 10 and
22 Attachment C) specifies that the parties include only APA, USAPA and the companies.

23 135. The Change of Control provisions in the East CBA require, in the event US
24 Airways enters into a merger or other corporate transaction with American or AMR that
25 satisfies the requirements of Section 1(J)(1) of the East CBA, that hourly pay rates for
26 East Pilots automatically increase to the “Book Rates.”
27

28 136. The “Book Rates” are the hourly pay rates in effect in the Restructuring

1 Agreement between US Airways and ALPA as of June 30, 2002.

2 137. These rates are significantly higher than the current pay rates under the East
3 CBA.

4 138. In or around May 2012, USAPA published an update regarding Change of
5 Control that contained the applicable “Book Rates” and relevant provisions from the East
6 CBA.

7 139. The pay increases that would occur if the Change of Control provisions in
8 the East CBA were triggered applied only to East Pilots and did not apply to pilots
9 covered by the West CBA.

10 140. The West CBA did not contain any comparable protections in the event of a
11 change of control, therefore, in the absence of the MOU those pilots covered by the West
12 CBA would be stuck with sub-standard pay rates and benefits until a single bargaining
13 representative was certified by the NMB, and (potentially) the seniority integration
14 process was completed.

15 141. If USAPA did not agree to waive the Change of Control provisions in the
16 East CBA, the announced merger with American would trigger those provisions and
17 result in substantial pay increases for the pilots flying under the East CBA, but not for
18 any pilots covered under the West CBA.

19 142. USAPA had only one chance to ratify the MOU. If the MOU was not
20 ratified, the merger would go forward and US Airways pilots would remain at their
21 existing block hour rates and other economic terms and conditions until the NMB made a
22 representation decision and the new bargaining representative (likely APA) negotiated a
23 single agreement covering all the pilots of the merged carrier.

24 143. If the merger went forward without the ratified MOU, US Airways pilots
25 would not receive any increased pay or benefits prior to the effective date of a newly
26 negotiated joint agreement, would not have any guarantee against furloughs, or any of the
27
28

1 many other protections of the MOU.

2 144. US Airways took the position from the beginning that any agreement
3 concerning the merger would be neutral with respect to seniority and that all issues
4 concerning seniority would be resolved through a process consistent with McCaskill-
5 Bond.

6 145. Paragraph 10(h) was proposed in order to insure that the MOU was neutral
7 with respect to the seniority issue.

8 146. The MOU is not the final collective bargaining agreement referenced in the
9 Transition Agreement.

10 147. Both USAPA and US Airways agree that the MOU is not the final
11 collective bargaining agreement referenced in the Transition Agreement.

12 148. The “Single Agreement” referred to in the 2005 Transition Agreement was
13 a joint collective bargaining agreement that would govern the combined operations of
14 America West and US Airways following the 2005 merger.

15 149. The “Single Agreement” was subject to separate ratification by the former
16 America West Pilots and the former US Airways Pilots.

17 150. No “Single Agreement” covering the combined operations of America
18 West and US Airways was ever negotiated.

19 151. US Airways has stated that the MOU is not the single agreement referenced
20 in the Transition Agreement requiring it to implement the Nicolau Award.

21
22 **K. Ratification of the MOU**

23 152. On January 4, 2013, the BPR voted unanimously to approve the MOU and
24 to send it out for pilot ratification with a BPR recommendation to approve.

25 153. The MOU had the unanimous support of the BPR members that represent
26 all former US Airways East pilot domiciles (Charlotte, Washington DC, and
27 Philadelphia), and from the domicile that includes all former America West pilots
28

1 (Phoenix).

2 154. During the negotiation and ratification periods, USAPA took numerous
3 actions to inform the pilots regarding the content and effect of the MOU.

4 155. Throughout the negotiation and ratification periods, all NAC updates
5 included the names, cellular phone numbers, and e-mail addresses for the members of the
6 NAC.

7 156. Pilots were encouraged to contact NAC members with any questions or
8 concerns regarding the MOU.

9 157. On January 15, 2013, the NAC published an update to all pilots in good
10 standing regarding the MOU, which included a summary of some of the significant terms
11 therein, and a schedule of the upcoming roadshow presentations being held at each
12 domicile.

13 158. The January 15, 2013 NAC Update also contained links to the actual text of
14 the MOU and the conditional labor agreement (referred to therein as the “APA 2012
15 Contract”).

16 159. In or around January 16, 2013, USAPA published and mailed an analysis
17 and explanation of the MOU to all pilots in good standing in a document entitled “Flight
18 Plan to a Merger: What the Memorandum of Understanding Means to You.”

19 160. The NAC scheduled roadshow presentations regarding the MOU as
20 follows:
21

Base	Dates (Times)	Location
DCA	Thurs, Jan 17th (9-2)	Conference Center, Terminal A, ground floor, next to the lobby of the old terminal
	Thurs, Jan 17th (2-5) Fri, Jan 18th (9-1)	Room 264 in terminal A
CLT	Mon, Jan 21st (4 PM)	USAPA Headquarters
	Tue, Jan 22nd (9-5) Wed, Jan 23rd (9-4)	Auditorium, above the Food Court
PHX	Thurs, Jan 24th (9-5) Fri, Jan 25th (9-1)	International Concourse, Meeting Room next to British Airways Club, above B23

PHL	Mon, Jan 28th (9-5) Tue, Jan 29th (9-4)	Airport Marriott
-----	--	------------------

1
2
3 161. Members of the NAC were present at each roadshow.

4 162. At each roadshow, pilots were told that seniority integration with American
5 Airlines would be accomplished by a process consistent with McCaskill-Bond, that the
6 MOU was neutral with respect to seniority and, in particular, that voting for the MOU
7 would not result in implementing the Nicolau Award.

8 163. Communications authored by West Pilots and sent to numerous West
9 Pilots also advised the West Pilots that the MOU was “seniority neutral” and further
10 “recommend[ed] that West Pilots vote yes if they want to see a merger with American
11 Airlines according to the terms of the MOU.”

12 164. The NAC posted a series of Questions and Answers concerning the MOU
13 on the USAPA website and sent a NAC update to the USAPA membership informing
14 them that the Q&As were available in the website. The Q&As informed USAPA
15 Members that the MOU and the 2012 AA-APA agreement “will replace the transition
16 agreement when implemented on and after the effective date.”

17
18 165. Plaintiffs and the Leonidas litigation control group knew the Transition
19 Agreement would be extinguished and replaced by the MOU well before voting on the
20 MOU closed.

21 166. The West Pilots understood and were fully aware prior to voting for the
22 MOU: a) that MOU was neutral with respect to seniority; b) that the MOU did not
23 incorporate the Nicolau Award; and c) that voting for the MOU would not result in
24 implementing the Nicolau Award.

25 167. Prior to the time the MOU ratification balloting closed, the West Pilots
26 considered whether they should take action, including seeking an injunction, to stop the
27 ratification process and prevent the MOU from being approved by the USAPA
28

1 membership entitled to vote.

2 168. No West committee member, Board of Pilot Representative, or any other
3 West Pilot disputed that the MOU was neutral as to seniority prior to the ratification vote.

4 169. The West members of the NAC, including Ken Holmes, fully endorsed the
5 MOU in its entirety, signed all of the materials presented concerning the MOU, approved
6 the statements in those materials concerning the economic advantages of the MOU and
7 approved the statement that the MOU was neutral with respect to the seniority dispute.

8 170. On February 8, 2013, 75% of valid ballots cast in the referendum balloting
9 voted to ratify the MOU.

10 171. Of the 1,041 West Pilots that voted, 1,017 voted to approve the MOU, and
11 24 voted to oppose it (a 97.69% approval rate).

12 172. Approximately 250 active West Pilots were not eligible to vote on
13 ratification of the MOU because they have not joined USAPA.

