Docket Nos. 14-15757, 14-15874, 14-15892

In the

United States Court of Appeals for the Ninth Circuit

Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; Steve WARGOCKI; Michael J. SOHA; Rodney Albert BRACKIN; and George MALIGA; *and a class of persons similarly situated*,

Plaintiffs-Appellants & Cross-Appellees

v.

US AIRLINE PILOTS ASSOCIATION,

Defendant-Appellee & Cross-Appellant

US AIRWAYS, INC.,

Intervenor-Cross-Appellant

Appeal from final judgment and rulings necessary thereto by the United States District Court for the District of Arizona, No. 2:13-CV-00471, Hon. Roslyn O. Silver, Senior United States District Judge

---

THIRD CROSS-APPEAL BRIEF OF PLAINTIFFS-APPELLANTS ADDINGTON, *et al*.

Andrew S. Jacob (#22516)
ajacob@polsinelli.com
Jennifer Axel (#023883)
jaxel@polsinelli.com
POLSINELLI P.C.
One East Washington St., Ste 1200
Phoenix, AZ 85004
Phone: (602) 650-2000
Fax: (602) 264-7033

Marty Harper (#003416)
mharperpllc@gmail.com
MARTY HARPER, PLLC
12817 N. 14th Drive
Phoenix, AZ 85029
Phone: (602) 251-3521
Fax: (602) 251-8055

Attorneys for Plaintiffs-Appellants & Cross-Appellants, Addington, et al.

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

Cases

III. LIST OF ABBREVIATIONS USED

ALPA ..... Air Line Pilots Association

DFR ..... Duty of fair representation

Dkt. ..... Ninth Circuit document number

Doc. ..... District Court document number

ER ..... Excerpt of record

Ex. ..... Trial exhibit

MOU ..... Memorandum of Understanding

RLA ..... Railway Labor Act

USAPA ..... US Airline Pilots Association

IV. JURISDICTION

Neither of the Appellees/Cross-Appellants (US Airways, Inc. or USAPA) disputes that this Court has jurisdiction to address the merits of the issues raised on appeal by Appellants/Cross-Appellees Don Addington; John Bostic; Mark Burman; Afshin Iranpour; Roger Velez; Steve Wargocki; Michael J. Soha; Rodney Albert Brackin; and George Maliga; and a class of persons similarly situated (collectively the "West Pilots").

V. LEGAL ARGUMENT

A. Standard of Review

The Parties do not dispute the standard of review.

B. Claim One: Duty of Fair Representation

In Claim One, the West Pilots sought a ruling that USAPA "breached the duty of fair representation by entering into the MOU because [without a legitimate union purpose] the MOU abandons a duty to treat the Nicolau Award as final and binding." (Doc. 134 at 13, ¶ 99 [ER 053].) For remedy, the West Pilots sought "an injunction requiring [USAPA] to conduct seniority integration . . . using the seniority order in the Nicolau Award list to order the US Airways pilots." (*Id*. at 17, ¶ 136 [ER 057].)

1. Reply to US Airways

US Airways offered no response on Claim One.

2. Reply to USAPA

USAPA incorrectly framed Claim One as a challenge to its power to contract. To the contrary, Claim One is a challenge to USAPA's improper exercise of that power in breach of its duty of fair representation. That duty precluded USAPA from bargaining away the West Pilots' existing right to have the Nicolau Award used when the airline integrates pilot operations unless such a bargain was reasonably likely to result in a net benefit to the entire craft (bargaining unit) of pilots. Absent unusual circumstances, because seniority changes are a zero-sum game, they have no such net benefit.

In other words, when a union takes sides in a seniority dispute, when it makes a contract that changes or waives an existing seniority order, it must have a legitimate reason—a reasonable expectation that making such a contract will benefit the craft. USAPA, however, has not identified a legitimate reason for its actions. It did not do so in the District Court. It did not do so in its Second Cross-Appeal Brief. (Dkt. 22-1.) Indeed, the record below has no evidence or testimony that could support a legitimate reason.

