PATRICK J. SZYMANSKI (*pro hac vice*)
PATRICK J. SZYMANSKI, PLLC
1900 L Street, NW, Ste 900
Washington, DC 20036
Telephone: (202) 721-6035
szymanskip@msn.com

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
Telephone: (212) 571-7100
bodwyer@odblaw.com
gsilverman@odblaw.com
jmele@odblaw.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

Attorneys for US Airline Pilots Association

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Don Addington, *et. al.*,

Plaintiffs,

v.

US Airline Pilots Association, *et. al.*,

Defendants.

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

US Airline Pilots Association's Reply Memorandum in Support of Motion for Summary Judgment

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page(s)

Statutes

Rules

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs simply cannot stick to a consistent DFR claim. Constantly shifting, they go from argument to argument, redefining their DFR claim at will in an attempt to find some theory that has even the thinnest veneer of plausibility. The latest version is that USAPA breached its DFR by entering into the MOU that nullifies or supersedes the Transition Agreement ("TA") seniority integration provisions. Doc. 267, at 10:18.[1] This claim was not asserted against USAPA in either the Complaint (Doc. 1) or the Amended Complaint (Doc. 134). It was, however, the claim asserted against US Airways (Doc. 134, at ¶¶101-112), which this Court dismissed on the ground that it was a "minor dispute" within the exclusive jurisdiction of the System Board of Adjustment. Doc. 122, at 6-7. Indeed, Plaintiffs' current iteration of their DFR claim rests entirely on an interpretation of the TA and the claim that it is a "contract" because "it superseded the separate pre-merger pilot collective bargaining agreements", and that it requires implementation of the Nicolau Award. Doc. 267, at 6:10. Never mind that the Court has already held that the TA can be amended by the parties. 2:10-cv-01570-ROS, Doc. 193, at 7. If that is now Plaintiffs' claim ─ that USAPA is violating the TA ─ it is a "minor dispute" outside the Court's jurisdiction no less than the identical claim that was asserted against US Airways. *See* n. 6 and accompanying text below. Equally contrary to Plaintiffs' new DFR formulation is the fact that US Airways, the other party to the TA, also asserts the TA was amendable and was in fact amended by the MOU.

For these reasons there is no merit to Plaintiffs' newly formulated claim, and Plaintiffs' perceived need to again change their claim demonstrates they cannot prove the DFR claim identified by the Court, namely whether USAPA breached its DFR by entering into the MOU without requiring the use of the Nicolau Award as the starting

[1] Page numbers reference ECF document page number.

point for integrating seniority with American. In any event, both Plaintiffs' reformulated claim and the claim identified by the Court must be dismissed because Plaintiffs have utterly failed to meet their burden of setting forth specific facts that demonstrate any genuine issue for trial.[2] Summary judgment should be granted on Count I in favor of USAPA.

ARGUMENT

I. The Transition Agreement does not limit the rights of USAPA and US Airways to enter into the MOU.

Finally acknowledging that the TA can be modified at any time, Plaintiffs now argue that USAPA "must have an objectively legitimate union purpose to do so." Doc. 267, at 6. However, Plaintiffs' DFR claim against USAPA is not that USAPA breached its DFR by modifying the TA. Their exact claim is that "USAPA . . . breached the duty of fair representation by entering into the MOU because the MOU abandons a duty to treat the Nicolau Award as final and binding." Doc. 134, at ¶99. Plaintiffs' claim against USAPA has never been about the TA. Moreover, this Court has already ruled that "[i]t is undisputed that the Transition Agreement can be modified at any time 'by written agreement of [USAPA] and the [US Airways].'" 2:10-cv-01570-ROS, Doc. 193, at 7. *See also Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S.Ct. 681 (1953) (No DFR when union agrees to amendment of existing collective bargaining agreement to allow enhanced seniority for certain veterans resulting in layoffs which otherwise would not have occurred). Consequently, that Plaintiffs had certain expectations resulting from the TA does not preclude the parties thereto from amending it. US Airways' denial of the

[2] In addition to filing a 17 page brief before seeking leave to exceed 10 pages, Plaintiffs' Doc. 268 also violated Local Rule 56.1 and Fed.R.Civ.Pro.56(e) by failing to respond to any of USAPA's Local Rule 56.1 Separate Statement of Facts in Support of Motion for Summary Judgment. As such, the Court should consider USAPA's statement of facts, Doc. 213, to be true for purposes of this motion. *Szaley v. Pima Cnty.*, 371 F.App'x 734, 735 (9th Cir. 2010); *Protective Life Ins. Co. v. Mizioch*, 2:10-CV-01728-PHX, 2011 WL 3297340, at *6 (D. Ariz. Aug. 1, 2011).

