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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don Addington; John Bostic; Mark Burman; Afshin Iranpour; Roger Velez; Steve Wargocki; Michael J. Soha; Rodney Albert Brackin; and George Maliga, on behalf of themselves and all similarly situated former America West Pilots,

Plaintiffs,

vs.

US Airline Pilots Ass'n, an unincorporated association,

Defendant.

US Airways, Inc.

Intervenor.

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

REPLY BRIEF IN SUPPORT OF INTERVENOR US AIRWAYS, INC.'S MOTION FOR SUMMARY JUDGMENT - CLAIM REGARDING MCCASKILL-BOND STATUTE

PRELIMINARY STATEMENT

Pursuant to the McCaskill-Bond statute and Sections 3 and 13 of the *Allegheny-Mohawk* Labor Protective Provisions ("LPPs") adopted therein, federal law mandates that seniority integration following airline mergers proceed in a "fair and equitable manner." By its Motion For Summary Judgment (Doc. No. 212), Intervenor US Airways, Inc. ("US Airways") seeks to ensure that in its upcoming merger with American Airlines, Inc. ("American"), the process of integrating pilot seniority lists satisfies this statutory requirement so that the long-standing dispute between defendant US Airline Pilots Association ("USAPA") and plaintiffs, the West Pilot Class, can finally be put to rest.

Nowhere in its Opposition Brief (Doc. No. 270) does USAPA explain how a process that excludes separate representation for the West Pilots could resolve the seniority dispute that has divided the US Airways pilots for so long. It cannot. The evidence is clear that the West Pilots are unalterably opposed to any method of East/West seniority integration other than what Arbitrator Nicolau concluded was fair and equitable: it's "the Nic or nothing." And the evidence is equally clear that USAPA is unalterably opposed to and will not advocate for an unmodified Nicolau Award seniority list.

Under these circumstances, and especially given that the West Pilots and East Pilots continue to work under two separate seniority lists and thus have distinct seniority interests at stake in the upcoming integration of US Airways and American pilots, a McCaskill-Bond process that does not afford the West Pilots an opportunity to present their arguments in favor of the Nicolau Award would not be fair and equitable.

ARGUMENT

I. McCaskill-Bond Does Not Equate The Seniority-Integration Process With Collective Bargaining, And Does Not Limit The Seniority-Integration "Representatives" Of Affected Employees To Their Certified Unions.

USAPA's continued reliance on the conclusory assertion that McCaskill-Bond recognizes seniority as being "within USAPA's purview as the exclusive NMB-certified representative of US Airways pilots" (Doc. No. 270 at 2:16-17) is misplaced. There is no dispute that seniority can be a proper subject for collective bargaining between an airline

and an NMB-certified representative. But USAPA inexplicably ignores the argument in US Airways' opening brief – that negotiations under the Railway Labor Act between US Airways and USAPA related to the US Airways-American pilots seniority integration have already been completed as reflected in Paragraph 10 of the Memorandum of Understanding ("MOU"). What remains is a negotiation/arbitration process among the pilots' merger representatives to determine the order of pilots on the integrated seniority list – a matter as to which US Airways is required by the MOU to remain neutral. There will be no further negotiations under the Railway Labor Act between US Airways and USAPA regarding the formulation of the integrated seniority list; instead, the remaining process will be conducted by the pilots' merger representatives under McCaskill-Bond.[1]

None of the cases cited by USAPA in support of its assertion here involves the integration of seniority lists following a merger – let alone an airline merger governed by McCaskill-Bond and the LPPs. Rather, USAPA relies on decisions which involve seniority rights that had already been negotiated into labor contracts,[2] and which thus do not support USAPA'S position that the McCaskill-Bond seniority-integration process is exclusively one of bargaining between carriers and NMB-certified representatives.

