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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF ARIZONA**

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| Don Addington; et al.,<br>Plaintiffs,<br><br>vs.<br><br>US Airline Pilots Ass'n, et al.,<br>Defendants. | No. CV-13-00471-PHX-ROS<br><br>**PLAINTIFFS' RESPONSE TO USAPA'S MOTION FOR SUMMARY JUDGMENT (Doc. 211)** |

Plaintiffs respond in opposition to USAPA's Motion for Summary Judgment (Doc. 211). This response is supported by a *Memorandum of Points and Authorities* that follows and by *Plaintiffs' Separate Statement of Facts in Response to Motions for Summary Judgment* ("PSOF") filed concurrently.

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Other Authorities**

# MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

This lawsuit arises out of USAPA's wrongful action to abandon the Nicolau Award by making a contract that purports to supersede the East/West seniority integration provisions in the 2005 Transition Agreement ("TA"). Although USAPA had authority to amend the TA, its discretion to do so was constrained by the duty of fair representation such that it could do so only for a legitimate union purpose.

USAPA has taken inconsistent and often erroneous legal and factual positions to avoid having this Court find that, by putting ¶ 10.h into the MOU, USAPA acted without a legitimate union purpose. In fact, the evidence is quite clear on this point. USAPA intended to have ¶ 10.h operate to abandon the Nicolau Award that all had agreed (before it was announced) would be a final determination of East/West seniority integration. It did this solely to meet the demands of the East Pilot majority. USAPA, therefore, acted without a legitimate purpose. In so doing, it breached its duty of fair representation.

Only one remedy can suffice. The Court should order USAPA to use the Nicolau Award to order East/West pilot seniority when US Airways pilots are integrated with those of American. And, to ensure that USAPA does not evade good faith compliance with that order, it should declare that the West Pilots must have full party status and representation of their own choosing in the process of integrating seniority with the American pilots.

## II. FACTUAL BACKGROUND

Plaintiffs are setting out the material facts in their Response to US Airways Motion for Summary Judgment (Doc. 212) and incorporate those facts here by reference.

## I. LEGAL ARGUMENT

Paragraph 10.h of the MOU abandons the Nicolau Award by purporting to supersede the East/West seniority integration provisions in the TA. Those TA provisions require using the Nicolau Award when the East and West sides of US Airways are integrated into a single operation. Because the MOU leads to East/West operational

integration (albeit along with integration of American Airlines operations) it is the "Single Agreement" referenced in the TA. To the extent that the TA did not expressly envision the present situation, the implied covenant (a recognized part of every collective bargaining agreement) requires integrating East and West operations here using the Nicolau Award. Although USAPA can change the TA seniority provisions (with the consent of US Airways), it must have an objectively legitimate union purpose to do so. USAPA breached the duty of fair representation because it did not.

### A. USAPA is bound by the 2005 Transition Agreement (the "TA").

#### 1. The TA is the contract "status quo" until it is superseded by another contract.

The TA seniority integration terms control East/West seniority integration unless US Airways and USAPA (or their successors) agree to change those terms. *See*, *e.g.*, *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 316 (D. N.J. 2004). In *Bensel*, a class of former TWA pilots argued that the pre-asset purchase TWA contract was the "status quo," not a series of post-asset purchase agreements entered into by American and its pilots. *Id.* The court found otherwise, finding that the new agreements replaced the former agreements. *Id.* After the 2005 merger of America West and US Airways, the TA became the controlling contract, the "status quo," to the extent that it superseded the separate pre-merger pilot collective bargaining agreements. As shown below, that did not change when USAPA replaced ALPA.

It is "well-established that a mere change of representative does not alter otherwise applicable contractual agreements." *Assoc. of Flight Attendants, AFL-CIO v. USAir, Inc.*, 24 F.3d 1432, 1439 (D.C. Cir. 1994). When USAPA became the pilots' new collective bargaining representative in 2008, therefore, it succeeded "to the status of the former representative without alteration in the contract terms." *Int'l Bhd. of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 163 (5th Cir. 1983). USAPA, therefore, is bound by the TA no less than ALPA would have been bound if it remained the bargaining

representative, and will be so bound until the TA is superseded by another contract with the consent of US Airways.