The economic benefits in the MOU were not a legitimate reason for USAPA to add a provision to the MOU that abandoned the seniority provisions in the 2005 Transition Agreement. There is no evidence that USAPA had to abandon those Transition Agreement provisions to obtain the

MOU's economic benefits. Indeed, USAPA offered no evidence at all of its reasons for adding such a provision to the MOU.

The District Court erred by failing to recognize, under such circumstances, that USAPA did not have a legitimate reason to abandon the 2005 Transition Agreement seniority provisions. This Court, therefore, must reverse and remand for entry of judgment in favor of the West Pilots on Claim One and for consideration of their common benefit fee claim in that light.

a. USAPA had to have a legitimate union purpose to make a contract that changed an existing commitment to a specific seniority order.

The US Supreme Court first recognized that a union cannot put illegitimate provisions into a collective bargaining agreement in *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202 (1944) (Union may not enter into a collective bargaining agreement that, without legitimate reason, favors white workers at the expense of black workers.). Unions are particularly constrained in regard to altering seniority rights because an alteration in seniority rights usually does nothing more than favor some workers at the expense of others. A line of cases beginning with *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793 (7th Cir. 1976), therefore, holds that a union must have a legitimate reason for making a contract that changes existing seniority rights.

In *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524 (7th Cir. 1992), the Seventh Circuit reaffirmed *Barton Brand*, holding that "a union may not juggle the seniority roster for no reason other than to advance one group of employees over another." *Id.* at 1535; *accord Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers,* 378 F.3d 269, 277 (2d Cir. 2004); *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 295, n.18 (5th Cir. 2001). No decision published thereafter has held otherwise.

Incredibly, USAPA argued in its brief here that it did not need a legitimate reason to make a contract (the MOU) that abandoned the existing commitment (from the 2005 Transition Agreement) to use the Nicolau Award in the Single Agreement. (Dkt. 22-1 at 43 ["Regardless of whether the MOU is the Single Agreement, it was not a DFR to enter into it, and 'legitimate purpose' is not the standard by which to determine any breach."].) USAPA argued, in effect, that it had the right to exercise its power to contract but had no corresponding duty to exercise that power fairly, to exercise it for a legitimate purpose. (*Id.*) That is simply untrue. *Richardson v. Alaska Airlines, Inc.*, 750 F. 2d 763, 766 (9th Cir. 1984) (recognizing that a union's "right to act as exclusive representatives for all members in the bargaining unit . . . carries with it a corresponding duty to represent all members fairly").

Indeed, the District Court expressly rejected that argument in prior litigation (the 2010 declaratory judgment action), where it ruled that USAPA would "breach its duty of fair representation" if it makes a contract that uses a seniority order other than the Nicolau Award unless such action was "supported by a legitimate union purpose." (Ex. 115 at 9:3 to 9:4 [ER 231-40]. This, apparently, means nothing to USAPA. That ruling should preclude USAPA from making a contrary argument in this litigation. *See ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund,* 754 F.3d 754, 760 (9th Cir. 2014).

This Court must reject USAPA's legally-flawed arguments. It must conclude that USAPA had to have a legitimate union purpose to make a contract that changed existing commitments to a specific seniority order.

b. MOU paragraph 10(h) changed the Transition Agreement commitment to use an arbitration-determined seniority order.

The 2005 Transition Agreement provided that an arbitration-determined seniority order, the Nicolau Award, would be incorporated into the "Single Agreement," the contract that would replace the separate contracts that governed the work of the East and West pilots. (Doc. 206-1 at SF # 19 [ER 062].) The MOU was crafted by USAPA to abandon that provision. Had it not had such a provision, the joint CBA would necessarily use the Nicolau Award seniority list. It would use a single seniority list

created by merging the Nicolau Award list with the American pilots' seniority list. Because the MOU expressly abandons that requirement, it changes an existing commitment to a seniority order.

USAPA argued that there was nothing to abandon because the Nicolau Award was never implemented,. (Dkt. 22-1 at 45.) That misses the point. The West Pilots' claim is that USAPA wrongly made a contract that abandoned an existing contractual commitment to use the Nicolau Award. The fact that the Award itself was not yet implemented is immaterial to that claim.