Moreover, neither the text of McCaskill-Bond nor Sections 3 and 13 of the LPPs purport to limit the seniority-integration representatives of unionized employees to unions alone. In generally mandating the application of Sections 3 and 13 of the LPPs to the integration of "covered employees," McCaskill-Bond does not distinguish between

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[1] USAPA's argument that allowing the West Pilots to participate separately in the McCaskill-Bond process will undermine its role as the exclusive collective bargaining agent for US Airways pilots is further belied by the fact that, in all likelihood, USAPA will no longer be the collective bargaining agent at the time of the McCaskill-Bond arbitration. (*See* Doc. No. 212 at 7 n. 6.)

[2] *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) (union and company could negotiate seniority regime in which veterans received seniority credit for military service before their employment by the company); *Indus. Union of Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615, 620 (3rd Cir. 1963) (company could not unilaterally abrogate seniority rights of union officials in expired labor contract); *Cal. Brewers Ass'n v. Bryant*, 444 U.S. 598, 608 (1980) (requirement that temporary employees work at least 45 weeks in calendar year before becoming permanent employees was component of "seniority system" as used in Section 703(h) of Title VII).

unionized and non-unionized employees. 49 U.S.C. § 42112, note § 117(b)(3). The LPPs adopted by McCaskill-Bond expressly provide in Section 3 for a process involving "representatives of the employees affected," but neither the LPPs nor McCaskill-Bond limit that term to certified unions and the Civil Aeronautics Board ("CAB") specifically refused on at least one occasion to "interpret the word 'representative' [as used in Section 3] to import the meaning of that term under the Railway Labor Act." *Braniff-Mid-Continent Merger Case*, 17 C.A.B. 19, 21-22 (1953). When Congress wants to define the term "representative" as being the equivalent of a certified collective bargaining agent, it knows how to do so.[3] That Congress did not do so in McCaskill-Bond reflects its intent that seniority-integration "representatives" not be so limited.

The exceptions in McCaskill-Bond to the general application of Sections 3 and 13 of the LPPs do not lend any support to USAPA's claim that McCaskill-Bond mandates "that where the employees are represented in collective bargaining, the collective bargaining agent is the only party participant in the process on behalf of the employees it represents." (Doc. No. 270 at 3:17-19.) Rather, these exceptions[4] – one of which is not applicable to the US Airways-American integration, and the other of which preserves the integration-related terms of labor contracts to the extent they grant "the protections afforded by sections 3 and 13" of the LPPs and thus begs the question before the Court – merely set forth the limited circumstances in which Sections 3 and 13 of the LPPs are not directly applicable to a post-merger seniority integration. In no way do they define the

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[3] *See, e.g.*, 29 U.S.C. § 2101(a)(4) (defining "representative" for purposes of the WARN Act as "an exclusive representative of employees within the meaning of . . . section 152 of Title 45 [*i.e.*, the Railway Labor Act].").

[4] Subsection 117(a)(1) provides that "if the same collective bargaining agent represents the combining crafts or classes at each of the covered air carriers, that collective bargaining agent's internal policies regarding integration, if any, will not be affected by and will supersede the requirements of this section," but here the pilots are represented by different unions. Subsection 117(a)(2) provides that "the requirements of any collective bargaining agreement that may be applicable to the terms of integration involving covered employees of a covered air carrier shall not be affected . . . so long as those provisions allow for the protections afforded by sections 3 and 13 of the Allegheny-Mohawk provisions." 49 U.S.C. § 42112, note §§ 117(a)(1) & (a)(2).

seniority-integration process that is required by McCaskill-Bond when, as here, Sections 3 and 13 of the LPPs are directly applicable.

Finally, USAPA's argument ignores that if Congress wanted to leave resolution of post-merger seniority-integration disputes exclusively to the collective bargaining process between certified unions and airlines, the enactment of McCaskill-Bond would have been totally unnecessary. For many years prior to the enactment of McCaskill-Bond, seniority integration in unionized settings was left solely to negotiations between the merging airlines and their employees (including their NMB-certified representatives). (*See* Doc. No. 270 at 5:20-6:6.) But this could lead to harsh results for smaller or otherwise less dominant employee groups, as was the case for TWA's pilots and flight attendants when American acquired TWA's assets. With the enactment of McCaskill-Bond in 2007, Congress addressed that problem by requiring compliance with Sections 3 and 13 of the CAB's LPPs where different unions represented the merging employee groups. *See, e.g., Comm. of Concerned Midwest Flight Attendants v. Int'l Bhd. of Teamsters Airline Div.*, 662 F.3d 954, 957 (7th Cir. 2011).[5] USAPA's attempt to characterize the McCaskill-Bond process as the exclusive domain of NMB-certified collective bargaining representatives therefore ignores Congress' intended purpose.