USAPA offers no authority that supports the proposition that, as a new bargaining representative, it is not bound by the contracts that were in effect when it replaced ALPA. *Assoc. of Flight Attendants*, merely recognized that a new union (or the old union for that matter) can make a contract with the consent of the carrier—a very unremarkable proposition. *Transport Workers Union of Amer. v. Hawaiian Airlines, Inc.*, 2009 WL 972483 at * 1, 12-13 (D. Hawaii Apr. 8, 2009), merely recognized that a contract is binding only according to its terms. The agreement there was that the contract at issue would not be binding until it was ratified by the union's members. *Id.* In contrast to those facts, the agreement here was that the TA went final in 2005 and, by its terms, the Nicolau Award would not be subject to ratification. [PSOF at ¶ 10.]

In short, because the TA controls the employment of US Airways pilots, it is the contract "status quo" until it is superseded by another contract. The questions then are: (1) What do the TA seniority integration provisions require? (2) What part of those provisions did USAPA try to supersede? and (3) Did USAPA do this for a legitimate union purpose?

**2. The TA requires implementation of the Nicolau Award.**

The TA requires implementation of the Nicolau after three events occur: (1) an integrated seniority list is created pursuant to ALPA Merger Policy procedures (which occurred with the announcement of the Nicolau Award in May 2007); (2) that list is accepted by US Airways (which occurred in December 2007); and (3) there is a "Single Agreement." [*Id.* at ¶ 8.] The MOU (which was ratified in February 2013) is the "Single Agreement."

**a. The MOU is the "Single Agreement."**

The TA defines the "Single Agreement" as a "single collective bargaining agreement applicable to the merged operations of America West and US Airways." [*Id.* at ¶ 9.] The Court already found that "[t]he text of the MOU supports the position adopted

by the West Pilots, US Airways and AMR: that it is a collective bargaining agreement." [Doc. 122 at 3:16 to 3:17.] US Airways surely agrees, as shown here:

> The MOU, which has already been approved by all parties and ratified by USAPA's membership, defines the terms and conditions of employment, including significant pay raises, that will become applicable to both East and West Pilots (and the American pilots as well) upon the effective date of AMR Corporation's Plan of Reorganization (i.e., the merger closing date) and those terms and conditions will remain in effect until at least January 1, 2019. The MOU thus represents the completion of the collective bargaining process for a combined East and West labor agreement – the very process that was still ongoing at the time of the Ninth Circuit's decision in Addington I and this Court's decision in Addington II.

[Doc. 49 at 5:9 to 5:22.]

Indeed, even Dean Colello, the Chairman of the USAPA Negotiating Committee, characterized the MOU negotiations as "collective bargaining negotiations." [PSOF at ¶ 71.] There is no question, therefore, that the MOU is a "single collective bargaining agreement."

Very plainly, the MOU is applicable to the merged operations of American and US Airways because it provides the single set of wages and other working conditions that are needed to merge pilot operations. [*See id.*] Because it is applicable to the merged operations of these two airlines, it is applicable to the merged operations of the two parts of one of the airlines, US Airways, that have been in separate operations since 2005. The MOU, therefore, is a "single collective bargaining agreement applicable to the merged operations of America West and US Airways." In other words, it is the "Single Agreement," referenced by the TA.[1]

USAPA has no valid basis to challenge such reasoning. Instead, USAPA invents a requirement that the Single Agreement must expressly refer to the Nicolau Award to trigger TA § VI.A. But that is not so stated in the TA. Quite to the contrary, there is no

[1] Because USAPA knew otherwise, it tried to add language to the MOU that disclaimed stating that the MOU was not the "Single Agreement." [PSOF at ¶ 62.]

need to refer to seniority in the Single Agreement because the TA does not provide for the possibility of a contract that would merge East and West pilot operations without using the Nicolau Award.

Finally, US Airways has not taken any action inconsistent with the MOU being the Single Agreement. First, its handling of the E-190 aircraft grievance is immaterial because the MOU was months away from ratification when that grievance was filed in August 2012. [*See* Doc. 213-10 at 114-116.] The fact that the grievance was decided after the MOU was ratified has no bearing because what was at issue was whether pre-MOU contracts were violated before then.