14 173. Another 45 West Pilots were not eligible to vote on ratification of the MOU
15 because they were on furlough.

16 174. In accordance with the USAPA constitution, only ballots cast by pilots who
17 were in good standing on the date balloting closed were counted.

18 175. Prior to the time the MOU ratification balloting closed, the West Pilots
19 were fully and repeatedly informed that USAPA opposed using the Nicolau Award as
20 the basis for integrating the East and West Pilot seniority lists.

21
22 **L. Joint CBA for the American-US Airways Merger**

23 176. The JCBA negotiation process is not a simple formality whereupon the
24 parties will merely memorialize the terms of the MOU and the Merger Transition
25 Agreement (“MTA”) into an integrated collective bargaining agreement.

26 177. The MOU provides, at paragraph 27 thereof, “If and when the NMB makes
27 a single-carrier finding, the organization certified to represent the pilots of the single
28

1 carrier, the single carrier acknowledged by the NMB and the certified organization shall
2 promptly engage or re-engage in negotiations to achieve a JCBA to be applicable to the
3 carrier that will be the product of the Merger.“

4 178. The MOU (including paragraphs 5 and 27) also does not state or imply that
5 the relevant parties to the MOU are precluded from changing the terms of the MTA
6 through negotiation and voluntary agreement during the JCBA process.

7 179. Beginning in March 2013 and continuing to present, USAPA and the APA
8 have been conducting planning sessions regarding the JCBA in Dallas-Fort Worth,
9 Texas.

10 180. USAPA's NAC, along with several other USAPA committees (including,
11 but not limited to, Scope Monitoring, Training, and Retirement & Insurance
12 Committees), have been present at several of these negotiating sessions.

13 181. The pay increases negotiated into the MOU are substantial, but less than the
14 increases the pilots flying under the East CBA would have been entitled to in the event of
15 a triggering of the Change of Control provisions.

16 182. With the exception of those terms and conditions found in paragraphs 3 and
17 25 of the MOU, every term and condition of employment for the US Airways pilots will
18 need to be negotiated and/or implemented by the relevant parties before a final JCBA can
19 be entered into.
20

21 183. In particular, in order to finalize the JCBA, the parties must consolidate
22 three different currently existing CBAs—the 2004 America West CBA, the 1998 US
23 Airways CBA and the 2012 APA CBA.

24 184. Although these CBAs contain many sections that address the same areas
25 (such as Scope, Scheduling, Vacations, Deadheading, Grievances, Insurance and so
26 forth), the particular provisions and practices regarding each are generally different and
27 the parties must agree what terms will apply to the consolidated pilots group and how the
28

1 transition will be made from the three existing agreement to the JCBA.

2 185. Further negotiations are required prior to entering into the JCBA with
3 respect to various subjects of bargaining, including, but not limited to:

- 4 a. Scheduling
- 5 b. Work Rules
- 6 c. Training
- 7 d. Retirement and Insurance
- 8 e. Vacation
- 9 f. International
- 10 g. Grievance
- 11 h. Sick
- 12 i. Medical
- 13 j. Scope
- 14 k. Leave.

15 186. Beginning in May 2013 to present, USAPA and the APA have been
16 conducting negotiating sessions regarding the JCBA in Dallas-Fort Worth, Texas.
17 USAPA's NAC, along with several other USAPA committees (including, but not limited
18 to, Scope Monitoring, Training, and Retirement & Insurance Committees), have been
19 present at several of these negotiating sessions.

20 **M. Seniority Integration with the American Airlines Pilots**

21 187. The MOU explicitly provides that a seniority integration process consistent
22 with the McCaskill-Bond Amendment to the Federal Aviation Act, 49 U.S.C. § 42112,
23 shall commence "as soon as possible after" the Effective Date.

24 188. The first step under the seniority integration process is for the employees
25 affected by a merger to attempt to settle the matter through direct negotiations, and if that
26 is unsuccessful, the second step is binding arbitration resulting in the issuance of a "final
27 and binding" decision (MOU, ¶10) that integrates seniority "in a fair and equitable
28 manner." See 49 U.S.C. § 42112. The MOU implements these provisions by requiring
the pilot representatives to attempt to reach an agreement during the 90-day period
following the Effective Date and, if no agreement is reached, to commence an arbitration

1 process before a panel of three neutral arbitrators. (MOU, ¶10.1)

2 189. The APA represents approximately 10,000 American pilots.

3 190. The APA has appointed a committee of seven pilots to their Seniority
4 Integration Committee.

5 191. APA has approximately \$5,000,000 in reserve at present to protect the
6 seniority of American pilots.

7 192. APA pilots recently voted to increase contributions to their “Seniority
8 Defense Fund.”

9 193. USAPA represents approximately 5,000 pilots.

10 194. In or about June 2013, USAPA President Gary Hummel appointed two
11 West Pilots and four East Pilots to serve on the Merger Committee.

12 195. As a result of these appointments, the Merger Committee is comprised of
13 representatives from all the major US Airways domiciles and a representative mix of
14 captains and first officers.
15

16 196. The Members of the Merger Committee are:

17 A. Chair, Jess Pauley. Jess Pauley is currently an A320 First Officer
18 based in Philadelphia. He has been a member of the Merger Committee
19 since 2010 and the Chairman of the Committee since April 2012. First
20 Officer Pauley was Vice Chairman of the Boston Domicile from July
21 2008 until it closed in March 2010.

22 B. Kevin Barry. Kevin Barry is an A320 First Officer based in Charlotte.
23 First Officer Barry previously was a member of the USAir Shuttle
24 Negotiation Committee from May 1993 through July 1996, was a
25 member of the USAir Shuttle Merger Committee from 1996 through
26 1999, and a member of the Joint Negotiating Committee from August
27 1999 through February 2000, all with respect to the merger of the USAir
28 Shuttle into US Airways. He was also a member of the USAPA Merger
Committee from May 2008 through August 2008 and more recently has
been supporting the work of the USAPA Merger Committee as a
“Subject Matter Expert.”

C. James Calveri. James Calveri is an A320 First Officer based in

1 Phoenix. First Officer Calveri has been a member of the NAC since
2 May 2012. The NAC is charged with negotiating any collective
3 bargaining or other agreement with the Company. The NAC was
4 responsible for negotiating the MOU between US Airways, AMR Corp.,
5 USAPA and the APA.

6 D. Robert E. Davison. Bob Davison is an A320 Captain based in
7 Philadelphia. Captain Davison was a member of the USAPA Merger
8 Committee from June 2008 through April 2010, Chairman of the
9 Committee from April 2010 through April 2011 and more recently has
10 been supporting the work of the Committee as a “Subject Matter
11 Expert.”

12 E. Tom Kubik. Tom Kubik is an A330 Captain based in Charlotte.
13 Captain Kubik has served as Assistant Chief Pilot, a Senior Check
14 Airman and as the Chairman of the USAPA Safety Committee.

15 F. Ken Stravers. Ken Stravers is an A320 Captain based in Phoenix.
16 Captain Stravers was the Chairman of the America West Merger
17 Committee during the Air Line Pilots Association (“ALPA”) seniority
18 integration proceeding that led to the Nicolau Award.

19 197. Since in or about 2009, dozens of West Pilots have served in various
20 official capacities on behalf of USAPA and on various USAPA committees, including,
21 but not limited to the USAPA BPR (the governing board of USAPA), the Appeal Board,
22 the Grievance Committee, the Scheduling Committee, the Negotiating Advisory
23 Committee, the Business Intelligence Committee, the Retirement and Insurance
24 Committee, the Membership Services Committee, and the Communications Committee.

25 198. The MOU provides that within 30 days of the Effective Date, the parties
26 will create a Protocol Agreement that will “set forth the process and protocol for
27 conducting negotiations and arbitration, if applicable, and will include a methodology for
28 allocating the reimbursement provided for in Paragraph 7 of the MOU.”

