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8
9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE DISTRICT OF ARIZONA**

11 Don ADDINGTON; et al.,

Case No. 2:13-CV-00471-ROS

12 *Plaintiffs,*

**PLAINTIFFS' RESPONSE TO
USAPA'S SUMMARY OF EVIDENCE**

13 vs.

14 US AIRLINE PILOTS ASS'N, an
15 unincorporated association; et al.,

16 *Defendants.*

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1 USAPA fails to offer evidence of its legitimate union purpose for using §10(h) of
2 the MOU to amend the 2005 Transition Agreement (“TA”). USAPA has presented no
3 evidence of its intent or purpose for §10(h) because the only person with such
4 knowledge, Mr. Szymanski, refused to sit for a deposition and declined the Court’s offer
5 to be sworn in and testify under oath at trial. Instead, USAPA offers partial and
6 inconsistent explanations. USAPA argues, for example, that the MOU is “seniority
7 neutral.” In fact, the MOU exchanges the neutral “process” for East/West seniority
8 integration found in the TA to a “new process” that will be absolutely controlled by the
9 East Pilot majority. USAPA also attempts to back-door establishing a legitimate union
10 purpose by ignoring a clear ruling from this Court and attempting to introduce such
11 evidence through a post-trial declaration from President Gary Hummel. As explained in
12 Plaintiffs’ Motion to Strike (Doc. 257), the Court must not allow that. The Declaration
13 and ¶¶ 11, 14, 30, 34, 37, 40, 41 and 42, of Doc. 260, which rely on it, should be stricken.

14 USAPA also argues that because Plaintiffs did not prove an illegitimate purpose,
15 USAPA is now legally free and clear. That USAPA refused to allow Mr. Szymanski, the
16 only person who knows the purpose of § 10(h), to testify regarding its purpose somehow
17 is irrelevant. USAPA is a labor organization and certified bargaining representative for
18 the West Pilots. It owes fiduciary duties to the West Pilots. That is has intentionally
19 obfuscated the intent of §10(h) and is now attempting to use that tactic against the West
20 Pilots is evidence of its utter inability to act fairly when it comes to the West Pilots.
21 Indeed, USAPA’s only evidence that it can fairly represent the West Pilots in McCaskill-
22 Bond process is self-serving testimony and West Pilots’ appointments to minority
23 positions within USAPA. USAPA’s representations are empty words and the minority
24 positions are worth nothing when it comes to seniority.

25 None of USAPA’s arguments are supported by the evidence in this matter.
26 USAPA believes that the “effect” of § 10(h) is a “clean slate” on seniority. [Colello,
27 Bradford, Hummel.] USAPA has also admitted that it will not propose the Nicolau
28 Award during McCaskill-Bond process. [Pauley.] The economic benefits of the MOU

1 were almost exclusively negotiated by APA, not USAPA. [Hummel, Colello, Owens,
2 Holmes]. The limited additional benefits that USAPA obtained had nothing to do with
3 §10(h). [Hummel, Colello, Owens, Holmes]. Finally and most damning is that the pay
4 rates in the MOU are the same as those that US Airways pilots would have received in
5 2007 if they had agreed to what is known as the Kirby Proposal. [Bradford]. The only
6 thing that USAPA really achieved with § 10(h) it that it believes this provision nullifies
7 its obligation to use the Nicolau Award. It has provided the Court no evidence as to why
8 it did so and thus has not established a legitimate union purpose. It has also failed to
9 rebut the evidence provided by Plaintiffs that establishes USAPA cannot represent the
10 West Pilots fairly in the McCaskill-Bond process.

11 Plaintiffs' response to USAPA's summary of evidence is as follows:

12 1. Undisputed.