US Airways' position on the Section 22.C grievances is also off-point because it is based on the effect of MOU ¶ 10.h, not whether the MOU is the Single Agreement. [*See* Doc. 213-5 at Tab 8.] In its response to those grievances, US Airways took the position that ¶ 10.h changed the TA requirement to implement integrated operations after negotiation of the Single Agreement. That argument, in fact, presumes that the MOU is the Single Agreement. US Airways argues only that ¶ 10.h allows it to defer the timing of integration of East and West operations to coincide with integration of US Airways and American operations. [*Id.*] [2]

**b. The TA requires using the Nicolau Award even if the TA does not directly address this situation.**

Like all collective bargaining agreements, the TA has an implied covenant of good faith and fair dealing that "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Restatement (Second) of Contracts* § 205 cmt. a. (1981); *see also Building Materials & Construction Teamsters v.*

[2] Further evidence of USAPA's total lack of credibility is that two of the officers that filed grievances demanding implementation of the Nicolau Award were the two West members of the Merger Committee, James "Rocky" Calveri and Kenneth Stravers. Although USAPA did not call either trial, it insinuated they supported the efforts of the Merger Committee to come up with undisclosed "solutions" to seniority, which did not include the Nicolau. These grievances show that was untrue.

*Granite Rock*, 851 F.2d 1190, 1195 (9th Cir. 1971) (recognizing a claim for breach of the implied covenant in a collective bargaining agreement); *Greater Kansas City Laborers Dist. Coun. v. Builders' Ass'n., of Kansas City*, 213 F. Supp. 429, 422, n.2 (W.D. Mo. 1963) (recognizing the existence of an "'implied covenants of good faith and fair dealing' to which the parties to a collective bargaining agreement are to be judicially held").

Consequently, it does not matter that the TA does not directly address how East/West seniority would be ordered in the present situation where there will be a merger with pilots from a third airline before there is East/West operational integration. The present situation, to the extent it is not directly addressed in the TA, is controlled by the implied covenant. On that basis, USAPA cannot take action that is inconsistent with the parties' justifiable expectations when the TA was made.

In 2005, all parties to the TA understood and expected that ALPA Merger Policy procedures would yield a "final and binding" seniority list. [PSOF at ¶ 10.] There is no evidence that anyone envisioned, back in 2005, that this seniority list would not be implemented prior to a subsequent merger with a third airline. But surely, given the definite language of finality in the TA, in 2005 the parties justifiable expected that the seniority list resulting from ALPA Merger Policy would determine the East/West seniority order in a subsequent merger. The implied covenant in the Transition Agreement, therefore, prevents USAPA and US Airways from taking action that is inconsistent with those expectations. It requires using the Nicolau Award in this merger (unless the TA were properly amended or superseded).

**B. USAPA breached the duty of fair representation because, without a legitimate union purpose, it made a contract that purports to nullify or supersede the TA seniority integration provisions.**

USAPA has been utterly inconsistent in its position on the "effects" of ¶ 10.h. On one hand, it argued in its motion that ¶ 10.h amends the TA requirement to use the Nicolau Award. But, on the other hand, USAPA argued in its summary of trial evidence that ¶ 10.h "has nothing to do with terminating the 2005 TA" [Doc. 260 at ¶ 10]. USAPA

is plainly looking for a series of words that will allow it to evade its breach of the duty of fair representation. Such words, however, just do not exist.

The actual effect of ¶ 10.h is yet to be finally determined. But, there is no question that USAPA put ¶ 10.h into the MOU with the intention of abandoning the existing obligation to use the Nicolau Award. [PSOF at ¶¶ 62, 94-95.] To do that, USAPA had to have a legitimate union purpose. The evidence proves it did not .

**1. USAPA must have an objectively legitimate union purpose.**

In general, union conduct "unrelated to legitimate union interests" is wrongful." *Robesky v. Oantas Empire Airways Ltd.*, 573 F.2d 1082, 1090 (9th Cir. 1978). In particular, "a union may not juggle the seniority roster for no reason other than to advance one group of employees over another." *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1537 (7th Cir. 1992). Consequently, a union must "show some objective justification," an objectively legitimate union purpose, when it agrees to reorder seniority. *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 800 (7th Cir. 1976). USAPA, by putting ¶ 10.h into the MOU plainly took an action intended to give it a "clean slate," allowing it to order seniority using procedures other than those agreed to in the TA. [PSOF at ¶ 95.] USAPA has procedures in place (that will not change) that are controlled by the East Pilot majority. [*Id.* at ¶¶ 94, 97-98.] These procedures will ensure that USAPA's date-of-hire seniority order and not the Nicolau Award is used in the integration with the American pilots. [*Id.* at ¶ 97] USAPA, therefore, must have an objectively legitimate union purpose for putting ¶ 10.h into the MOU.[3]