USAPA also mischaracterizes the Nicolau Award as a mere suggestion of a method of ordering the seniority of the East Pilots and West Pilots. (Dkt. 22-1 at 45 ["West Pilots cannot lose what they never had. The Nicolau Award was and has always been a proposal — one that the majority of US Airways pilots rejected.'].) That is simply a false characterization. The Nicolau Award is not a proposal. It is the final result from an arbitration of two competing proposals. It is the result of a neutral dispute resolution process that all agreed would give a final and binding result. It was properly accepted by US Airways at the end of 2007. It would have been implemented years ago but for USAPA's wrongful conduct. Paragraph 10(h), therefore, changed a firm contractual commitment to implement the result of that arbitration.

c. USAPA did not have a legitimate union purpose.

USAPA has never explained its purpose for putting language into the MOU that abandoned the 2005 Transition Agreement commitment to use the Nicolau Award. Yet, contrary to the record below, USAPA now denies that its officers and leaders "consistently denied knowing why USAPA put paragraph 10(h) into the MOU." (Dkt. 22-1 at 47.) But, it fails to identity any evidence or testimony in the record that shows otherwise. That is because there is no such evidence or testimony.

(1) *Baker* does not support USAPA.

Baker v. Newspaper and Graphic Communications Union, Loc. 6, 628 F.2d 156, 166 (D.C. Cir. 1980), does not help USAPA. It merely recognizes that a union may alter an existing commitment to a specific seniority order if such action is directly linked, quid pro quo, to an economic benefit provided by the employer. The employer in *Baker* gave the union an ultimatum: change the furloughing order or we will close the plant. *See id.* at 166. There is no evidence here that US Airways demanded that USAPA abandon the 2005 Transition Agreement seniority provisions. There is no evidence that it conditioned any of the MOU economic benefits on USAPA abandoning those seniority provisions.

The only seniority language required by US Airways was USAPA's agreement that it would abide by existing federal law, McCaskill-Bond. But

nothing in McCaskill-Bond is inconsistent with honoring an existing seniority agreement. This situation, therefore, is materially different from that in *Baker*. In other words, *Baker* does not support USAPA's arguments.

(2) The decision to abandon the Nicolau Award was not "neutral."

The whole notion of "seniority neutrality" needs to be put to rest. Under the terms of the 2005 Transition Agreement, the seniority of the US Airways pilots would be ordered according to the Nicolau Award. That was not "neutral." The Nicolau Award is a specific seniority order that was created in a process of neutral arbitration. It balanced competing and at times conflicting interests of two groups of pilots. USAPA crafted language into the MOU that allowed it discretion to disregard the Nicolau Award, to order seniority in a manner preferred by the East Pilots. That shift from the Nicolau Award to broad discretion was not "neutral." It was favorable to the East Pilots and detrimental to the West Pilots.

(3) Overall contract benefit does not excuse otherwise illegitimate action.

A union may not put wrongful provisions into a contract on the mere basis that the contract provided benefits unrelated to the otherwise wrongful provisions. Were it otherwise, a union could tack all sorts of wrongful provisions onto an otherwise legitimate contract. For example, a contract that obtained better wages could, for no legitimate reason, put workers with

a disfavored race or gender at the bottom of a seniority list. That has long been illegal. *See Steele*, 323 U.S. at 202 (Union may not enter into a collective bargaining agreement which favors white union employees to the detriment of black employees.). Notwithstanding that the MOU had economic benefits, it was just as illegal here to abandon the Transition Agreement seniority terms, to the detriment of the West Pilots.

There is no evidence that any economic benefit in the MOU was contingent on adding paragraph 10(h). Economic benefit, therefore, did not prove a legitimate union purpose here. This Court, then, must reject USAPA's argument that the "unprecedented economic benefit" of the MOU justified adding paragraph 10(h). (Dkt. 22-1 at 38.)

(4) Majority intransigence does not excuse otherwise illegitimate action.

A line of cases establishes that the preference of a majority faction does not provide a legitimate reason for changing an existing seniority agreement. *See*, *e.g.*, *Barton Brands*, 529 F.2d at 798-99 ("[S]eniority decisions may not be made solely for the benefit of a stronger, more politically favored group over a minority group."). Indeed, it is well recognized that the duty of fair representation exists to constrain the extent to which a majority can impose its will. *See Air Wisconsin Pilots Protection Committee v. Sanderson*, 909

F.2d 213, 216 (7th Cir. 1990). Majority intransigence, therefore, does not allow a union to act in a manner that would otherwise be illegitimate.