II. The "Fair And Equitable" Standard Governs The Seniority-Integration Process, Including Who May Have Separate Representation In That Process.

USAPA misapprehends CAB authority in arguing that the "fair and equitable" standard from Section 3 of the LPPs is solely addressed to the outcome of the seniority-integration process rather than the process itself. (*See* Doc. No. 270 at 3:1-14). In fact, the CAB often considered whether employee sub-groups had been or would be adequately represented in the seniority-integration process – when deciding after-the-fact challenges

[5] Contrary to USAPA's characterization of this decision (*see* Doc. No. 270 at 5:7-19), the Seventh Circuit did not hold that CAB decisions could not be used to interpret McCaskill-Bond. Rather, the court held that the district court in that case had improperly interpreted the term "covered transaction" in McCaskill-Bond, because its interpretation was inconsistent with McCaskill-Bond's express definition of that term and the context in which the statute was enacted. 662 F.3d at 957-58.

to integrated seniority lists brought by dissatisfied employees,[6] and when deciding requests for separate participation brought by employee sub-groups before the seniority-integration process was completed.[7]

US Airways agrees that the CAB's endorsement of separate representation for sub-groups of unionized employees was limited to circumstances where it was warranted. (*See* Doc. No. 270 at 7:12-18.) The current case demonstrably meets that standard. It has been more than eight years since the US Airways-America West merger, and despite one arbitration to generate a "final and binding" decision and three subsequent rounds of litigation, the East and West Pilots still work under separate seniority lists. Judicial recognition of the West Pilots' right to separate participation is the only way to ensure that the US Airways-American seniority-integration process includes representatives who will advocate for each of the distinct seniority interests reflected in the current separate seniority lists. There is no dispute that the West Pilots, if given the opportunity, will argue that the unmodified Nicolau Award should be used to determine the relative ordering of the US Airways (East and West) pilots (*see* Doc. No. 269 at ¶ 17), and there is no dispute that, however USAPA attempts to accommodate the West Pilots' seniority interests, it will not propose use of the unmodified Nicolau Award. (*See id*. at ¶¶ 12-16).

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[6] *See, e.g., United-Capital Merger Case*, 40 C.A.B. 903, 907 (1964) (where subgroup of flight crew employees had been invited to participate in the seniority-integration arbitration and did in fact participate, seniority-integration procedures were fair); *National Airlines Acquisition, Arbitration Award*, 97 C.A.B. 570, 571 (1982) (denying petition of former National employees to overturn a seniority-integration arbitration decision where those employees had separately participated in the arbitration); *cf. Transport Workers Union v. Civil Aeronautics Bd.*, 725 F.2d 775, 780 (D.C. Cir. 1984) (affirming CAB decision to order separate arbitration on a seniority-related issue after integrated seniority list had been arbitrated, because affected employee sub-group had not participated in prior arbitration proceeding, noting that the CAB's order "conforms fully with the Board's duty to see that all employee groups have ***a fair opportunity to participate*** in the integration process) (emphasis added).

[7] *American-Trans Caribbean Merger*, 57 C.A.B. at 586 n.10 (concluding that subgroups of furloughed pilots from both [pre-merger carriers, who were both unionized] would be entitled to have separate or additional representation"); *Braniff*, 17 C.A.B. at 21 (stating that "it would frustrate [this] protective condition if [one group] were permitted to dictate the seniority rights of the [other]."); *cf. Delta Air Lines, Employee Integration*, 63 C.A.B. 700, 703 (1973) ("every group of employees affected by negotiations under [the LPPs] is entitled to separate representation that will protect the group's interest").

Under the unique circumstances of this case, fairness and equity – the linchpin of the LPPs adopted by McCaskill-Bond – mandate that the West Pilots be afforded an equal opportunity to present their position.