[3] USAPA's argument that ¶ 4 of the MOU abrogates the TA is a red herring. First, it does not matter what part of the MOU functions to block implementation of the Nicolau Award. Second, ¶ 4 merely provides that "each term of the MTA [the name for the MOU when it goes into effect] shall be applicable to all US Airways pilots at the earliest practicable time for each such term, and such terms, when applicable, shall govern and displace any conflicting or wholly or partially inconsistent provisions of the former US Airways pilot agreements or the *status quo* arising thereunder." [Exhibit 24.] In other words, ¶ 4 merely provides that ¶ 10.h supersedes the TA to the extent that it conflicts with the TA. Without ¶10.h, ¶ 4 would have no effect on the TA seniority provisions.

**2. An objectively legitimate union purpose should reasonably intend to benefit the workers as a whole.**

"A primary purpose of a labor union is to negotiate contracts on behalf of its members." *NLRB v. Stephen Dunn & Assocs.*, 241 F.3d 652, 673 (9th Cir. 2001). A legitimate union purpose, therefore, seeks "increased benefits for workers in the bargaining unit as a whole." *See Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 742 (1981). In particular, when a union bargains to reorder seniority it must have a "legitimate purpose" for doing so. *Laborers & Hod Carriers Loc. No. 341 v. NLRB*, 564 F.2d 834, 840 (9th Cir. 1977). Otherwise, it breaches its duty of fair representation. *See Bernard v. Air Line Pilots Ass'n, Int'l*, 873 F.2d 213, 217 (9th Cir. 1989).

A line of cases addresses legitimate union purpose in the context of union decisions that affect worker seniority. These cases establish that a union's "seniority decisions may not be made solely for the benefit of a stronger, more politically favored group over a minority group." *Barton Brands,* 529 F.2d at 798-99.

In *Barton Brands*, for example, workers had earlier agreed to a final resolution of a seniority dispute that arose in the context of a merger, just as occurred here when the pilots entered into the 2005 Transition Agreement. *Id.* at 796. Notwithstanding that agreement, when layoffs began a majority faction within the worker group insisted on reopening the seniority issue. *Id*. The union complied with those demands and re-formulated seniority, putting a minority faction first in line for layoffs. *Id*. The court strongly disapproved. It explained that a union's "seniority decisions may not be made solely for the benefit of a stronger, more politically favored group over a minority group." 529 F.2d at 798-99. Consequently, it required the union to "show some objective justification for its conduct." *Id.* at 800.

There are but a few instances where courts found that a union had an objectively legitimate reason to reorder worker seniority. The Seventh Circuit allowed a union to do so, in one example, because under those particular circumstances it strengthened the union's leverage in future contract negotiations with the employer. *Rakestraw,* 981 F.2d

at 1535. The union in *Rakestraw* had agreed to "never" change a seniority order that was favorable to a minority faction of pilots who had earlier crossed its picket lines during a strike action. *Id.* at 1528. Years later, it negotiated a contract provision that reduced the seniority of those pilots. *Id.* at 1529. Although this plainly shifted seniority benefits from a minority faction to a majority faction, it also could "strengthen the hand of organized labor in future conflicts with management." *Id.* at 1535 That was because punishing pilots who had crossed the union's picket lines in the past would discourage others from crossing the its picket lines in the future. That was a legitimate reason to shift seniority benefits because it would cause the carrier to expect that, in the future, that pilots would honor picket lines. That would give the union stronger bargaining leverage that could result in a better contract, which would benefit the entire group of workers.

In another example, the D.C. Circuit allowed a union to agree to reorder seniority because it would preserve jobs. *Baker v. Newspaper & Graphic Commc'ns Union, Local 6*, 628 F.2d 156 (D.C. Cir. 1980). In a prior merger, that union had committed itself to maintain a certain seniority order. *Id.* at 159. Sometime later, the employer threatened to shut down all operations unless the union agreed to dishonor that commitment and change the seniority order. *Id.* at 156. The union had a legitimate reason to accede to the employer's demands because it was necessary to keep the employer in business:

> [T]he union's negotiators understandably considered themselves to be in a no-win situation. They determined that the workers' losses would be minimized if the dovetailing proposal were accepted—the loss of work for some being deemed preferable to job losses for all if the [employer] closed down. Under these circumstances, the union's conduct was eminently reasonable.