199. The “reimbursement” referenced in paragraphs 7 and 10(f) of the MOU is
in two separate amounts.

200. First, up to \$1.5 million is available from US Airways to reimburse USAPA
for its expenses associated with negotiating and administering the MOU (with the

1 exception of seniority integration expenses).

2 201. Second, a separate \$4 million is provided by US Airways and American to
3 reimburse the merger representatives for expenses incurred as part of the seniority
4 integration process pursuant to paragraph 10 of the MOU.

5 202. The allocation of this \$4 million will be determined by the merger
6 representatives in the Protocol Agreement.

7 **N. Section 22.C Grievance**

8 203. In August 2013, numerous Phoenix-based pilots (but not any of the named
9 Plaintiffs) filed protests under Section 22.C of the America West Pilots' Collective
10 Bargaining Agreement concerning the July 1, 2013 seniority list posted by US Airways,
11 contending that the ratification of the MOU made the Nicolau List the status quo and that
12 the Nicolau List must therefore be published as the applicable seniority list for US
13 Airways pilots.
14

15 204. In August, 2013, in response to Section 22.C protests filed by Phoenix-
16 based pilots , US Airways stated as follows:

17 This will acknowledge receipt of the letter of protest you filed pursuant
18 to Section 22.C of the America West Pilots' Collective Bargaining
19 Agreement concerning the July 1, 2013 seniority list posted by the
20 Company. In that protest, you contend that the Company is obligated to
21 implement the Nicolau Award as soon as the MTA/MOU becomes
22 effective. That contention is meritless, and your protest must be denied.

23 Section 22.C of the America West Pilots' Collective Bargaining
24 Agreement only applies to disputes regarding a West Pilot's seniority
25 relative to other West Pilots as set forth on the West Pilots seniority list.
26 Challenges to the East/West integrated seniority list, which will be
27 created after there has been a merger and the federally-required
28 McCaskill-Bond seniority integration process has been completed, are
beyond the scope of Section 22.C.

Moreover, even if the Section 22.C process applied to disputes regarding
the future East/West integrated seniority list, your claim that the
MTA/MOU amounts to a single labor agreement obligating the

1 Company to apply the Nicolau Award immediately is contrary to the
2 express provision in the Transition Agreement (Section XII.B) that any
3 of the Transition Agreement's provisions "[m]ay be modified by written
4 agreement of the Association and the Airline Parties collectively."

5 By its terms, the MOU constitutes a written agreement between USAPA
6 and the Company which modifies the provisions of the Transition
7 Agreement relating to implementation of an integrated seniority list.
8 Paragraph 10.h. of the MOU specifies that "US Airways agrees that
9 neither this Memorandum nor the JCBA shall provide a basis for
10 changing the seniority list currently in effect at US Airways other than
11 through the process set forth in this Paragraph 10." The Paragraph 10
12 process provides for seniority-list integration in accordance with the
13 standards and procedures of the federal McCaskill-Bond law, and that
14 process will not even begin until after the merger has been
15 consummated. Modifying the seniority lists immediately, as you have
16 requested, would violate the MTA/MOU.

17 **O. Communications and Negotiations Between USAPA and West Pilots**

18 205. The West Pilot class leaders and their attorneys, have consistently stated,
19 and maintain to this date, that the West Pilots members will not voluntarily agree to
20 anything other than an unmodified Nicolau Award.

21 206. USAPA has made a number of efforts to meet with West Pilots to explore
22 resolution of their seniority dispute and also to explain and answer questions about
23 USAPA's 2008 bargaining proposal on seniority had been rejected or boycotted by West
24 Pilots.

25 207. By letter dated October 12, 2012, USAPA President Gary Hummel wrote to
26 Captain John Scherff, the Phoenix Domicile Chairman for the USAPA Board of Pilot
27 Representatives ("BPR") requesting that the East and West representatives of USAPA
28 arrange a meeting to sit down and attempt to work together towards an acceptable
seniority integration proposal.

29 208. Many of the Plaintiffs opposed meeting with USAPA to attempt to work
toward an acceptable seniority integration proposal because they took the position that

1 only implementation of the Nicolau list was acceptable.

2 209. By letter dated October 16, 2012, Captain Scherff responded to President
3 Hummel stating that the position directed by the West Pilots was “Nicolau-or-nothing.”
4 He did not respond to President Hummel’s request for an actual meeting to discuss this
5 issue further.

6 210. By letter dated October 12, 2012, Marty Harper, counsel for plaintiffs,
7 wrote to Patrick Szymanski, counsel for USAPA, regarding this Court’s October 11,
8 2012 decision in the Declaratory Judgment Action , demanding that USAPA implement
9 the Nicolau list.

10 211. By letter dated October 15, 2012, Mr. Szymanski responded to Mr.
11 Harper’s October 12, 2012 letter requesting that the West Pilots agree to sit down with
12 USAPA officials in order to have good faith discussions about USAPA’s potential
13 seniority proposal in McCaskill-Bond proceedings.

14 212. By letter dated October 17, 2012, Mr. Harper replied to Mr. Szymanski’s
15 October 15, 2012 letter, stating that his clients indicated the same “Nicolau-or-nothing”
16 position as stated by Captain Scherff, and advising that his “clients will have no part” of
17 sitting down and negotiating with USAPA over the potential seniority proposal in
18 McCaskill-Bond proceedings
19

20 213. USAPA has on several occasions informed the Plaintiffs and its pilots that
21 it is willing to consider a seniority integration proposal other than the 2008 Conditions
22 and Restrictions Proposal.

23 214. Plaintiffs and the Leonidas control group have never been willing to
24 consider any of the proposals.

25 215. Plaintiff Iranpour has stated that “the notion that we as West Pilots can be
26 part of any seniority integration is ludicrous and needs to be put to rest firmly” and
27 explaining he meant “Leonidas is not a union” and has “no position to negotiate a
28

1 compromise to the Nicolau award on behalf of the West Pilots.”

2 216. Leonidas is not a union and Plaintiffs have not taken any steps with the
3 NMB to seek a change of union representation.

4 217. In May, 2013, the District Court directed the parties to this action to engage
5 in settlement discussions.

6 218. On May 20, 2013, the USAPA BPR took the following actions in relation
7 to effectuating the District Court’s directive for the parties to engage in settlement
8 discussions: agreed to reimburse plaintiffs’ representatives for lost flight pay for flights
9 dropped in order to attend the settlement discussions directed by the Court, approved the
10 formation of a committee to meet with plaintiffs to explore settlement; approved the
11 selection of members of that committee; gave the committee authority to enter into
12 settlement discussions subject to final approval of the BPR and membership ratification,
13 if appropriate; and allocated an emergency budget for the committee.
14

15 **P. The West Pilots and Leonidas, LLC**

16 219. In or around August 2007, a group of West Pilots formed an Arizona
17 limited liability company named Leonidas, LLC to fund their seniority dispute with
18 USAPA.

19 220. The sole purpose of Leonidas, LLC, pursuant to its Operating Agreement,
20 is as follows:

21 1.3. *Purpose.* The purpose and business of this Company shall consist
22 solely of soliciting funds in the form of cash and using said funds to fund
23 an independent legal campaign in the matter of the seniority integration
24 of the America West Airlines pilots and US Airways pilots, for the
benefit of the pilots of the former America West Airlines.

25 221. The stated “Objectives” of Leonidas, LLC provide, in part, that:

26 (5) We will not tolerate discrimination against the pilots of America
27 West in any form, including the dilution of the Nicolau Award by any
means, contractual or otherwise.

28 (6) We will not engage in fruitless debates over matters already settled.

1 222. Attorneys' fees and expenses incurred in connection with the legal
2 representation of Plaintiffs in *Addington I*, including appeals therein, have been paid only
3 by Leonidas, LLC.