13 2. In December 2012 when USAPA's NAC arrived in Dallas, it agreed to
14 accept all of the benefits of the APA 2012 CBA agreement as a baseline. [Holmes].
15 Regardless of any efforts made by USAPA during the course of the MOU, once APA
16 becomes the certified bargaining agent for the post-merger American all of those benefits
17 will accrue to US Airways pilots. [Hummel, Bradford] USAPA was able to garner some
18 additional benefits, like a \$40 million "sign up bonus" and the "retrospective pay" in
19 return for a unanimous vote by the BPR in favor of the MOU and support for the merger.
20 [Holmes, Colello, Scherff]. However, none of the economic benefits actually obtained by
21 USAPA related to the MOU are connected to § 10(h). [Colello, Holmes].

22 3. USAPA presented no evidence that it persuaded US Airways to negotiate
23 with USAPA because of scope protections in the East Contract. There is no evidence that
24 any party to the MOU wanted USAPA to have authority to unilaterally dictate East/West
25 seniority integration. In July 2012, prior to negotiations of MOU I, Scott Kirby, from US
26 Airways, indicated that MOU I would not address the East/West seniority dispute.
27 [Hummel Dep.] Indeed, the first draft of the McCaskill-Bond language in MOU I was
28 drafted by US Airways and did not include anything akin to 10(h) or purport to limit the

1 participants in McCaskill-Bond on the US Airways side only to USAPA. [Owens] When
2 MOU I was presented to the BPR in August 2012, the BPR had no issue with the
3 seniority language and did not instruct the NAC to change it. [Scherff, Holmes, Colello]

4 There is no evidence showing that the other parties to the MOU wanted to change
5 the McCaskill-Bond language from what was contained in MOU I. The evidence shows
6 that it was USAPA that unilaterally insisted on amending the McCaskill-Bond provision
7 from MOU I. [Colello; JPS, Doc. 206-1, Stipulations of Fact, at ¶ § F(94)].

8 The *intent* of adding Section 10(h) could not be established by anyone from
9 USAPA, other than Mr. Szymanski, who refused to sit for a deposition, or testify at trial.
10 [Exhibits 129-130; Transcript at 310:21-311:4]. However, everyone from USAPA now
11 agrees that the *effect* of Section 10(h) was to nullify the obligation to use the Nicolau
12 Award. [Hummel, Bradford, Colello].

13 4. Undisputed.

14 5. Mr. Colello's testimony that USAPA worked collectively for the good of
15 all pilots is self-serving. Mr. Colello testified that the MOU created a "clean slate" for
16 USAPA with respect to the Nicolau Award and that he did not inform any West Pilot that
17 this was the effect of §10(h). [Colello].

18 6. See Response to ¶ 5. USAPA's argument that bargaining is a "give and
19 take" is canned testimony intended to divert the Court's attention from the fact that
20 USAPA does not provide a legitimate union purpose for inclusion of § 10(h) and its
21 failure to disclose the "effect" of § 10(h) until this litigation. USAPA has admitted that it
22 did not receive anything of value for the inclusion of § 10(h). [Colello, Holmes]. With
23 respect to §10(h), there was nothing but give on the part of West Pilots (lose the Nicolau
24 Award) and take on the part of East Pilots (Date of Hire List).

25 7. None of the concerns that the BPR had with the APA Term Sheet or MOU
26 I related to East/West seniority or McCaskill-Bond. [Scherff; Holmes, Colello, Crimi,
27 Ex. 104]. The NAC's attempt to ensure US Airways pilots stood in the best position with
28 respect to APA was not related to East/West seniority. [Owens, Hummel, Colello]

1 8. The McCaskill-Bond provision of MOU I was drafted by US Airways and.
2 was acceptable to the NAC and the BPR. [Owens, Scherff, Holmes, Colello].

3 9. The TA is binding on USAPA. [Ex. 115 (Doc. 193 from Declaratory
4 Judgment Action) at § III, pg. 6:4-20). The material terms and conditions of employment
5 for both the East and West pilots following the merger are now known and fixed by
6 MOU #2. [Holmes; Colello].