*Id.*

*Rakestraw* and *Baker* show that a union can have an objectively legitimate purpose for changing a "permanent" seniority order where doing so obtains an overall benefit for the workers. In *Rakestraw*, that benefit was strengthening the union's bargaining leverage. In *Baker*, it was preserving jobs.

### 3. A union is deemed to act arbitrarily or irrationally where it acts without a legitimate union purpose.

USAPA gains nothing by trying to apply the "arbitrary" or "irrational" formulation of the duty of fair representation. Those terms are merely used as a shorthand for acting without a legitimate purpose, not as a shorthand for some kind of psychological aberration. Although courts often do not make this point clear, the Ninth Circuit did so in *Hays v. Nat'l Elec. Contractors Ass'n, Inc.* 781 F.2d 1321 (9th Cir. 1985), where it "defined as 'arbitrary,' conduct that is 'without a rational basis,' made with reckless disregard for the right of individual employees, or 'egregious' and 'unrelated to legitimate union interests.'" *Id.*at 1324, quoting *Robesky*, 573 F.2d at1088-90.

### 4. USAPA acted in bad faith when it put § 10(h) into the MOU.

There is clear evidence that USAPA was wrongfully created to prevent implementation of the Nicolau Award. [PSOF at ¶¶ 19-21, 23.] That by itself can be seen as a breach of the duty of good faith. *Air Wisconsin Pilots Protection Committee v. Sanderson*, 909 F.2d 213, 217 (7th Cir. 1990) (Posner, CJ.) (commenting on similar actions by a disgruntled majority, that it "could itself be thought a violation of the duty of fair representation by the union that the majority used as its tool.).

USAPA also intentionally misled its members for the evident purpose of creating unrealistic East Pilot expectations that USAPA could prevent implementation of the Nicolau Award. USAPA did so in particular when it gave misleading explanations of the Court's October 2012 order. Such misrepresentations by a union, where done in bad faith, breach the duty of fair representation. *Bautista v. Pan American World Airlines,* 828 F.2d 546, 550 (9th Cir. 1987) ("Intentionally misleading statements by union officials designed to persuade members to join in . . . ratification of a newly negotiated agreement, can supply the bad faith necessary to a DFR violation.").

Not only do USAPA's actions evidence bad faith but they also evidence that USAPA must know it did not have a legitimate purpose for the inclusion of § 10.h. Otherwise, it had no reason to mislead its members.

**5. USAPA fails to offer contrary authority.**

USAPA cites a number of decisions that are off point. Some cannot be directly applied here because they deal with a union's alleged failure to properly pursue a grievance. *E.g.*, *Vaca v. Sipes*, 386 U.S. 171 (1967) ; *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985); *Johnson v. United States Postal Service*, 756 F.2d 1461 (9th Cir. 1985).

*ALPA v. O'Neill*, 499 U.S. 65 (1991) is distinguishable because it addressed whether the terms of a strike settlement could be so unfavorable as to be evidence of an arbitrary decision. There was no question of shifting a benefit from one worker group to another.

USAPA does cite two Supreme Court decisions that address a union's agreement to seniority terms. These do not help USAPA because the Supreme Court found in both decisions that the unions had a legitimate purpose for their actions. In *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), for example, the union agreed to give workers seniority credit for time served in the military forces during World War II, even if they had not been employed by the company prior to military service. The Supreme Court found that the union had a legitimate basis for this action because there is "fairness inherent in crediting employees with time spent in military service in time of war or national emergency." *Id.* at 339. Such special circumstances do not exist here at all.

In *Humphrey v. Moore*, 375 U.S. 335 (1964), the Supreme Court addressed a union making a de novo decision as to how to integrate the seniority of two workforces. There was no evidence that this decision was motivated by a preference for a politically powerful majority. Moreover, there was no prior agreement as to how to integrate these two workforces. This decision merely shows that it can be rational to integrate seniority according to length of service. *Id.* at 347-48. But it must be distinguished from the present matter because here there are other considerations. There was an agreement, the TA, to use ALPA Merger Policy to determine East/West seniority integration. In *Humphrey*, in other words, there was a "clean slate." Here, there is not.