4 223. Attorneys' fees and expenses incurred by the West Pilots in connection
5 with the legal representation of Plaintiffs in the US Airways Declaratory Judgment
6 action, including appeals therein, have been paid only by Leonidas, LLC.

7 224. Attorneys' fees and expenses incurred to date by Plaintiffs in connection
8 with the legal representation of Plaintiffs in the instant matter have been paid only by
9 Leonidas, LLC.

10 **Q. "MOU I" Negotiations**

11 225. At some point prior to the MOU, US Airways began negotiating a
12 conditional labor agreement contract terms with the Allied Pilots Association ("APA"),
13 the union for American Airlines pilots, that would go into effect if and when there was a
14 merger between US Airways and AMR.

15 226. By April 2012, APA and US Airways executed an agreement that has been
16 referred to as the "Conditional Labor Agreement" ("CLA") or "APA Term Sheet."

17 227. US Airways initially said it did not need anything from USAPA. In or
18 about June 2012, USAPA told US Airways that it would not support the merger unless
19 the Company guaranteed appropriate terms, conditions, and protections for US Airways
20 pilots in the event of a merger. US Airways subsequently agreed to negotiate with
21 USAPA concerning terms, conditions, and protections in addition to those stated in the
22 Conditional Labor Agreement that would be guaranteed to US Airways pilots in the event
23 of a merger.
24

25 228. At the time US Airways informed USAPA President Hummel about the
26 conditional agreement it had negotiated with APA and about its plan to merge with
27 American, US Airways took the position that any merger agreement with USAPA would
28

1 not address seniority other than to provide for its resolution through a process consistent
2 with the McCaskill-Bond Amendment.

3 229. The USAPA NAC was responsible for negotiating terms of an agreement
4 for a proposed merger of the airlines and integration of US Airways and American pilots.

5 230. West Pilots comprised two of the four members of the NAC involved in the
6 negotiations with respect to the CLA.

7 231. The additional terms, conditions, and protections that emerged from the
8 negotiations between US Airways and the NAC were memorialized in a three-party
9 agreement document entitled “Memorandum of Understanding Regarding Contingent
10 Collective Bargaining Agreement,” which is generally referred to as “MOU I.”

11 232. Negotiators for US Airways and USAPA tentatively approved MOU I on
12 August 20, 2012.

13 233. USAPA sought a lump sum payment to its pilots if they ratified MOU I and
14 US Airways ultimately agreed to a \$40 million payment to its pilots if they ratified MOU
15 I.

16 234. The USAPA BPR found deficiencies in MOU I and directed the NAC to
17 negotiate further to address those deficiencies.

18 235. When the NAC went to Dallas to address those deficiencies, US Airways
19 said it was about to sign a non-disclosure agreement with American which would prevent
20 it from negotiating with USAPA and APA and therefore would not meet with the NAC to
21 further discuss MOU I.

22 236. At the request of the UCC in the AMR Bankruptcy, American, US
23 Airways, USAPA and APA went to Dallas in mid-December 2012 to negotiate a multi-
24 party agreement to establish terms and conditions, protections and procedures that would
25 apply to the pilots in the event of a merger between American and US Airways.
26
27
28

CONCLUSIONS OF LAW

A. Jurisdiction - Standing

1
2
3 1. Plaintiffs must show the existence of a constitutionally sufficient, currently
4 existing “injury in fact” in order to establish standing and jurisdiction under Article III.
5 The Supreme Court has “repeatedly reiterated[,] ‘threatened injury must be *certainly*
6 *impending* to constitute injury in fact’ and that ‘allegations of *possible* future injury’ are
7 not sufficient.” *Clapper v. Amnesty Int’l USA*, 133 S.Ct. 1138, 1147 (2013) (emphasis in
8 original) (citations omitted); *accord Alcoa v. Bonneville Power Administration*, 698 F.3d
9 774 (9th Cir. 2012).

10
11 2. Constitutionally required injury in fact is absent where the alleged injury
12 depends on the outcome of an independent judicial proceeding. *Clapper v. Amnesty Int’l*
13 *USA*, 133 S.Ct. at 1149-50 & 1155; *Alcoa v. Bonneville Power Administration*, 698 F.3d
14 at 793.

15 3. Here, the alleged injury to Plaintiffs and the members of the West Pilot
16 Class does not exist unless and until the MOU goes into effect and the MOU will not go
17 into effect until the merger is approved. Whether the merger will be approved depends
18 on the outcome of the antitrust action filed by the Department of Justice and the attorneys
19 general of several states and the District of Columbia to block the merger. Complaint,
20 No. 1:13-cv-01236-CKK, Doc. No. 1 (D. D.C. Aug. 13, 2013; Amended Complaint, No.
21 1:13-cv-01236-CKK, Doc. 73 (D. D.C. Sept. 5, 2013).

22 4. The DOJ Antitrust action to enjoin the merger is an independent judicial
23 proceeding.

24 5. There is therefore no constitutionally sufficient “injury in fact,” Plaintiffs
25 lack standing and this case must be dismissed.
26
27
28

1 **B. Jurisdiction - Ripeness**

2 6. Ripeness is a constitutional prerequisite for jurisdiction. *United States v.*
3 *Streich*, 560 F.3d 926, 931 (9th Cir. 2009). A court has no jurisdiction to review claims
4 unless they are ripe. *Id.*

5 7. In the context of a challenge to the negotiation of or terms of a collective
6 bargaining agreement, a duty of fair representation claim is not ripe until there is a “final
7 product.” *Air Line Pilots Ass’n Intern. v. O’Neill*, 499 U.S. 65, 78 (1991). *See Addington*
8 *v. US Airline Pilots Ass’n*, 606 F.3d 1174, 1181-82 (9th Cir. 2010) (“*Addington I*”).

9 8. The MOU is a conditional agreement entered into by US Airways, USAPA,
10 APA and American Airlines, that provides for a process for reaching a joint collective
11 bargaining agreement (“JCBA”) that will apply to pilots of American Airlines and US
12 Airways if the merger is consummated. USAPA Exhibit 130, Doc. 77-8.

13 9. Negotiations for a joint collective bargaining agreement are not complete
14 and a “final product” on seniority will not be reached unless and until the merger is
15 complete. *See* MOU ¶ 10, USAPA Exhibit 130, Doc. 77-8, at pp. 6-7.

16 10. The case is not ripe. *See e.g., Streich*, 560 F.3d at 931; *Addington I*, 606
17 F.3d at 1181-82.

18 11. The outcome of the DOJ Antitrust action to enjoin the merger between AA
19 and US Airways is a future speculative and contingent event. *See* MOU ¶ 10, USAPA
20 Exhibit 130, Doc. 77-8, at pp. 6-7.

21 12. Negotiation and/or arbitration of a Joint Collective Bargaining Agreement
22 is a future speculative and contingent event. *See, e.g.,* MOU, ¶18(c), USAPA Exhibit
23 130, Doc. 77-8, at pp. 9-10 (“For purposes of clarity this Memorandum is null and void in
24 its entirety and as to all Parties if the Merger is not consummated.”).

25 13. The determination by the NMB concerning Single Carrier Status of a
26 merged American Airlines and US Airways is a future speculative and contingent event.
27
28

1 See, e.g., MOU ¶18(c), USAPA Exhibit 130, Doc. 77-8, at pp. 9-10 (“For purposes of
2 clarity this Memorandum is null and void in its entirety and as to all Parties if the Merger
3 is not consummated.”).

4 14. No action as to seniority integration has been taken by USAPA and no final
5 product with respect to seniority integration has occurred that can be reviewed by this
6 Court. See Amended Complaint, Doc. 134 ¶ 82 (“The MOU does not address the
7 Nicolau Award or any aspect of East-West seniority integration.”); MOU ¶ 10, USAPA
8 Exhibit 130, Doc. 77-8, at pp. 6-7.