7 10. USAPA has provided no admissible evidence as to why § 10(h) was
8 included in the MOU. [Colello, Hummel, Pauley, Holmes]. Instead, USAPA's counsel,
9 who drafted the language but refused to testify to its purpose, argues its purpose was to
10 "make clear" the "status quo" would continue. That Mr. Szymanski is the same person
11 who wrote §10(h), is defending USAPA in this lawsuit and is merger counsel underscores
12 the inability of USAPA to recognize or avoid a conflict of interest on seniority.

13 Without §10(h), the procedures in the 2005 Transition Agreement would control
14 East/West integration. According to the testimony of USAPA's officers and NAC
15 Chairman, § 10(h) nullifies those provisions by providing USAPA a "clean slate."
16 [Colello, Hummel, Bradford]. It also allows USAPA to dictate East/West seniority
17 integration, or in other words subject the West Pilots to a date of hire list with East Pilots,
18 which was not the status quo prior to the MOU. [Pauley (depo.) at 18:18-20:16; Ciabaton
19 (depo.) 50:7-50:15; Crimi (depo.) at 94:18-94:24; Bradford (depo.) at 52:23- 53:6].

20 11. The TA is in effect until the Effective Date of the MOU. [Colello].
21 USAPA's claim that §10(h) was a "clarification" rests on the proposition (which it knew
22 the West Pilots disagreed with) that it was not bound by the TA or the obligation to
23 implement the Nicolau Award. Section 10(h) is an amendment to the seniority
24 integration provisions in the TA, which requires ordering the seniority of the East and
25 West pilots according to the Nicolau Award. *See* ¶¶ 3, 10, *supra*. Because USAPA has
26 entered into a CBA that does not require implementation of the Nicolau Award, it must
27 have a legitimate union purpose for doing so. [Ex.115]. It has not offered one.

28 12. Captain Holmes agreed to move forward with the final provision of § 10(h)

1 because USAPA, its bargaining representative, and Pat Szymanski, its counsel, failed to
2 explain to him the “effect” this provision had on seniority (to nullify the Nicolau Award)
3 and instead told him that the MOU was “neutral”. *See* Doc. 259 at § V.

4 13. *See* Response to ¶ 12.

5 14. It is apparent there was a “secret agenda” with respect to § 10(h). Only Mr.
6 Szymanski knows the purpose or intent of Section 10(h). [Hummel, Pauley, Colello,
7 Owens [dep.], Homes]. He refused to testify. [¶ 3, *supra*]. Before ratification USAPA
8 took the position that the MOU was “neutral” on seniority, after ratification it states that §
9 10(h) gave USAPA a “clean slate.” [Colello, Holmes, Scherff]. The only plausible reason
10 for doing so was to trick the West Pilots to voting in favor of the MOU.

11 15. Whether the change of control provision of the East CBA was triggered by
12 the merger is disputed by US Airways. [DeVicq, Owens]. Despite its contingency, the
13 East Pilots were expressly told by USAPA that it would be waiving the change of control
14 provision and educated about the ramifications of this waiver. [Owens, Ex. 24 (MOU) at
15 § 14, Ex. 87]. There is no evidence in the record as to why the East Pilots agreed to
16 waive change of control and none of the East Pilots testified as to why (or if) they voted
17 for the MOU. There is evidence that the incremental value of ratifying MOU #2 was in
18 the order of \$300 million and the properly discounted value of the change of control
19 provision was only \$120 million. [DeVicq] Even if the change of control provision of the
20 East CBA applied, East Pilots gave up nothing by waiving it.

21 16. *See* Response to ¶ 15.

22 17. The 2007 Kirby proposal would have paid increased wages from 2007 to
23 2013 and, in 2014, would have paid about the same wages as under MOU #2.
24 [Bradford]. The benefits in the MOU are not “unprecedented” and could have been
25 attained in 2007 (or any time thereafter) if the East Pilots had not refused the Kirby
26 proposal simply because it required them to implement the Nicolau Award. [Diorio,
27 Bradford]. The benefits of the MOU were primarily negotiated by APA, not by USAPA.
28 [Holmes, Colello, Owens] There is no evidence in the record that the APA has stated it is

1 entitled to “credit” because it primarily negotiated the improved wages and benefits in the
2 MOU.