This Court must reject USAPA's argument (made for the first time in this appeal) that USAPA put paragraph 10(h) into the MOU so as to avoid "polarizing [the] US Airways/America West seniority integration dispute." First, there is no evidence in the record that this was USAPA's reason. Second, this excuse is merely a euphemistic way of saying that USAPA could cater to the demands of the East Pilot majority because it was intransigent. That is simply not a legitimate reason. Majority intransigence does not excuse otherwise illegitimate action.

3. Remedy

USAPA did not adequately explain why this Court cannot provide the remedy sought by the West Pilots. It ignores controlling authority, in such matters, that recognizes courts can order both carriers and unions to follow a specified seniority ordering. *E.g.*, *Franks v. Bowman Transportation Co.*, 424 U. S. 747, 769 (1976) (remedy may "include an award of seniority status"); *Bernard v. Airline Pilots Association*, 873 F.2d 213, 215, 219 (9th Cir. 1989) (affirming imposition of a seniority list on the airline and union). This Court had ample authority to support providing the remedy requested here—a direct order to use the Nicolau Award.

C. Claim Four: McCaskill-Bond

1. Reply to US Airways

In Claim Four, the West Pilots argue that they have a right to separate participation in the McCaskill-Bond process. Contrary to US Airways' characterization, this claim will not be mooted by the "pending separate arbitration" that APA, USAPA, and the airline will conduct. First, this pending separate arbitration will not decide, as stated by US Airways, "whether a West Pilot merger committee will be designated to participate in the [McCaskill-Bond] seniority-integration process." (US Airways Br. at 1 [Dkt. 21 at 3].) Rather, it will decide whether APA (which has been representing all pilots affected by the current merger since mid-September) is allowed to designate such a committee.

Second, this appeal and the arbitration address different questions. The arbitration will address whether APA, as the current collective bargaining representative of all pilots at the new airline, has a right to appoint a West Pilot committee. In contrast, this appeal addresses whether McCaskill-Bond and the RLA give the West Pilots the right to have such a committee.

And finally, a West Pilot committee must have adequate funding to meaningfully participate in the McCaskill-Bond seniority integration process. The West Pilots may not be able to secure such funding if they are limited to obtaining relief through the pending separate arbitration. In

contrast, if the West Pilots prevail on this appeal of the McCaskill-Bond claim, the matter should be remanded to address their common benefit fee claim. A fee award obtained on that claim could be used to fund expenses that they will incur in the McCaskill-Bond seniority integration process.

For these reasons, this Court should address the merits of the appeal on Claim Four without regard to the outcome of the pending separate arbitration.

2. Reply to USAPA[1]

a. Current federal law provides the same protections to worker groups that the Civil Aeronautics Board ("CAB") provided when it regulated this industry.

Because McCaskill-Bond incorporates the CAB's seniority integration Labor Protective Provisions ("LPPs"), it stands to reason that Congress intended that McCaskill-Bond would provide the same protection to minority interests that the CAB provided. Absent a compelling reason to the contrary, there is no reason to think that the LPPs should be applied any differently now than they were applied by the CAB when it regulated this industry. USAPA offers no such compelling reason. This Court, therefore, should hold that a minority worker group such as the West Pilots has the

[1] Much of the argument in this section is taken directly from a brief filed by US Airways in the underlying litigation, Doc. 98.

same right under McCaskill-Bond to participate in a merger related seniority integration that it would have had under the CAB.

b. The CAB allowed worker groups with conflicting seniority interests separate independent representation in the seniority integration process.

The West Pilots are entitled to separate independent representation in the seniority integration process because any representative designated (and controlled) by USAPA will not represent them fairly. It is that simple.

Surely, Congress intended that McCaskill-Bond would entitle employees affected by a merger to fair representation in a seniority integration process. After presiding over more than three years of litigation, the District Court expressed "serious doubts that USAPA will fairly and adequately represent all of its members [in such a process] while it remains a certified representative." (Doc. 298 at 21:6 to 21:8 [ER 102].) Despite having such misgivings, the District Court did not order that the West Pilots must have separate representation because it found, in error, that only a certified labor union can participate in a McCaskill-Bond seniority arbitration.