Section 22 grievances refutes Plaintiffs' claim that as a party to the TA, US Airways "understood and expected that ALPA Merger Policy procedures would yield a 'final and binding' seniority list." Doc. 267, at 10. To the contrary, in rejecting those grievances US Airways emphasized that the claim that it was obligated to apply the Nicolau Award in the MOU "is contrary to the express provision in the Transition Agreement (Section XII.B) that any of the Transition Agreement's provisions '[m]ay be modified by written agreement of the Association and the Airline Pilots collectively.'" Doc. 213, USAPA's Local Rule 56.1 Separate Statement of Facts in Support of Motion for Summary Judgment, (USAPA 56.1 Stmt.), ¶101.[3] In entering into the MOU, US Airways modified the TA, thus amending any perceived "definite language of finality".[4] *Id.*; Doc. 213-4 Tab 6.

This Court stated that "USAPA and US Airways are now engaged in negotiations for an entirely new collective bargaining agreement and there is no obvious impediment to USAPA and US Airways negotiating and agreeing upon any seniority regime they wish." 2:10-cv-01570-ROS, Doc. 193, at 7. That is precisely what USAPA and US Airways did when they entered into the MOU prescribing that the seniority integration between the US Airways and American pilot groups will be conducted consistent with the McCaskill-Bond process. This Court ruled that it is "negotiating for a particular

[3] That two of the grievants were the West members of the Merger Committee who now oppose separate representation by the West Pilots in the seniority integration process further confirms that the West Pilots are already well represented in that process. Doc. 260, ¶41 (USAPA Summary of Evidence).

[4] Doc. 267 at 10. Plaintiffs' implication that parties to an agreement must always meet members' expectations, and that failing to do so is evidence of a DFR is simply inconsistent with the realities and "wide range of reasonableness" allowed in collective bargaining. *See Humphrey v. Moore*, 375 U.S. 335, 349 (1964) (Finding that union's assurances to one group of members that they had "nothing to worry about" was not a breach of the DFR even though some of those members were later laid off.). "Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes." *Id.*, at 349-50.

seniority regime" that triggers USAPA's duty of fair representation, not USAPA and US Airways' decision to amend the TA.[5] *Id.* As this Court has already ruled, any dispute concerning the TA, including what it requires, is a "minor dispute" within the exclusive jurisdiction of the System Board of Adjustment.[6] *See* Doc. 122, at 6-7.

As to Plaintiffs' continued claim that the MOU is the "single agreement" referenced in the TA (Doc. 267, at 7), Plaintiffs submit no evidence to rebut USAPA and US Airways' agreement that it is not. The MOU is a four-party agreement between US Airways, American, USAPA, and the APA which is applicable to the merged operations of US Airways and American, not the merged operations of America West and US Airways. USAPA 56.1 Stmt., ¶44. Further, in MOU ¶4, the parties explicitly agreed to modify and displace all provisions of the TA and agreed that the procedures in ¶10 provide the exclusive means for integrating seniority, including the provision that the *status quo* of separate seniority lists shall continue. USAPA 56.1 Stmt., ¶49. Consistent with that provision, by letter dated February 28, 2013, US Airways denied the David

[5] This Court noted in its October 11, 2012 Order in the Declaratory Judgment Action that "there is no claim that the Transition Agreement itself is limiting USAPA's authority during the negotiation of a new collective bargaining agreement." 2:10-cv-01570-ROS, Doc. 193, at 6, n. 2.