9 15. This case is not ripe and should be dismissed because there is no case or
10 controversy and there is no injury-in-fact because Plaintiffs’ claims depend upon future
11 speculative and contingent events. *Clapper v. Amnesty Int’l USA*, 133 S.Ct. 1138, 1147
12 (2013).

13 C. **Plaintiffs’ Claims are Barred by the Doctrines of Issue and Claim**
14 **Preclusion**

15 16. In *US Airways v. Addington et. al*, No. 2:10-cv-01570-ROS, the Court
16 granted USAPA’s motion for summary judgment on Count II and held that USAPA “is
17 free to pursue any seniority position it wishes” (2:10-cv-01570-ROS, Doc. 193, p. 1) and
18 that a seniority proposal other than the Nicolau Award “does not automatically breach its
19 duty of fair representation.” *Id.* at p. 8.

20 17. In *US Airways v. Addington et. al*, No. 2:10-cv-01570-ROS, the Court also
21 held “It is undisputed that the Transition Agreement can be modified at any time ‘by
22 written agreement of [USAPA] and the [US Airways].’” 2:10-cv-01570-ROS, Doc. 193,
23 p. 7.

24 18. Plaintiffs did not appeal from the Judgment in that case.

25 19. *Res judicata* and collateral estoppel bar the re-litigation of the claims now
26 asserted by Plaintiffs. *Res judicata* bars assertion of a claim previously tried and decided.
27 *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992). For the doctrine
28

1 to apply, there must be (1) an identity of claims, (2) a final judgment on the merits, and
2 (3) privity between parties.” *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning*
3 *Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003). With respect to claim preclusion or
4 collateral estoppel the rule is stated as follows:

5 The general principle announced in numerous cases is that a right, question, or fact
6 distinctly put in issue and directly determined by a court of competent jurisdiction,
7 as a ground of recovery, cannot be disputed in a subsequent suit between the same
8 parties or their privies; and, even if the second suit is for a different cause of
9 action, the right, question, or fact once so determined must, as between the same
parties or their privies, be taken as conclusively established, so long as the
judgment in the first suit remains unmodified.

10 § 4416 Issue Preclusion in General, 18 Fed. Prac. & Proc. Juris. § 4416 (2d ed.) (quoting
11 Justice Harlan in *Southern Pacific Railroad v. United States*, 168 US 1, 48 (1897)).

12 The doctrine of issue preclusion prevents relitigation of all “issues of fact or
13 law that were actually litigated and necessarily decided” in a prior
14 proceeding. *Segal v. American Tel. & Tel. Co.*, 606 F.2d 842, 845 (9th
15 Cir.1979), *quoted in Americana*, 754 F.2d at 1529. “In both the offensive
16 and defensive use situations the party against whom estoppel [issue
17 preclusion] is asserted has litigated and lost in an earlier action.” *Parklane*
18 *Hosiery Co. v. Shore*, 439 U.S. 322, 329, 99 S.Ct. 645, 650, 58 L.Ed.2d 552
19 (1979). The issue must have been “actually decided” after a “full and fair
opportunity” for litigation. 18 C. Wright, A. Miller & E. Cooper, *Federal*
Practice & Procedure: Jurisdiction § 4416, at 138 (1981) .

20 *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988).

21 20. For *res judicata* to apply, the courts consider (1) whether rights or interests
22 established in the prior judgment would be destroyed or impaired by prosecution of the
23 second action; (2) whether substantially the same evidence is presented in the two
24 actions; (3) whether the two suits involve infringement of the same right; and (4) whether
25 the two suits arise out of the same transactional nucleus of facts. *Clark*, 966 F.2d at 1320
26 (citing *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982)).
27
28

1 21. The parties to this action and the Declaratory Judgment Action, *US*
2 *Airways v. Addington et. al*, No. 2:10-cv-01570-ROS, are identical; substantially the
3 same evidence is presented in this action and the prior action; and this litigation and the
4 prior lawsuit involve the alleged infringement of the same rights and issues and arise out
5 of the same transactional nucleus of facts –USAPA’s duty of fair representation to the
6 former America West Pilots or that the 2005 Transition Agreement purportedly requires
7 USAPA to negotiate seniority integration that includes the Nicolau Award. #

8 22. It is undisputed that Plaintiffs alleged in the prior actions that USAPA was
9 required to negotiate for and implement the Nicolau award in any successor collective
10 bargaining agreement. It is also cannot be disputed that claim was rejected. In the
11 Declaratory Judgment Action, the West Pilots sought summary judgment arguing
12 “USAPA would breach its duty of fair representation if it implements a collective
13 bargaining agreement that dishonors the Nicolau arbitration” 2:10-cv-01570-ROS Doc.
14 150 p. 21 (D. Ariz Jan. 27, 2012.)

15 23. In this action Plaintiffs again assert the same claim that has already been
16 rejected, arguing: “USAPA, therefore, breached the duty of fair representation by
17 entering into the MOU because the MOU abandons a duty to treat the Nicolau Award as
18 final and binding.” 2:13-cv-00471-ROS Doc. 134 p. 16 (D. Ariz. Aug. 2, 2013).

19 24. To the extent that Plaintiffs are arguing that USAPA is or was required to
20 negotiate the Nicolau Award in a future agreement, such claims are barred by *res*
21 *judicata* and/or collateral estoppel. 2:10-cv-01570-ROS, Doc. 1, p. 3.

22 25. To the extent that Plaintiffs are arguing that USAPA may not modify the
23 Transition Agreement, such claims are barred by *res judicata* and/or collateral estoppel.
24 2:10-cv-01570-ROS, Doc. 1, p. 3.

25 26. To the extent that Plaintiffs assert they have been injured by the MOU or
26 the process set forth in the MOU for resolving seniority integration , that claim is also
27
28

1 barred under principles of *res judicata* and/ or collateral estoppel in accordance with the
2 decision of the Ninth Circuit Court of Appeals in *Addington I* because the status quo
3 continues, there is no final product integrating seniority and Plaintiffs have suffered no
4 injury in fact. *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1179-80 (9th Cir.
5 2010).

6 **D. This Case Presents A Minor Dispute under the Railway Labor Act**

7 27. Under the Railway Labor Act, disputes growing out of the interpretation or
8 application of agreements concerning rates of pay, rules, or working conditions are
9 subject to mandatory arbitration before the System Board of Adjustment. 45 U.S.C. §§
10 184; *Consol. Rail. Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299, 303 (1989);
11 *International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Aloha Airlines*,
12 776 F.2d 812, 815 (9th Cir. 1985).

13 28. Here, the Plaintiffs' allegation that USAPA is required to follow the
14 Nicolau Award is based in the interpretation and application of either the 2005 Transition
15 Agreement or the MOU or both.

16 29. Plaintiffs' claim therefore presents a minor dispute under the RLA.

17 30. The System Board of Adjustment has exclusive jurisdiction over minor
18 disputes. *Conrail*, 491 U.S. at 310.