All parties to this appeal agree that workers can participate in seniority integration procedures apart from their certified bargaining representatives. USAPA, for example, asserts that it can properly continue to represent the East Pilots (and for that matter the West Pilots) regardless that it is no longer

their certified representative. Yet, it argues that the West Pilots have no right to separate representation because they are not so certified. That makes no sense.

It is long-established in this industry that a committee independent of a certified representative can represent an interest group in a seniority-integration process. *E.g., National Airlines Acquisition, Arbitration*, 95 C.A.B. 584 (1982) (seniority-integration process involved two committees from one union, two committees from another union, and a non-union committee representing the interests of union members on furlough); *National Airlines Acquisition, Arbitration Award*, 97 C.A.B. 570 (1982) (former National employees formed their own committee after their minority union consented to an arrangement between the post-merger carrier and the majority/incumbent union). When the CAB oversaw application of the LPPs, it made clear that the LPPs did not mandate representation by the employees' RLA collective bargaining representative. *See Braniff-Mid-Continent Merger Case*, 17 C.A.B. 19, 21-22 (1953) ("we are unable to interpret the word 'representative' . . . to import the meaning of that term under the [RLA]").[2]

[2] The CAB did make occasional statements suggesting that employees were properly represented in a seniority-integration proceeding by their union, but in none of those cases did the CAB state that the unions for the

In *Delta Air Lines, Employee Integration*, 63 C.A.B. 700, 703 (1973), the CAB articulated the controlling general principle: "every group of employees affected by negotiations under these provisions [i.e., Sections 3 and 13] is entitled to separate representation that will protect the group's interest." (Emphasis added.) The CAB further clarified that collective bargaining representatives were not always appropriate Section 3 and 13 representatives for seniority-integration purposes. *See id*. at 702. Prior to the merger of Northeast Airlines, Inc. ("Northeast") and Delta Air Lines, Inc. ("Delta"), flight attendants and clerical employees at Northeast were represented by the Transport Workers Union ("TWU") but were unrepresented at Delta. Post-merger, the TWU petitioned the CAB to compel arbitration of seniority integration under Section 13 of the LPPs, but the CAB dismissed the petition and rejected the argument that the TWU was

---

affected employee subgroups were the exclusive representatives of those employees for seniority-integration purposes. For example, in *National Airlines Acquisition, Arbitration*, 95 C.A.B. at 584 n.1, the CAB described the unions as the "appropriate representatives of employees affected by an acquisition or a merger." The underlying proceeding, however, allowed participation and separate representation for a subgroup of furloughed crewmembers and the CAB relied on this fact to reject the subgroup's petition to set aside the final integrated seniority list. Accordingly, that decision does not support the proposition that employees can only be represented by their unions.

the representative of the former Northeast employees for seniority-integration purposes merely because it had been the collective bargaining representative of those employees prior to the merger. *Id*. But the CAB did, however, state that the "TWU may ultimately obtain arbitration if it presents evidence to Delta of authority to represent former Northeast employees and if the dispute is not otherwise resolved." *Id*.

Under the circumstances of the present case, the West Pilots are a separate "affected" group of employees within the meaning of the LPPs. This is because there are currently two separate seniority lists for the US Airways pilots. As a result, the McCaskill-Bond negotiation/arbitration process will necessarily have to determine the relative seniority of East Pilots and West Pilots either prior to or as part of the overall process of integrating the US Airways pilots with the American pilots.[3]

The question then is whether USAPA can loyally represent both the East Pilots and the West Pilots—whether it would protect West Pilot interests if it is controlled by the East Pilots.

---

[3] The Nicolau Award provides a relative order of the US Airways pilots amongst themselves that could (and should) be used in the integration with the American pilots. The date-of-hire order promulgated by USAPA provides an entirely different approach.