[6] It is well established that under the Railway Labor Act, disputes growing out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions are subject to mandatory arbitration before the System Board of Adjustment. 45 U.S.C. §184; *Consol. Rail. Corp. v. Ry. Labor Executes' Ass'n*, 491 U.S. 299, 303, 109 S.Ct. 2477, 2480 (1989); *International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Aloha Airlines*, 776 F.2d 812, 815 (9th Cir. 1985). In fact, Section X of the TA establishes such a system board to hear disputes concerning the interpretation or application of the TA. Doc. 213-4 Tab 6, p. 12. Plaintiffs' claim that USAPA is bound by the TA, that the TA is the contract "status quo", that the TA requires implementation of the Nicolau Award, and that the MOU is the "single agreement" referenced in the TA, concern the interpretation or application of the TA, and therefore is within the exclusive jurisdiction of the System Board of Adjustment. Just as this Court ruled that Plaintiffs' claim against US Airways "is a basic claim about the interpretation or application of a collective bargaining agreement" that "must be submitted to arbitration", so too must this new iteration of Plaintiffs' DFR claim against USAPA be submitted to arbitration. Doc. 122, at 6-7.

Braid grievance in part because "[a]t this point in time, we have neither a combined contract nor a combined seniority list." Doc. 213-10 Tab 43, p. 8.

As discussed in USAPA's initial memorandum in support of its motion (Doc. 211, pp. 7-10), USAPA acted properly, reasonably and well within its DFR to all the pilots it represents when it agreed to the MOU which, at the request of the airline parties, contained ¶4 which provided that the MOU (and the MTA) replaced not only the TA but also any preexisting *status quo* within.

II. Plaintiffs mischaracterize ¶10.h of the MOU and ignore that both East and West Pilots were fully and accurately informed that the MOU was neutral on the subject of seniority.

Plaintiffs claim "USAPA put ¶ 10.h into the MOU with the intention of abandoning the existing obligation to use the Nicolau Award." Doc. 267, at 11. They are wrong.

As an initial matter, both the Ninth Circuit and this Court recognize that consistent with its DFR, USAPA is not under any obligation to use the Nicolau Award. *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1181 n. 3 (9th Cir. 2010) ("We note . . . that USAPA is at least as free to abandon the Nicolau Award as was its predecessor, ALPA."); 2:10-cv-01570-ROS, Doc. 193, at 7 ("[I]f USAPA wishes to abandon the Nicolau Award and accept the consequences of this course of action, it is free to do so.").

Second, USAPA has never been secretive about its dissatisfaction with the Nicolau Award, and its opposition to the unmodified Nicolau Award.

Third, all ¶10.h says is that the MOU is seniority neutral. That the MOU is seniority neutral was repeatedly communicated to the membership prior to the MOU ratification vote and was understood by Plaintiffs as demonstrated in their emails and the Leonidas updates. USAPA 56.1 Stmt., ¶¶82, 89, 90; Doc. 213-9 Tabs 18, 19, 22; West Pilots Email Chain, annexed as Ex. A to the Declaration of Joy K. Mele. In this respect, the idea that there was some secret or nefarious purpose behind ¶10.h is a notion

constructed by Plaintiffs in a desperate attempt to manufacture anything even remotely resembling a DFR claim. The wording of ¶10.h is straightforward and states that the existing two-list system will be maintained until changed through the process set forth in the remainder of ¶10, nothing more. As such, it insures that the MOU is neutral with respect to seniority. USAPA Merger Committee Chairman Jess Pauley aptly described ¶10.h as "belt and suspenders to make sure people understood what the intent of the MOU was . . . . And, again, the intent is to be neutral." Pauley Dep. Tr., p. 81, relevant portions annexed as Mele Decl. Ex. B.

Fourth, ¶10.h has nothing to do with terminating the TA. It is ¶4 of the MOU that explicitly provides for termination of the TA. Paragraph 4 provides that "each term of the MTA shall be applicable to all US Airways pilots . . . and . . . shall govern and displace any conflicting or wholly or partially inconsistent provision of the former US Airways pilot agreements or the *status quo* arising thereunder." Doc. 213-2 Tab 1, pp. 1-2. Paragraph 4 was proposed by US Airways, AMR, and the UCC, who all made clear that any agreement with USAPA governing the terms and conditions of US Airways pilots post-merger would not address seniority including the seniority integration issues between the East and West pilots. Doc. 260, ¶¶3, 11 (USAPA Summary of Evidence); Doc. 206-1, Stipulations and Undisputed Facts ¶77; USAPA 56.1 Stmt. ¶54; Doc. 213-4 Tab 7, p. 52; Hummel Dep. Tr., pp. 142-143, relevant portions annexed as Mele Decl. Ex. C; Colello Trial Tr., pp. 263-264, 275-277, relevant portions annexed as Mele Decl. Ex. D. Plaintiffs are incorrect when they state that "[w]ithout ¶ 10.h, ¶ 4 would have no effect on the TA seniority provisions." Doc. 267, at 11, n 3. Paragraph 4 states that the MTA shall displace the current *status quo*, and Plaintiffs argue that the "status quo" is the TA, and the TA requires implementation of the Nicolau Award. *Id.*, at 6-7. However, ¶4 explicitly states the *status quo* will be terminated.