19 31. Because Plaintiffs' duty of fair representation claim essentially alleges that
20 the MOU is the Single Agreement described in the 2005 Transition Agreement, it rests on
21 the interpretation or application of the 2005 Transition Agreement and the MOU and is
22 therefore a "minor dispute" over which the Court has no jurisdiction.
23

24 **E. Claim I Must Be Dismissed**

25 32. A union breaches its duty of fair representation only when its conduct is
26 "arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). "The
27 Supreme Court has long recognized that unions must retain wide discretion to act in what
28

1 they perceive to be their members' best interests." *Peterson v. Kennedy*, 771 F.2d 1244,
2 1253 (9th Cir. 1985) (citing *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953)).
3 "Any substantive examination of a union's performance, therefore, must be highly
4 deferential, recognizing the wide latitude that negotiators need for the effective
5 performance of their bargaining responsibilities." *Air Line Pilots Ass'n Intern. v. O'Neill*,
6 499 U.S. 65, 78 (1991). The Ninth Circuit has "stressed the importance of preserving
7 union discretion by narrowly construing the unfair representation doctrine." *Johnson v.*
8 *United States Postal Service*, 756 F.2d 1461, 1465 (9th Cir. 1985, as amended May 3,
9 1985). Thus, "the final product of the bargaining process may constitute evidence of a
10 breach of duty only if it can be fairly characterized as so far outside a 'wide range of
11 reasonableness,' . . . that it is wholly 'irrational' or 'arbitrary.'" *O'Neill*, 499 U.S. at 78
12 (quoting *Huffman*, 345 U.S. at 338). The rationality of a union's decision must be
13 evaluated "in light of both the facts and the legal climate that confronted the negotiators
14 at the time the decision was made." *Id.* at 78.
15

16 33. As stated by the Court, the claim in Claim One is that:

17 USAPA breached the duty of fair representation when it entered into the
18 MOU because the MOU does not require USAPA use the Nicolau Award
19 in the McCaskill-Bond process.

20 Order, Doc.122, at 4.

21 34. USAPA was not required to follow the Nicolau Award and acted consistent
22 with its duty of fair representation when it negotiated the MOU without requiring the
23 Nicolau Award to be the starting point for the seniority integration proceeding.

24 35. Plaintiffs have failed to meet their burden to establish any breach of the
25 duty of fair representation in that Plaintiffs have failed to show that USAPA's conduct in
26 negotiating and agreeing to the MOU was in bad faith or wholly irrational.
27
28

1 **F. The 2005 Transition Agreement Does Not Require USAPA To Follow The**
2 **Nicolau Award**

3 36. Plaintiffs' duty of fair representation claim rests, in part, on the already
4 rejected assertion that USAPA is somehow constrained from altering or amending the
5 terms of the Transition agreement. Plaintiffs' duty of fair representation claim also rests
6 on the erroneous assertion that the MOU constitutes the "Single Agreement" referred to
7 in the 2005 Transition Agreement and that therefore USAPA must follow the Nicolau
8 Award. Plaintiffs' Amended Complaint, Doc. 134, at ¶¶ 107-112, 135.

9 37. The MOU is not the Single Agreement referenced in the Transition
10 Agreement. Article V of the 2005 Transition Agreement explicitly describes the "Single
11 Agreement" as "a single collective bargaining agreement applicable to the merged
12 operations of America West and US Airways" and it is not disputed that the "Single
13 Agreement" contemplated by the 2005 Transition Agreement would have included the
14 results of the ALPA Merger Policy (i.e., the Nicolau Award) and would have been
15 subject to separate ratification by the former US Airways Pilots and the former America
16 West Pilots. *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1179-80 (9th Cir.
17 2010).

18 38. The MOU is not a "single collective bargaining agreement applicable to the
19 merged operations of America West and US Airways" but is a four-party agreement (US
20 Airways, American, USAPA and APA) applicable to the merged operations of US
21 Airways and American.

22 39. The parties to the MOU, which include the parties to the Transition
23 Agreement, explicitly provided that the MOU was not to be considered the "Single
24 Agreement" described in the 2005 Transition Agreement in paragraph 10.h of the MOU.
25

26 40. "The Transition Agreement can be modified at any time 'by written
27 agreement of [USAPA] and the [US Airways].'" 2:10-cv-01570-ROS, Doc. 193, p. 7.
28

1 41. The parties modified the 2005 Transition Agreement to provide that the
2 MOU was neutral with respect to seniority integration. *See* MOU ¶ 10, USAPA Exhibit
3 130, Doc. 77-8.

4 42. If the merger is consummated and the MOU takes effect, the MOU
5 provides that the Transition Agreement will be replaced by the MOU on the Effective
6 Date of the Plan of Reorganization. MOU ¶ 1 USAPA Exhibit 130, Doc. 77-8 p. 1.

7 43. There is no breach of the Transition Agreement.

8 44. The MOU is not the “Single Agreement” described in the 2005 Transition
9 Agreement and even if it were, the parties were free to modify it.

10 45. Nothing in the Transition Agreement prevented the parties from entering
11 into the MOU.

12 46. Nothing in the Transition Agreement required USAPA or US Airways to
13 implement the Nicolau Award.

14
15 **G. The Nicolau List Is Not Part Of The RLA Status Quo**

16 47. As stated by Judge Edwards in *Association of Flight Attendants v. USAir*
17 (*“AFA”*), 24 F.3d 1432, 1433-34 (D.C. Cir. 1994), a newly certified bargaining
18 representative (such as USAPA) is “not contractually bound” by any of the agreements
19 negotiated by the predecessor representative (such as ALPA) and is free to negotiate .

20 48. While negotiating for a new agreement, the new representative is required
21 to maintain the “status quo” as defined in Section 6 of the Railway Labor Act, 45 U.S.C.
22 §156. *Id.* at 1434.

23 49. The new bargaining representative is not “in any way limited by [any prior
24 agreement] in their pursuit of new terms of employment” and in fact “has full bargaining
25 rights with respect to covered employees without regard to whether the employees
26 previously have been covered by a collective bargaining agreement.” *Id.* at 1440.
27
28

1 50. In *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S.
2 142, 150-53 (1969), the Supreme Court explained that the RLA status quo consists of the
3 “actual, objective working conditions and practices, broadly conceived, *which were in*
4 *effect prior to the time the pending dispute arose.*” 396 U.S. at 153 (emphasis added).

5 51. The Nicolau Award is not part of the status quo because it was never
6 ratified and has never gone into effect.

7 52. With respect to seniority, the “actual, objective working conditions . . . in
8 effect” at all times through the present consist of two separate lists, one for the former US
9 Airways Pilots (and new hires) and one for the former America West Pilots. See, e.g.,
10 *Addington v. USAPA*, 606 F.3d 1174 (9th Cir. 2010).

11 53. The “status quo” for seniority in effect at the time the MOU was negotiated
12 has remained the same as the seniority systems in effect at America West and US
13 Airways at the time of their merger.

14 54. The Nicolau list is not an “actual, objective working condition” that is “in
15 effect” and not the “status quo” under the RLA.

16 55. The Nicolau Award was the product of an internal ALPA Policy – the
17 ALPA Merger and Fragmentation Policy.

18 56. As a newly certified bargaining representative USAPA had no obligation to
19 follow the Nicolau Award.

20 57. The Objectives stated in the USAPA Constitution require USAPA to seek
21 integration of seniority with another airline “based on date of hire . . . with reasonable
22 conditions and restrictions to preserve each pilot’s un-merged career expectations.”
23

24 58. The Objectives stated in the USAPA Constitution do not require USAPA to
25 adhere to strict date of hire seniority without conditions and restrictions.
26

27
28

1 59. The Objectives stated in USAPA’s Constitution in fact allow the Board of
2 Pilot Representatives considerable leeway in approving a seniority integration proposal
3 subject to ratification by USAPA’s members.

4 **H. USAPA Acted Reasonably And Did Not Violate Its Duty of Fair**
5 **Representation When It Negotiated The MOU Without Any Reference**
6 **To The Nicolau Award**

6 60. USAPA was not required to follow the Nicolau Award.

7 61. Under all of the circumstances, USAPA acted consistent with its duty of
8 fair representation when it decided that the significant and unprecedented economic
9 benefits of the MOU should not be tied to any particular resolution of the seniority
10 dispute and that all issues concerning seniority integration should be resolved through a
11 seniority integration process based on the McCaskill-Bond Amendment.