Five years of litigation makes abundantly clear that the West Pilots and East Pilots have strongly-held and sharply-conflicting views on how their relative seniority should be determined. It is also clear that USAPA's governing body, officers, and attorneys are loyal to the East Pilot view of that issue. Indeed, the District Court expressly found that it is highly doubtful that USAPA can or will fairly represent the West Pilots in this context. (Doc. 298 at 21:6 to 21:8 [ER102].)

Because no committee appointed by and controlled by USAPA will be loyal to West Pilot interests, the West Pilots are entitled to separate representation here – just as the East Pilots and West Pilots had separate representation in connection with the Nicolau arbitration (even though they were then represented by the same union), and just as the American pilots will have separate representation vis-à-vis the US Airways pilots (even though they now are all represented by the Allied Pilots Association).

In arguing that it must be the exclusive seniority-integration representative for all US Airways pilots, USAPA relies on its former status as the exclusive collective bargaining representative for US Airways pilots under the RLA (a status that it lost on September 16, 2014). Any such reliance would be misplaced. USAPA's former status under the RLA was limited to negotiations with US Airways (or its successor). The McCaskill-Bond seniority negotiations in connection with the US Airways/American

merger will not be negotiations between a carrier and a union, but rather negotiations between and among groups of employees. In that circumstance, USAPA's prior role as the exclusive collective bargaining representative is irrelevant to the question of whether the West Pilots are entitled to separate representation in the forthcoming seniority-integration process. The CAB decisions discussed above answer that question. In light of the fact that there are currently separate seniority lists for the East Pilots and West Pilots (which will have to be effectively integrated as part of the overall process of integrating the US Airways pilots with the American pilots), and given the sharply-divergent views of the East Pilots and West Pilots on this subject, the West Pilots are entitled to participate throughout the McCaskill-Bond process through a representative of their own choosing.[4]

---

[4] Although several CAB decisions rejected the challenges of dissatisfied employee subgroups to the fairness of an integrated seniority list on the basis that their interests had not been properly taken into account, those decisions are distinguishable because the employees did not raise their objections until after an agreement on seniority integration had been reached or the dispute had been arbitrated. *See*, *e.g.*, *United-Capital Merger Case*, 40 C.A.B. 903 (1964); *National Airlines Acquisition*, 94 C.A.B. 433 (1982); *National Airlines Acquisition*, 95 C.A.B. 584 (1982). The issue here is whether the West Pilots have a right to separate representation from the outset of the McCaskill-Bond process given a timely request for the same, and not whether the outcome of the process is ultimately "fair and equitable."

In short, it is long established in this industry that groups with conflicting seniority interests can and should be independently represented in the seniority integration process. There is no question here that the East Pilots and West Pilots have conflicting seniority interests. The mere fact that the East Pilots have refused for more than seven years to honor an agreement to implement an arbitrated resolution of the East/West seniority integration shows that any representative chosen or controlled by East Pilots cannot and will not fairly represent the West Pilots in this context. The District Court recognized this conflict but unfortunately was constrained by a serious misunderstanding of industry procedures. This Court should reverse on that basis and order that the West Pilots must have separate representation of their choosing.

3. Remedy

"The District Court has jurisdiction to enforce by injunction petitioners' rights to nondiscriminatory representation by their statutory representative." *Graham v. Bdh. of Firemen*, 338 US 232, 240 (1949). The only way that West Pilots can have nondiscriminatory representation here is to have representatives separate from and independent of USAPA. This Court, therefore, should vacate the judgment on Claim Four, direct the District Court to enter judgment in favor of the West Pilot Class, and direct the entry

of an order that West Pilots must have full party status in the MOU seniority integration process, with representatives of their choosing.

D. Claim Three: Fee Award

1. Reply to US Airways

US Airways offered no response to the West Pilots' opening brief on Claim Three, common benefit fee award.

2. Reply to USAPA

The West Pilots and USAPA agree that Claim Three was not litigated in the District Court. In the event that this Court reverses on either Claim One or Four, it should remand to also address Claim Three on the merits. In addition, this Court should address whether the West Pilots are entitled to a common benefit fee award here for efforts that were expended to obtain a favorable result on this appeal.