Lastly, earlier drafts of the MOU also provided for termination of the TA. August

20, 2012 draft of the MOU, ¶2, annexed as Mele Decl. Ex. E; Mele Decl. Ex. D, p. 277 (Colello Trial Tr.). The earlier draft of the MOU (that was never put to ratification vote) stated that "the JCBA shall replace any and all prior collective bargaining agreements." Mele Decl. Ex. E, ¶2. It also provided in ¶9 that "[t]he pilot representatives shall deliver an integrated seniority list in accordance with the McCaskill-Bond process . . . " *Id.*

Plaintiffs' focus on ¶10.h is misplaced. Regardless, the record lacks any evidence that USAPA misrepresented that the Nicolau Award was included in the MOU or was going to be used in the seniority integration process. Instead, the undisputed evidence shows that Plaintiffs knew all along that the MOU did not include the Nicolau Award, that fact was the basis of many discussions as to when a DFR claim would be "ripe", and Plaintiffs had the advice of their counsel throughout these discussions. *See* West Pilots Email Chains, annexed as Mele Decl. Ex. A and F; Holmes Trial Tr., pp. 132-133, relevant portions annexed as Mele Decl. Ex. G.

III. In entering into the MOU, USAPA obtained benefits for all US Airways Pilots.

Citing *Baker v. Newspaper & Graphic Commc'ns Union, Local 6*, 628 F.2d 156 (D.C. Cir. 1980) and *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524 (7th Cir. 1992), Plaintiffs argue 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." Doc. 267, at 13. That is precisely what happened with the MOU.[7] In exchange for acceding to the non-negotiable pre-condition to entering into negotiations laid down by US Airways and the UCC that the MOU be silent as to seniority, and that an integrated

[7] Plaintiffs' reliance on *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793 (7th Cir. 1976) is misplaced because the Nicolau seniority list was never implemented, or ratified and thus a far cry from any "permanent" seniority order. Indeed, seniority integration based on date-of-hire would be consistent with the current seniority of the East and West pilots which is governed by their respective collective bargaining agreements, both of which order seniority based on date-of-hire.

seniority list be governed by a process consistent with the McCaskill-Bond Amendment, US Airways pilots obtained about $1.6 billion in wages and other benefits. USAPA 56.1 Stmt., ¶¶39-40, 53-54, 56-68. While Plaintiffs quibble with the exact monetary figure of the wages and benefits obtained under the MOU (Doc. 267, at 16, n 4), they do not dispute the fact that the MOU conferred benefits on all US Airways pilots. In fact, it was because of these benefits that Leonidas recommended voting for the MOU. Doc. 213-9 Tab 21. Plaintiffs and class members were well aware of the benefits contained within the MOU, and that these benefits were for all US Airways pilots. USAPA 56.1 Stmt., ¶80. It was because of these benefits that West Pilots voted for the MOU.[8] *See* West Pilots Trial Testimony regarding MOU vote, portions annexed as Mele Decl. Ex. G-1. Now that the Department of Justice anti-trust lawsuit has been settled, the merger will likely close in December, and US Airways pilots will soon reap the economic benefits of the MOU.

[8] The overwhelming vote by the West Pilots for the MOU is strong evidence that West Pilots voted in favor of its benefits even though it patently did not include the Nicolau Award, and that ratification with full knowledge of the terms of the agreement is a legitimate defense to Plaintiffs' DFR. *See Gullickson v. Southwest Airlines Pilots' Ass'n*, 87 F.3d 1176 (10th Cir. 1996); *Papcin v. Dichello Distributors, Inc.*, 697 F.Supp. 73 (D.Conn. 1988), *judgment aff'd in unpublished decision*, 862 F.2d 304 (2d Cir. 1988). Plaintiffs' argument that ratification is not a legitimate defense is antithetical to the Ninth Circuit's holding that Plaintiffs' DFR claim is not ripe until the parties complete negotiations and the membership ratifies the agreement. *Addington*, 606 F.3d at 1180.