3 18. There was no evidence of any direction from the BPR to the Merger
4 Committee to put additional seniority related provisions into MOU #2.

5 19. USAPA utterly failed to educate the West Pilots about the ramifications of
6 the MOU. USAPA repeatedly told the West Pilots that the MOU was “seniority neutral.”
7 [Scherff, Holmes, Exhibits 125, 78, 124]. USAPA never told the West Pilots: (1) that all
8 it meant by labeling MOU #2 as neutral on seniority was that the words “Nicolau” and
9 “date-of-hire” do not appear; (2) that it intended to use MOU #2 “to take away the
10 requirement to use the Nicolau” or to exclude them from the McCaskill-Bond process; or
11 (3) how they should vote if they wanted to preserve their claims to implement the
12 Nicolau Award. [Holmes, Bradford (dep); Colello; Owens; Hummel (dep) Ex. 78, 144.]
13 Rather, USAPA repeatedly advised West Pilots to disregard their position on
14 implementation of the Nicolau Award when they voted. [Ex. 78, 124, 125; Scherff.] In
15 contrast, USAPA used clear language to ensure that East Pilots knew that MOU #2
16 waived the change-of control provision in the East CBA. [Ex. 96; Owens]

17 20. USAPA never disclosed to the West Pilots during the roadshows that the
18 MOU abandoned the obligation to use the Nicolau Award. [Holmes, Scherff] Instead, the
19 West Pilots were told that the MOU was seniority “neutral” and that their vote on the
20 MOU should not be predicated in any way on the Nicolau Award. [Ex. 78, 124, 125].

21 21. Prior to the ratification vote on the MOU, USAPA did not disclose to the
22 West Pilots that the “effect” of § 10(h) was to nullify the TA obligation to use the
23 Nicolau Award. [Scherff, Holmes, Colello] When speaking to East Pilots at a Charlotte
24 domicile road show, Mr. Szymanski stated that he regarded the Nicolau Award as “dead.”
25 [Holmes; Scherff; Ex. 131, Ex. 123]. The Phoenix domicile roadshow occurred after the
26 Charlotte one and Mr. Szymanski changed his tune, going back to the MOU is “neutral.”
27 [Scherff, Holmes]. Whether Mr. Szymanski was playing to the East audience by saying
28 the Nic was “dead” was unclear to the West Pilots in the audience. [Holmes].

1 Captain Holmes only has the ability to post information on the Leonidas website
2 approved by others within the group. [Holmes]. Captain Holmes, the West Pilot's
3 representatives to the BPR and Leonidas are not class representatives, are not a labor
4 organization or a bargaining representative and do not owe labor fiduciary duties to the
5 West Pilots. Only USAPA has that position and responsibility. USAPA had an obligation
6 to be forthright with the West Pilots about the "effects" of the MOU. It was not.

7 22. ALPA Merger Policy in effect in 2005 did allow the arbitration board to
8 take date-of-hire and length of service into account and, in fact, the Nicolau arbitration
9 panel gave it consideration. [Ex. 114 at 26, 27]. Whether Arbitrator Nicolau gave due
10 consideration to length of service is not at issue in this litigation. An impartial arbitrator
11 and jury have already found that the Nicolau was fair and equitable.