In a similar vein, *Int'l Longshoreman's & Warehouseman's Union v. Kuntz*, 334 F.2d 165, 169 (9th Cir. 1964), is distinguishable because it did not involve setting aside a seniority regime that was intended to be final.

**6. USAPA did not have an objectively legitimate union purpose.**

USAPA seems to offer two purportedly "legitimate" reasons as to why it agreed to an MOU that abandoned the Nicolau Award by nullifying or superseding the TA seniority provisions: (1) the MOU had "unprecedented" wages and other benefits [Doc. 211 at 11:19 to 11:25 (ECF pagination)] ; and (2) East Pilots would not have otherwise voted in sufficient numbers to ratify the MOU [*id.* at 13 (implied)]. USAPA's first reason is readily dispensed with because the wages and other favorable terms in the MOU have no "relation" to nullifying the TA seniority provisions. *See Robesky*, *supra*, 573 F.2d at 1090 (the legitimate purpose must relate to the union's actions).

There is no evidence that the company provided concessions or better terms in exchange for nullifying the TA seniority provisions. [PSOF at ¶¶ 61, 67-69.] Rather, ¶ 10(h) merely co-exists in a contract that happens to have unrelated favorable terms. If such co-existence justified otherwise illegal contract provisions, then a union majority would be free to do all sorts of mischief that would disadvantage a minority faction within the union. The Court, therefore, should reject USAPA's first reason.[4]

USAPA's second reason for abandoning the Nicolau Award is no better. USAPA argues, in effect, that it was legitimate to accede to the demands of East Pilot majority if it feared that this majority would otherwise refuse to ratify the MOU. If that were a valid reason, the East Pilot majority could impose any oppressive provision on the West Pilot

[4] Moreover, the only thing "unprecedented" about the MOU is that USAPA saw this as an opportunity to get better wages without having to honor the commitment to implement the Nicolau Award. [*Id.* at ¶ 102 (Bradford conceding that the Kirby proposal would have paid about the same in 2014); *id.* at ¶ 103 (Bradford conceding that the MOU failed to recover hundreds of millions of dollars lost by turning down the Kirby proposal).] The actual value of ratification was small, particularly when taking into account the lost value of the change-of-control provision. [*Id.* at ¶¶ 100, 104.]

minority simply by refusing to agree to anything else. According to USAPA, any union could shift seniority benefits from a disfavored minority to a favored majority as long as the majority threatened to obstruct the collective bargaining process. That is not what the East Pilots will want when they are merged with the American pilots (in about 18 months) and they could be subject to such domination by the American pilots.

The duty of fair representation exists to prevent the kind of serious mischief that would be allowed by USAPA's argument. It exists to restrain unions from blindly following the will of the majority. *Air Wisconsin*, 909 F.2d at 216. Consequently, a union's oppressive conduct is not excused by the unrelenting will of the majority. That is particularly true where the union, as here, repeatedly encouraged the majority to believe it had the right and power to be oppressive. [PSOF at ¶¶ 19, 21, 23, 36-43, 81.] A union's leadership (and counsel) have an obligation to stand up to its membership under such circumstances, not to yield to it.

Contrary to such obligations, USAPA (and its counsel, both former and current) misled the East Pilot majority from its beginnings about its power to improve their seniority prospects at the expense of the West Pilots. [*Id.*] If the East Pilots have intransigent demands, it springs from a mistaken understanding of the law and from expectations mismanaged by USAPA. The fault for such intransigence lays with USAPA's leadership and legal counsel (past and present), not with the West Pilots. USAPA cannot use that fault and other shortcomings to create a legitimate union purpose to allow it to oppress the West Pilots. This Court, therefore, should find as a matter of law that USAPA did not have an objectively legitimate union purpose for agreeing to nullify the TA seniority provisions.

**C. USAPA has no valid affirmative defense.**

USAPA must be estopped from using the West Pilot ratification vote as the basis for an affirmative defense. USAPA wrongfully encouraged the West Pilots to vote to ratify the MOU without regard to their position on the Nicolau Award and utterly failed to warn West Pilots that it intended to use that vote to argue that they waived their rights

to the Nicolau Award. [*Id*. at ¶¶ 83-87.] If USAPA had such plans, it owed a duty to the West Pilots to make the consequences of a yes vote crystal clear (just as it did in regard to waiver of the East Pilots' change-of-control provisions). Instead, USAPA deliberately failed to do so. Consequently, it should now be estopped from asserting that any such rights were waived. *See Carrillo v. United States*, 5 F.3d 1302, 1306 (9th Cir. 1993) (elements of equitable estoppel).