The fact that, as per the Constitution, only active members could vote does not undermine the MOU ratification vote. Those eligibility rules were perfectly consistent and transparent and among the privileges non-members knowingly waived. In any event, how pilots who did not vote or who were not eligible to vote would have voted is irrelevant and purely speculative. The fact that there were West Pilots who voted *against* the MOU despite its economic benefits is further evidence that the West Pilots who voted for the economic benefits did so notwithstanding the fact that the Nicolau Award was not included in the MOU. *See* Mele Decl. Ex. F, p. 3 (Email from plaintiff George Maliga: "Regardless of what Andy and Marty say tomorrow, it is no vote from me on the MOU . . . The MOU is [sh*t], and it's even worse without the Nic."). "A voluntary choice may not be withdrawn because the choice was an effort to make the best of a bad situation. Adult pilots, of sound mind and well aware of the consequences of their acts, must expect to keep their contracts, even when they wish they could have made better deals." *Rakestraw*, 981 F.2d at 1534. Having voted for the MOU for the economic benefits, these pilots must now accept the MOU and all its terms.

Plaintiffs argue for the first time that USAPA acted in bad faith by giving "misleading explanations of the Court's October 2012 order." Doc. 267, at 14. There was robust discussion of this Court's order and, not surprisingly, West Pilots, including Mr. Scherff, chose to claim that they prevailed, even though their motion for summary judgment on Count I was denied. Scherff Trial Tr., p. 156, annexed as Mele Decl. Ex. I; PHX Domicile Update, dated October 30, 2013, annexed as Mele Decl. Ex. J. That USAPA chose to emphasize other parts of the decision, including the Court's statement that "Defendant US Airline Pilots Association is free to pursue any seniority position it wishes " consistent with its DFR is neither bad faith nor evidence of bad faith. "To establish that the union's exercise of judgment was in bad faith, the plaintiff must show 'substantial evidence of fraud, deceitful action or dishonest conduct.'" *Beck v. United Food & Commercial Workers Union, Local 99*, 506 F.3d 874, 880 (9th Cir. 2007) (citing *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emp. of Am. v. Lockridge*, 403 U.S. 274, 299, 91 S. Ct. 1909, 1924 (1971)). Plaintiffs fail to meet their burden of producing evidence of fraud, deceitful action, or dishonest conduct. *Simo v. Union of Needletrades, Indus. & Textile Employees*, 322 F.3d 602, 618 (9th Cir. 2003) ("The burden is on the workers to produce evidence of bad faith.").

In conclusion, there is no evidence in the record supporting Plaintiffs' claim that the absence of the Nicolau Award in the MOU was a breach of USAPA's DFR. Plaintiffs cannot meet their burden of setting forth specific facts showing the existence of a genuine issue for trial. *Barthelemy v. Air Line Pilots Ass'n*, 897 F.2d 999, 1004 (9th Cir. 1990). USAPA has a duty of fair representation to all its members, not merely Plaintiffs and the West Pilots. To that end, USAPA (and US Airways) entered into an agreement that was seniority neutral and provided substantial and unprecedented economic and non-economic benefits to all US Airways pilots. By agreeing that seniority integration between US Airways and American would be conducted consistent with the McCaskill-

Bond process, USAPA sought to avoid risking the substantial economic gains in the MOU by tying it to the issues regarding seniority integration. *See* Doc. 213-3 Tab 3 (USAPA's Response to Plaintiffs' Interrogatories, Response #1).

"Compromises on a temporary basis, with a view to long range advantages, are natural incidents of negotiation." *Huffman*, 345 U.S. at 338, 73 S.Ct. 681, 686. By ensuring that seniority integration would be conducted consistent with the McCaskill-Bond process in exchange for economic benefits for all US Airways pilots, USAPA satisfied its duty of fair representation to its members.

CONCLUSION

For the foregoing reasons, USAPA respectfully requests that the Court grant summary judgment in favor of USAPA on all issues and dismiss the Amended Complaint.

Respectfully submitted this 19th day of November 2013.

Martin & Bonnett, P.L.L.C.
By: s/Susan Martin
Susan Martin
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 Defendant USAPA

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 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
MARTY HARPER, PLLC
CityScape
One East Washington St., Ste. 1200
Phoenix, AZ 85004

Andrew S. Jacob
Jennifer Axel
POLSINELLI, 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