12 23. *Id.*

13 24. That USAPA cites Exhibits 208 and 223 as "evidence" that the Nicolau
14 Award was an "ALPA proposal" is highly misleading to the Court and further evidence
15 of USAPA's utter lack of credibility. Exhibit 208 is a brief filed by the West MEC after
16 the East MEC unsuccessfully attempted to vacate the Nicolau Award. Among other
17 things, it states, that the Nicolau Award was not a binding seniority list until proposed by
18 ALPA and accepted by US Airways. Ex. 208 at pp. 2-3. Exhibit 208 was filed on
19 September 20, 2007. *Id.* On December 14, 2007, ALPA proposed the Nicolau Award to
20 US Airways pursuant to the TA. [Ex. 223]. One week later, on December 20, 2007, US
21 Airways' accepted the Nicolau Award, making it a binding and enforceable seniority list.
22 [JPS (Stipulated Facts) at ¶ 30.] The only piece that remained before implementation was
23 the negotiation of a CBA, which occurred with the MOU. [Ex. 223; Ex. 24, Colello,
24 Holmes]. The Court has already found that ALPA's obligations under the TA, including
25 the obligation to use the Nicolau Award, are binding on USAPA. [¶ 9, *supra*]

26 25. The Nicolau Award was accepted by ALPA and US Airways. [Ex. 223;
27 JPS (Stipulated Facts) at ¶ 30.] The status quo is the Nicolau Award. [Scherff].

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1 26. USAPA did not disclose to the West Pilots that the “effect” of § 10(h)
2 would be to nullify the obligation in the TA to utilize the Nicolau Award. *See* ¶¶ 19-21,
3 supra. USAPA has also failed to articulate what the legitimate union purpose of
4 including §10(h) in the MOU was other than generalities about the economic benefits of
5 the MOU, all of which are unrelated to Section 10(h). *See* ¶¶ 6, 10, supra.

6 27. Although USAPA indicates in the Summary of Evidence that it intends to
7 use Date of Hire for purposes of integration with the American pilots, the Chairman of its
8 Merger Committee would not answer this question on the stand and stated that USAPA
9 would go into McCaskill-Bond process with two lists: East and West. [Pauley]. Despite
10 Mr. Pauley’s attempts to mislead the Court, it is obvious to all that USAPA will go into
11 McCaskill-Bond process with its pilots organized by date of hire list(s). *See* ¶ 10, supra.

12 28. Exhibit 310 was an internal discussion amongst Plaintiffs regarding the
13 “intent behind the language in the MOU.” USAPA has still failed to provide that intent.
14 Plaintiffs’ suppositions on USAPA’s intent with respect to the MOU, or its effect are
15 simply evidence of USAPA’s failure to provide that information to the West Pilots prior
16 to the vote on the MOU. That some Plaintiffs or members of Leonidas ultimately
17 guessed the “effect” of § 10(h), which USAPA cannot even stand by in its pleadings, is
18 hardly surprising or somehow an effective waiver. *See* ¶ 14.

19 29. *See* ¶ 28. The MOU not including reference to the Nicolau Award is of no
20 probative value. Mr. Koontz, one of Leonidas’ founders, testified this “made sense”
21 because other CBA’s, like the Kirby proposal, also did not include reference to the
22 Nicolau Award. [Koontz]. There is no evidence that the West Pilots, Leonidas or
23 Captain Holmes knew, prior to the ratification vote, that USAPA intended for the MOU
24 to nullify its obligation to utilize the Nicolau Award.

25 Leonidas and its members like Captain Holmes have been fighting for six years,
26 with their own funds, for the Nicolau. That they recommended that the West Pilots vote
27 in favor of the MOU is evidence of the lack of disclosure by USAPA and the confusion
28 created by USAPA, Mr. Szymanski and § 10(h).

1 30. There is no admissible evidence that the MOU would not have been ratified
2 if it included the Nicolau Award because USAPA did not to take a poll on this issue
3 before the ratification vote. [Bradford].

4 31. Undisputed but immaterial.

5 32. USAPA’s support for the proposition that the West Pilots had an “explicit
6 understanding that it would not put the Nicolau Award into effect” is a citation to a
7 paragraph of its Statement of Facts (¶ 127) that does not exist and an email from Steve
8 Bradford with a “Subject” that includes “DO NOT FORWARD.” *See* Doc. 213, Ex. 137.
9 Exhibit 137 is Captain Bradford’s commentary about statements written by West Pilot
10 Johan Devicq, where among other things Captain Bradford dismisses the Court’s warning
11 that “Discarding the Nicolau Award places USAPA on dangerous ground” as “Dicta” and
12 concludes that date of hire is a legitimate union purpose. *Id.* According to USAPA the
13 MOU is not seniority “neutral”, it nullifies the obligation to use the Nicolau Award. *See*
14 ¶¶ 10-11, 19-21, *supra*. That the MOU was ratified does not excuse USAPA’s obligation
15 to provide a legitimate union purpose for discarding the Nicolau Award.