E. USAPA does not raise an appealable issue in its cross-appeal.

On its cross-appeal, USAPA seeks a ruling that certain statements made by the District Court in its order are *obiter dictum* without precedential effect. But, parties cannot appeal from dictum. *Oxford Shipping Co. v. New Hampshire Trading Corp.*, 697 F.2d 1, 7 (1st Cir. 1982) ("Since the judgment appealed from was in [a party's] favor, and since the statement made was in no sense necessary to that judgment, the statement was dictum. There is no known basis for an appeal from a dictum."). USAPA's

participation in the McCaskill-Bond process here was not at issue. Any statement by the District Court in that regard, therefore, was not necessary to the judgment. Such statements, consequently, are un-appealable dictum. This Court, therefore, should not decide the issues raised in USAPA's cross-appeal.

VI. CONCLUSION

For the reasons set forth herein, this Court should find that the District Court was in error where it entered judgment in favor of USAPA on Claims One and Four. This Court should vacate that judgment and remand with instruction for the District Court to: (1) enter judgment on Claims One and Four in favor of the West Pilot Class; (2) provide injunctive relief; and (3) consider the merits of Claim Three for a common benefit fee award. This Court should also enter an order awarding the West Pilot Class the reasonable fees and related litigation expenses incurred on this appeal.

DATED: November 13, 2014.

Respectfully submitted
/s/ Andrew S Jacob
_____
Andrew S. Jacob, Esq.
Jennifer Axel, Esq.
POLSINELLI P.C.

Marty Harper, Esq.
MARTY HARPER, PLLC

Attorneys for Plaintiffs-Appellants & Cross-Appellees

VII. CERTIFICATION OF COMPLIANCE

CERTIFICATION OF COMPLIANCE TO FED. R. APP. 32 (A)(7)(C) AND CIRCUIT RULE 32-1

I certify that: (check appropriate option(s))

__X__1. Pursuant to FRAP 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached First Cross-Appeal brief is

◙ Proportionately spaced, has a typeface of 14 points or more and contains 4,567 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

or is

□ Monospaced, as 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

_____2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

□ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

□ This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

□ Proportionately spaced, has a typeface of 14 points or more and contains _____ words.

□ Monospaced, has 10.5 or fewer characters per inch and contains _____ pages or _____ words or _____ lines of text.

_____ 3. Briefs in Capital Cases.

□ This brief is being filed in a capital case pursuant to the type-volume limitations set forth in Circuit Rule 32-4 **and is**

□ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words),

or is

□ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

_____ 4. Amicus Briefs.

□ Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points or more and contains 7,000 words or less,

or is

□ Monospaced, has 10.5 or fewer characters per inch and contains not more than either 7,000 words or 650 lines of text,

or is

□ **Not** subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5).

November 13, 2014 /s/ Andrew S. Jacob
Date Signature of Attorney

VIII. PROOF OF SERVICE

I am over the age of eighteen years of age, not a party to this action, and employed by Polsinelli, P.C.

On November 13, 2014, I caused *Third Cross-Appeal Brief of Plaintiffs-Appellants & Cross-Appellees* to be electronically filed with the Clerk of the Ninth Circuit Court of Appeals. In addition, I properly served what was electronically filed by mail by causing a true and correct copy to be placed in a sealed envelope, with postage prepaid, deposited with the United States Postal Service on this day following ordinary business practices addressed to opposing counsel at the last address given, as follows:

Patrick J. Szymanski, Esq.
PATRICK J. SZYMANSKI, PLLC
1900 L Street, NW, Ste 900
Washington, DC 20036

KAREN GILLEN, Esq.
US AIRWAYS, INC.
111 West Rio Salado Parkway
Tempe, AZ 85281

Gary Silverman, Esq.
Joy K. Mele, Esq.
O'DWYER & BERNSTIEN, LLP
52 Duane Street, 5th Floor
New York, NY 10007

Robert A. Siegel, Esq.
Chris A. Hollinger, Esq.
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071-2899

Susan Martin
Jennifer Kroll
MARTIN & BONNETT, P.L.L.C.
1850 N. Central Ave. Suite 2010
Phoenix, Arizona 85004

I declare under penalty of perjury under the laws of Arizona that the foregoing is true and correct and this declaration was executed on November 13, 2014 at Phoenix, AZ.

/s/ *Andrew S. Jacob*