12 62. As the certified bargaining representative for all the US Airways pilots,
13 USAPA’s decisions with respect to the MOU, the manner in which the McCaskill-Bond
14 process is carried out and how to best protect the interests of all US Airways pilots in that
15 process are committed to its sound discretion and the wide range of reasonableness it is
16 entitled to exercise under federal law. *See, e.g., Vaca* , 386 U.S. at 190; *Bautista v. Pan*
17 *American World Airlines*, 828 F.2d 546, 549 (9th Cir. 1987) (quoting *Huffman*, 345 U.S.
18 at 338); *Ackley v. Western Conference of Teamsters*, 958 F.2d 1463, 1472 (9th Cir. 1992)
19 (“A union's conduct during bargaining need only fall within ‘[a] wide range of
20 reasonableness’ to survive judicial review”) (quoting *O’Neill*, 499 U.S. 65).

22 63. There are a wide range of reasonable and legitimate ways to integrate
23 seniority, and the courts “are careful not to substitute their judgments for those of the
24 authorized labor organization.” *Ratkosky v. United Transp. Union*, 843 F.2d 869, 876
25 (6th Cir. 1988).

26 64. The MOU confers significant benefits and advantages on all members of
27 the bargaining unit, including the West Pilot class. MOU , USAPA Exhibit 130. The
28

1 economic benefits of the MOU are significant and substantial and include an estimated
2 value of pay and benefit enhancements of \$1.6 billion over six years, including for
3 example:

- 4 • pay rates and other economic benefits for US Airways pilots equal to those
5 provided to American Airlines pilots;
- 6 • average pilot pay increases of \$30,000 per year upon the effective date of
7 the POR (retroactive to February 8, 2013) and an approximate average additional
8 increase in 2016 of another \$40,000 per year;
- 9 • an industry average pay parity adjustment effective on January 1,2016,
10 which would bring pay for all the pilots of the proposed merged airline into line with the
11 two other major domestic carriers – Delta Airlines and United Airlines; increase in the
12 pension contribution rate (made by the Company to a 401(k) account for each eligible
13 pilot) to 14% from the current rate of 10% for all US Airways pilots in addition to the
14 above pay increases;
- 15 • on January 1,2014, the pay rates for all pilots will increase an additional 8%
16 and the pension rate will increase to 16%; and a \$40 million lump sum payment to be
17 distributed amongst all US Airways pilots on the Effective Date of the POR.

18 MOU, USAPA Exhibit 130, Doc. 77-8.

19
20 65. In addition, the MOU confers significant noneconomic benefits on all US
21 Airways pilots, including without limitation, “no-furlough” provision and scope
22 provisions that protect the jobs of all US Airways pilots in the merged airline. MOU ¶¶ 8,
23 10(b), 11, USAPA Exhibit 130, Doc. 77-8.

24
25 66. Paragraph 10.h of the MOU provides for a seniority integration process
26 consistent with the McCaskill-Bond Amendment to the Federal Aviation Act, 49 U.S.C. §
27 42112, that is separate from the process for reaching a JCBA. MOU, ¶10, USAPA
28 Exhibit 130, Doc. 77-8 pp. 6-7.

1 67. USAPA’s determination to negotiate an MOU that is neutral on seniority
2 and that commits the resolution of all issues concerning seniority integration to a process
3 consistent with the McCaskill-Bond amendment would be in the best interest of all of its
4 members is rational and well within the wide discretion accorded to unions in
5 determining what is in the best interests of all members. *See, e.g., O’Neill*, 499 U.S. at
6 78.

7 68. In DFR cases arising out of the negotiation of a seniority arrangement,
8 ratification of the seniority arrangement by those asserting a duty of fair representation
9 claim is a valid defense to claims of union misconduct in reaching the seniority
10 arrangement. *Gullickson v. Southwest Airlines Pilots’ Ass’n*, 87 F.3d 1176, 1183-84 (10th
11 Cir. 1996); *see also Papcin v. Dichello Distributors, Inc.*, 697 F.Supp. 73, 80 (D. Conn.
12 1988) (In dismissing plaintiffs’ hybrid DFR claim, finding that the 1980 agreement
13 modified seniority provisions, and “plaintiffs knew this to be the case when they voted to
14 ratify the 1980 agreement.), judgment aff’d in unpublished decision 862 F.2d 304 (2d
15 Cir. 1988).

16 69. The MOU and the materials distributed to Plaintiffs and the West Pilot
17 Class prior to ratification of the MOU were abundantly clear and informed USAPA
18 members that the MOU did not contain the Nicolau Award and fully informed them that
19 seniority would be determined through a process consistent with the McCaskill-Bond
20 amendment. *Gullickson*, 87 F.3d at 1185 (finding that plaintiffs knew “ratifying the [new
21 collective bargaining agreement] signified assent to the seniority arrangements contained
22 in the [Letter of Agreement].”).

23 70. Plaintiffs and the West Pilot Class were well informed of the nature and
24 effect of the MOU, and the seniority integration procedure contained therein, and
25 USAPA’s widely known position regarding the Nicolau Award, including, *inter alia*: 1)
26 that the MOU did not contain any reference to or purport to implement the Nicolau
27
28

1 Award, (2) that USAPA had no intention of advancing the Nicolau Award either in any
2 seniority integration proceeding set forth in the MOU or otherwise, (3) that the MOU
3 provided the Transition Agreement would sunset upon the Effective Date of the POR and
4 (4) that the MOU continues the current status quo regarding seniority until final seniority
5 integration is determined under the process set forth in paragraph 10 of the MOU. *See*
6 *Gullickson*, 87 F.3d at 1185 (noting, *inter alia*, extensive information regarding
7 agreement including language of agreement which was available for review,
8 communications made by plaintiffs, meetings held to explain the document).

9
10 71. Plaintiffs and the West Pilot class knowingly and voluntarily voted
11 overwhelmingly for ratification of the MOU.

12 72. The ratification of the MOU by approximately 98% of the Phoenix based
13 pilots precludes a finding that USAPA breached its duty of fair representation by
14 negotiating an MOU that is neutral with respect to seniority. *Gullickson*, 87 F.3d at
15 1183-84; *Papcin*, 697 F.Supp. at 80 (judgment aff'd in unpublished decision 862 F.2d
16 304 (2d Cir. 1988)). *See also Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1534
17 (7th Cir. 1992).

18 73. There is no showing that an MOU that included the Nicolau Award would
19 have been agreed to by the parties to the collective bargaining agreement or would have
20 been ratified by USAPA's membership. *See Addington I*, 606 F.3d at 1180.

21 74. In order to establish a breach of the duty of fair representation, Plaintiffs are
22 required to show a causal connection between the breach and the alleged harm. *Acri v.*
23 *International Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1397 (9th Cir.
24 1986); *Ackley v. Western Conf. of Teamsters*, 958 F.2d 1463, 1473 (9th Cir. 1992).

25 75. Plaintiffs have not established that they suffered any harm as a result of the
26 alleged breaches of the duty of fair representation. *Acri*, 781 F.2d at 1397; *Ackley*, 958
27 F.2d at 1473.
28

1 76. Further, Plaintiffs have not established a causal connection between the
2 harm they allege and the action of USAPA because US Airways and the other parties to
3 the MOU made it clear from the outset that they did not want the MOU to address
4 seniority other than through a process consistent with the McCaskill-Bond amendment.
5 *Acri*, 781 F.2d at 1397; *Ackley*, 958 F.2d at 1473.

6 77. USAPA did not breach its duty of fair representation by negotiating the
7 MOU that did not include any reference to the Nicolau Award.

8 78. USAPA is not required to present the Nicolau list as the starting point for
9 the seniority integration proceeding with APA.

10 79. A decision that the MOU requires the use of the Nicolau Award would
11 constitute a material change in the MOU and could not become effective unless agreed to
12 by the other parties to the MOU and ratified by USAPA's membership.

13 80. Reopening the MOU in this fashion could be seriously detrimental to
14 USAPA's members.

15 81. Plaintiffs' DFR claim must be dismissed.

16 **I. Claim Four Must Be Dismissed**

17 82. The NMB has exclusive jurisdiction to determine union representation
18 disputes under the RLA. Section 2, Ninth of the RLA, 45 U.S.C. § 152, Ninth.