16 33. Undisputed but irrelevant that Captain Hummel appointed West Pilots to
17 USAPA committees.

18 34. There is no admissible evidence in the record for this proposition.
19 USAPA’s Committees and governance are dominated by East Pilots. [Koontz, Holmes,
20 Scherff, Colello, Pauley].

21 35. Undisputed but irrelevant.

22 36. Undisputed that Mr. Pauley testified in Court that he will present two lists
23 to APA; however, the order these pilots will be presented to APA in one unified list is
24 Date of Hire. *See* Doc. 260 ¶ 27; ¶ 10, *supra*.

25 37. Mr. Pauley, the Chairman of the Merger Committee testified that the list
26 ultimately proposed by USAPA could not possibly be the Nicolau list. [Pauley at 404:13
27 to 404:21.] USAPA’s officers and committee chairmen all agree that MOU #2 operates to
28 allow the USAPA BPR to dictate that the seniority of US Airways pilots will be ordered

1 by date-of-hire and not by the Nicolau Award when they are integrated with the seniority
2 of the American pilots according to the procedures in the MOU. [Pauley (depo.);
3 Ciabatoni (depo.); Crimi (depo.); Bradford (depo.).

4 As discussed in Plaintiffs' Summary of Evidence, USAPA BPR representatives
5 unequivocally stated that USAPA's constitution precludes the Nicolau Award. Doc. 259
6 at § III(B). Captain Hummel, Captain Bradford and numerous others campaigned on the
7 basis of "unconditional" support for date of hire. *Id.* at III(D). USAPA's protestations of
8 fairness aside, the overwhelming weight of the evidence demonstrates that USAPA will
9 use date of hire to integrate with American pilots absent intervention of the Court.

10 38. *See* ¶ 37, *supra*.

11 39. *See* ¶ 37, *supra*. Other than saying that two lists offer "flexibility" to
12 USAPA, no one from USAPA can articulate how this is the case or offered to share with
13 the Court (or West Pilots) any of the "various scenarios" the Merger Committee is
14 currently contemplating.

15 40. USAPA cannot fairly represent the West Pilots on the issue of seniority.
16 *See* Plaintiffs' Summary of Evidence at § VIII. USAPA has stymied efforts by West
17 Pilots on the BPR to communicate with those in its domicile. [Scherff]. USAPA has also
18 refused to amend its constitution to be neutral. *Id.* While stymying West efforts to
19 educate US Airways Pilots as whole, USAPA has engaged on a campaign of
20 misinformation regarding the Nicolau Award from its inception. Doc. 259 at § III(E).

21 41. *Id.* Every West Pilot involved in USAPA governance testified that based
22 on their experience, USAPA cannot represent the West Pilots fairly and impartially on
23 the issue of seniority. [Koontz, Holmes, Scherff]

24 42. *Id.* USAPA's sole support, other than self-serving testimony, that it has
25 fully and fairly represented West Pilots with respect to all issues and grievances is the
26 fact that it has brought grievances on behalf of West Pilots. USAPA bringing grievances
27 on behalf of West Pilots does not establish it can fully represent West Pilots all issues and
28 the overwhelming weight of the evidence clearly establishes otherwise.

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RESPECTFULLY SUBMITTED this 6th day of November, 2013.

POLSINELLI PC

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of November, 2013, I electronically filed the foregoing with the Clerk of the Court and electronically served a copy of the same upon all parties by using the CM/ECF system.

By: /s/ Jennifer J. Axel