Moreover, the ratification vote (even by a strong majority of West Pilots) cannot possibly waive the claims of those West Pilots who did not even have a right to cast a vote, or who voted against the MOU. Indeed, the notion that a majority of the West Pilots could waive the duty of fair representation rights of other West Pilots conflicts with the very basis for having the duty. *See Emporium Capwell Co. v. Western Addition Community Org*., 420 U.S. 50, 64 (1975) ("In vesting the representatives of the majority with this broad power Congress did not, of course, authorize a tyranny of the majority over minority interests.").

The right to fair representation is a personal right that belongs to each West Pilot individually. That is true whether the pilot is a union member or not, whether the pilot is active or on furlough. Consequently, even if those pilots who cast an affirmative ratification vote waived their personal claims (which they did not) there would still be several hundred pilots (non-members, furloughees, members who did not vote, and members who voted against ratification) who did not waive their claims. [*See* PSOF at ¶ 93.] Consequently, the outcome of the MOU vote—particularly because some six hundred West Pilots did not vote to ratify—cannot support a class-wide affirmative defense to Claim One. [*Id*.]

In sum, the Court has two reasons to reject USAPA's affirmative defense. First, as a matter of law, the ratification votes of West Pilots—even a majority of West Pilots—cannot waive the claims of West Pilots who did not vote to ratify. Second, USAPA should be estopped from making such a defense because it deliberately misled the West Pilots, before the close of voting, to believe that they would not lose the right to defend

the Nicolau Award if they voted for ratification. The Court should hold, therefore, that as a matter of law USAPA does not have a viable affirmative defense to Claim One.

**D. McCaskill-Bond Participation**

In a separate filing, Plaintiffs support US Airways' motion for summary judgment on Claim Four [Doc. 212], which seeks an order that the West Pilots are entitled to full party status and representatives of their choosing in the process of integrating pilot seniority with the American pilots. Plaintiffs rely upon and incorporate that argument here by reference.

**E. Common Benefit Fee Award**

The Court has determined that it will not address the merits of a common benefit fee award before there is a final determination of prevailing party. Plaintiffs, therefore, do not respond here to that portion of USAPA's motion, reserving the right to do so if and when the Court determines that they are the prevailing party on Claims One and/or Four.

**F. Remedy**

The appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach. *Vaca*, 386 U.S. at 195. Because the duty of fair representation is judicially created, remedies of its breach are necessarily left to judicial determination. *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 53 (1979). Depending on the circumstances of the particular breach, the RLA "contemplates resort to the usual judicial remedies of injunction and award of damages." *Id*. "A court, seeking a remedy to match the union's wrong, has at its disposal the full panoply of tools traditionally used by courts to do justice between parties." *Id*.

In *Bernard*, the Ninth Circuit affirmed a preliminary injunction that: (1) set aside a seniority integration agreement between the union and the carrier; (2) specified how pilot seniority would be ordered on an interim basis; and (3) directed ALPA to apply its current merger policy with the affected pilots having separate representation. 873 F.2d at 215, 217-218. Here, Plaintiffs seek relief comparable to that provided in *Bernard.* They ask for an order requiring USAPA to use the Nicolau Award to order East/West pilot

seniority when US Airways pilots are integrated with those of American. And, to ensure that USAPA does not evade good faith compliance with that order, they ask for a declaration that the West Pilots have full party status and representation of their own choosing in process of integrating seniority with the American pilots. That will compel USAPA to do nothing more than what was agreed to in the TA. Given the history of this dispute, USAPA's lack of credibility, and its history of doing whatever it can to evade using the Nicolau Award, no other remedy will suffice.

## III. CONCLUSION

Plaintiffs respectfully ask the Court to deny USAPA's motion for summary judgment.

Dated this 13th day of November, 2013.

**POLSINELLI PC**

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of November 2013, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the ECF System for filing and transmittal.

*/s/ Andrew S. Jacob*
By _____