III. USAPA's Ability To Represent The Seniority Interests Of All US Airways Pilots As A Group Will Not Be Undermined By Granting US Airways' Motion For Summary Judgment.

USAPA's assertion that allowing separate West Pilot participation will "cripple" its efforts to achieve the best seniority-integration outcome for all US Airways pilots (Doc. No. 270 at 9:28) ignores the nature of the instant dispute. This dispute is about the relative ordering of the US Airways East and West Pilots, and ***not*** about the ordering of US Airways pilots as a group relative to American pilots. Although the American pilots' merger representatives will presumably advocate for an overall US Airways-American seniority integration that is relatively more beneficial to American pilots, USAPA offers no reason why American's pilots would care about the relative order of East and West Pilots on the final integrated seniority list.[8] And to the extent USAPA is concerned about presenting a "united front" on behalf of US Airways pilots in the negotiation/arbitration process with American's pilots, that concern can easily be addressed by first determining the relative order of East and West Pilots, in the McCaskill-Bond arbitration or otherwise, and then proceeding to the integration with American pilots.

IV. The Norris-LaGuardia Act Is Inapplicable.

The restrictions of the Norris-LaGuardia Act ("NLGA"), 29 U.S.C. §§ 101-115, on federal-court jurisdiction to issue injunctions in a labor dispute are not applicable here. First, US Airways is not seeking a mandatory injunction against USAPA; rather, it is seeking a declaratory judgment regarding the West Pilots' rights under McCaskill-Bond.[9]

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[8] USAPA's claim that US Airways intervened in this lawsuit to advocate for separate West Pilots' participation in order to curry favor with APA is thus baseless. (*See* Doc. No. 270 at 10:22-11-21.) US Airways intervened to protect its own significant interest in ensuring a prompt and final integration of seniority lists that complies with federal law (Doc No. 123 at 1:25-2:22), and there is no evidence to the contrary.

[9] *See, generally, Bituminous Coal Operators' Ass'n v. Int'l Union*, 585 F.2d 586, 595 (3rd Cir. 1978) (rejecting argument that "in any dispute within the coverage of the Norris-

(*See* Doc. No. 212 at p. 2:1-9 of the ECF filing.) Second, this case does not involve a "labor dispute," as there is no dispute between US Airways and USAPA over the negotiation of terms and conditions of employment for US Airways' pilots or over who is the representative of US Airways' pilots in any such negotiations. Rather, as noted above (*see supra* at 1:25-2:10), the dispute between USAPA and the West Pilots regarding the latter's representation in the McCaskill-Bond process does not implicate any further negotiations with US Airways.[10]

CONCLUSION

For the foregoing reasons, Intervenor US Airways respectfully requests that the Court grant its Motion For Summary Judgment.

Dated: November 18, 2013.

For O'Melveny & Myers LLP

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LaGuardia Act a declaratory judgment is prohibited to the same extent as an injunction"), *abrogated on other grounds by Carbon Fuel Co. v. UMW*, 444 U.S. 212 (1979).

[10] *Cf. Cont'l Airlines, Inc. v. E. Pilots Merger Comm., Inc.*, 484 F.3d 173, 184 n.11 (3rd Cir. 2007) (holding that NLGA did not apply in seniority-integration dispute between two employee groups because there was "no dispute between an employer and employees about the provisions of a collective bargaining agreement affecting the terms of employment"); *Duffer v. United Cont'l Holdings, Inc.*, No. 3:13–cv–0318-GPC-WVG, 2013 WL 756303, *3 (S.D. Cal. Feb. 27, 2013) (pilot's attempt to enjoin distribution of funds from post-merger carrier according to plan formulated by his pre-merger union Master Executive Council was not a "labor dispute" under the NLGA).

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2013, I caused to be electronically transmitted the attached Reply Brief In Support Of Intervenor US Airways, Inc.'s Motion For Summary Judgment – Claim Regarding McCaskill-Bond Statute to the Clerk's office using the CM/ECF System for filing.

/s/Robert A. Siegel

Robert A. Siegel

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