19 83. In April 2008, the NMB certified USAPA as the exclusive bargaining
20 representative of the single transportation system craft or class of all US Airways pilots
21 and, since April 2008, USAPA has been the exclusive bargaining representative of all US
22 Airways pilots.

23 84. A union's duty of fair representation standard emanates only from the
24 *exclusive* representative status of the NMB-certified bargaining unit representative.
25 *McNamara-Blad v. Assoc. of Prof. Flight Attendants*, 275 F.3d 1165, 1169 (9th Cir.
26
27
28

1 2002) (“The duty of fair representation arises from a union's statutory role as the
2 exclusive bargaining representative for a unit of employees.”).

3 85. Only certification by the NMB creates exclusive representative status
4 under the RLA and the corresponding duty of fair representation. *McNamara-Blad v.*
5 *Assoc. of Prof. Flight Attendants*, 275 F.3d 1165, 1169 (9th Cir. 2002).

6 86. The Court has no jurisdiction or authority to review the NMB’s
7 determination that USAPA is the exclusive bargaining representative for all of the US
8 Airways pilots. *McNamara-Blad v. APFA*, 275 F.3d at 1170, (citing *Switchmen’s Union*
9 *v. NMB*, 320 U.S. 297, 303-07 (1943)). See also *America West Airlines v. National*
10 *Mediation Board*, 119 F.3d 772, 775 (9th Cir 1997).

11 87. The McCaskill-Bond Amendment incorporates NMB determinations of the
12 questions of craft or class and representation through its language conditioning
13 imposition of the Section 3 and 13 seniority integration process to a “covered transaction
14 involving two or more covered air carriers that results in the combination of crafts or
15 classes that are subject to the Railway Labor Act (45 U.S.C. 151 et seq.)” 49 U.S.C. §
16 42112.
17

18 88. The Section 3 and 13 seniority integration process among the pilots of US
19 Airways and the pilots of American Airlines is a matter of collective bargaining and
20 therefore is within USAPA’s exclusive representative status as certified representative of
21 US Airways pilots. See, e.g., *California Brewers Ass’n v. Bryant*, 444 U.S. 598, 608, 100
22 S.Ct. 814, 820 (1980); *Hass v. Darigold Dairy Products*, 751 F.2d 1096, 1099 (9th Cir.
23 1985); *Colbert v. Brotherhood of Railroad Trainmen*, 206 F.2d 9, 13 (9th Cir. 1953), *cert.*
24 *denied*, 346 U.S. 931, 74 S.Ct. 320 (1954).

25 89. Allowing Plaintiffs to act as representatives of West Pilots in the
26 McCaskill-Bond process would violate the NMB’s certification of USAPA as
27
28

1 representative of US Airways pilots and the NMB's exclusive authority to determine the
2 representative of US Airways pilots.

3 90. Paragraph 10 of the MOU requires that the seniority integration process
4 must be "consistent with" the requirements of McCaskill-Bond, that is, following the
5 Section 3 and 13 process. MOU, USAPA Exhibit 130, Doc. 77-8.

6 91. Allowing Plaintiffs to act as representatives of West Pilots in the
7 McCaskill-Bond process would violate the MOU.

8 92. Allowing Plaintiffs to act representatives of the West Pilots in the
9 McCaskill-Bond process would violate USAPA's ability as the exclusive representative
10 for all US Airways Pilots to make decisions and enter into agreements on behalf of that
11 group of employees without judicial interference. *See Local 1052, United Broth. of*
12 *Carpenters and Joiners of Am. v. Los Angeles County Dist. Council of Carpenters*, 944
13 F.2d 610, 613 (9th Cir. 1991) (stating that "[t]here is a well-established federal policy of
14 avoiding unnecessary interference in the internal affairs of unions ..."). *See Shea v. Int'l*
15 *Ass'n of Machinists and Aerospace Workers*, 154 F.3d 508, 517 (5th Cir. 1998) (applying
16 this principle to DFR claims arising under the RLA). *See also Hendricks v. Airline Pilots*
17 *Ass'n Int'l*, 696 F.2d 673, 677 (9th Cir. 1983) ("Under the collective bargaining system,
18 selection of a union as the bargaining representative substantially reduces the ability of
19 individual employees to deal directly with their employer. Hence, federal labor policy
20 'extinguishes the individual employee's power to order his own relations with his
21 employer and creates a power vested in the chosen representative to act in the interests of
22 all employees.'") (quoting *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180, 87 S.Ct.
23 2001, 2006 (1967)).

24 93. Claim Four must be dismissed.

25
26 **J. Plaintiffs are Not Entitled to Attorneys' Fees (Claim Three)**

27 94. Plaintiffs achieved no benefit to any party whose interests they purported to
28

1 represent.

2 95. Plaintiffs cannot prevail on their claim for attorneys' fees as a matter of law
3 because they are not "prevailing" parties. *See Park, ex rel. Park v. Anaheim Union High*
4 *School Dist.*, 464 F.3d 1025, 1034 (9th Cir. 2006) ("For the purposes of attorney's fees
5 awards, a prevailing party is defined as 'a party which 'succeed[s] on any significant
6 issue in litigation which achieves some of the benefit the parties sought in bringing the
7 suit.'" (internal citations omitted) (emphasis included); *Kollsman v. Cohen*, 996 F.2d
8 702, 706 (4th Cir. 1993) ("A dismissal of an action, whether on the merits or not,
9 generally means the defendant is the prevailing party.").

10 96. Plaintiffs' attorneys' fees have been paid by a third party, Leonidas, LLC,
11 that is not a party to this action and has no legal right to recover fees. *See, e.g.,*
12 *Unification Church v. I.N.S.*, 762 F.2d 1077, 1082 (D.C. Cir. 1985) (upholding denial of
13 attorneys' fees to individuals where church paid attorneys' fees: "Whatever the outcome
14 of our consideration of fees here, then, the individual appellants will not pay the fees. If
15 we deny fees, the Church will pay the fees. If we award fees, the INS will pay the fees.
16 The Church is the beneficiary of any award of fees, not the individual appellants, and
17 thus the Church can fairly be characterized as the real party in interest.").

18 97. Plaintiffs have no authority to attempt to collaterally attack or alter or
19 amend the judgments in earlier litigations by seeking attorneys' fees for work performed
20 in those litigations that plaintiffs lost and which, in any event, were never part of the
21 judgments in those cases.

22 98. Plaintiffs are not entitled to attorneys' fees.

23 Respectfully submitted this 14th day of October 2013.

24
25
26 **Martin & Bonnett, P.L.L.C.**

27 By: s/Susan Martin
28 Susan Martin

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Jennifer L. Kroll
Martin & Bonnett
1850 N. Central Ave., Suite 2010
Phoenix, AZ 85004

Patrick J. Szymanski (*pro hac vice*)
Patrick J. Szymanski, PLLC
1900 L Street, NW, Suite 900
Washington, DC 20036

Brian J. O'Dwyer (*pro hac vice*)
Gary Silverman (*pro hac vice*)
Joy K. Mele (*pro hac vice*)
O'Dwyer & Bernstien, LLP
52 Duane Street, 5th Floor
New York, NY 10007

Attorneys for US Airline Pilots Association

CERTIFICATE OF SERVICE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I hereby certify that on October 14, 2013, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Marty Harper
Andrew S. Jacob
Jennifer Axel
Polsinelli & Shughart, PC
CityScape
One East Washington St., Ste. 1200
Phoenix, AZ 85004

Attorneys for Plaintiffs

US Airways, Inc.
Karen Gillen
111 West Rio Salado Parkway
Tempe, AZ 85281

Robert A. Siegel
Chris A. Hollinger
400 South Hope Street, Suite 1500
Los Angeles, CA 90071-2899

Attorneys for US Airways, Inc.

s/J. Kroll