

1 Edgar N. James*
2 Daniel Rosenthal*
3 JAMES & HOFFMAN, P.C.
4 1130 Connecticut Avenue, NW
5 Suite 950
6 Washington, DC 20036
7 (202) 496-0500
8 (202) 496-0555 (fax)
9 ejames@jamhoff.com
10 dmrosenthal@jamhoff.com

7 Stanley Lubin
8 LUBIN & ENOCH, P.C.
9 349 North 4th Avenue
10 Phoenix, AZ 85003-1505
11 (602) 234-0008
12 (602) 626-3586 (fax)
13 stan@lubinandenoch.com

12 *Attorneys for Allied Pilots Association*

13 *Admitted pro hac vice

14
15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE DISTRICT OF ARIZONA**

17
18 Don Addington, *et al.*,
19 Plaintiffs,
20 v.
21 US Airline Pilots Association, *et al.*,
22 Defendants.

No. CV-13-00471-PHX-ROS

**ALLIED PILOTS
ASSOCIATION'S OPPOSITION
TO PLAINTIFFS' MOTION
UNDER RULE 25 AND
PROPOSED INJUNCTION**

**ORAL ARGUMENT
REQUESTED**

1 The Allied Pilots Association (“APA” or the “Association”) submits this response to the
2 Plaintiffs’ brief, filed on September 4, 2015, seeking to substitute the Association in place of
3 USAPA and enjoin it.

4 The APA, as the certified representative of the pilots at US Airways and American, does
5 not oppose Plaintiffs’ attempt to join it as a party to this case, with the qualifications noted below.
6 Indeed, APA, as the sole party with a duty of fair representation toward the pilots on the three
7 unmerged seniority lists, seeks clarity with respect to the scope of its obligations and the
8 obligations of the merger committees appointed by it. APA does not want to be left as a non-party
9 parsing the boundaries of Fed. R. Civ. P. 65(d)(2).
10

11 However, the Association believes that an injunction binding the new APA East Merger
12 Committee would be unwarranted and unwise, adding uncertainty and delay to the seniority
13 integration process.
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15 Moreover, the APA is not a successor to USAPA, which continues to exist (with a large
16 treasury), was never merged into APA, and never transferred any of its debts or liabilities to APA.
17 Indeed, as we explain below, the APA has had an adversarial and litigious relationship with
18 USAPA in large part because the APA was determined to appoint a West pilot merger committee
19 once it assumed a duty of fair representation toward all of the US Airways pilots. After a long
20 delay caused by USAPA, APA did eventually become the representative of the U.S. Airways
21 pilots as the result of a determination of the National Mediation Board (“NMB”) pursuant to
22 Section 2, Ninth, of the Railway Labor Act, 45 U.S.C. § 152, Ninth. But APA begins with a fresh
23 start in terms of its duty of fair representation toward the U.S. Airways pilots and its statutory
24 obligations under McCaskill-Bond. Thus, the Association urges the Court to add the APA
25 through a straightforward application of Rule 19, rather than unnecessarily and incorrectly
26 invoking Rule 25.
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1 As to the expansion of the Ninth Circuit’s directed injunction to encompass the APA, we
2 note at the outset that Plaintiffs elide a very important point in their recitation of the facts
3 following the decision of the Ninth Circuit panel. Specifically, Plaintiffs’ motion suggests that the
4 APA colluded in a “work around” of the pending injunction. “Plaintiffs’ Motion to Substitute
5 APA” at 3. But the Association did no such thing. Rather, the McCaskill-Bond Board of
6 Arbitration directed the APA to use its best efforts to appoint a new East Merger Committee—an
7 order on which the APA had taken no position—and the Association complied with that legally-
8 binding order. *See* APA Letter Brief to the McCaskill-Bond Panel of July 1, 2015, Exhibit 1.

9
10 The APA opposes the Plaintiffs’ request that the injunction apply to the APA East Merger
11 Committee, but not because the Association approves of USAPA’s actions that the Ninth Circuit
12 found to be a breach of the duty of fair representation, or because the APA lacks sympathy for the
13 situation of the former America West pilots. Rather, the APA believes that the McCaskill-Bond
14 Board of Arbitration is best served by letting each Merger Committee advance whatever proposal
15 it elects and avoid the inevitable rancor that will ensue at American and within APA if one of the
16 three committees is subject to the injunction. Moreover, all parties to the seniority integration
17 process will be best served by avoiding the complication, delay, and litigation inherent in
18 restricting one of the committees.

20 **I. Background**

21 Although the Court is well aware of the facts regarding the unsuccessful efforts to
22 integrate the East and West seniority lists in the US Air/America West merger, it may be less
23 familiar with the efforts thus far to integrate those lists with the American pilot seniority list in the
24 wake of the US Airways/American merger. The APA lays out those efforts in brief below,
25 seeking to emphasize how careful the Association has been to treat both the East and West pilots
26 fairly.
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1 In advance of the American/US Airways merger, the two airlines, APA, and USAPA
2 entered into a Memorandum of Understanding (MOU) providing, inter alia, for an integration
3 process consistent with the McCaskill-Bond statute. Following vigorous opposition by USAPA,
4 the NMB found that the merged company constituted a single carrier on September 16, 2014, and
5 certified the APA as the single collective bargaining representative. *American Airlines, Inc./US*
6 *Airways, Inc.*, 41 NMB 289.

8 While that decision was pending, USAPA raised a dispute with APA regarding the
9 Association's declared intention to appoint a merger committee for the pilots at America West.
10 USAPA therefore sued American, US Airways and APA. *USAPA v. US Airways, Inc.*, No. 1:14-
11 cv-00328 (D.D.C., Feb. 27, 2014).

12 Pursuant to a request from the NMB, the parties agreed to mediate their differences and
13 ultimately reached a Protocol Agreement, Exhibit 2, that provided that APA would not
14 unilaterally make a decision to appoint a West merger committee but would submit the question
15 to a Preliminary Arbitration Board that would determine whether APA should create a West pilot
16 merger committee. That arbitration occurred in December 2014, after the APA had been certified
17 as the collective bargaining representative for the pilots at US Airways and American.

19 At the arbitration, the APA and American argued in favor of the appointment of a West
20 pilot committee. Only USAPA opposed the committee, asserting that, as the previously certified
21 representative of the pilots at US Airways, it had the legal right to represent the pilots on both
22 unmerged seniority lists at US Airways. On January 9, 2015, the Preliminary Arbitration Board
23 "order[ed] APA to designate the West Pilots Merger Committee as a full participant in the
24 seniority integration process." Exhibit 3. Accordingly, APA appointed a West Merger Committee
25 consisting of representatives chosen by the West pilots.
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1 With that matter settled, the parties began to prepare for the seniority integration
2 arbitration. Under the Protocol Agreement, APA is not a party in that arbitration. Exhibit 2 at 11
3 (“The parties to the seniority integration arbitration before the Arbitration Board will be the
4 [West, East and Legacy American] Merger Committees and American.”). Moreover, APA may
5 take no position with respect to the integration of the three seniority lists. *Id.* at 9 (“APA shall not
6 interfere in the deliberations and decision making of the Merger Committees.”).

8 APA did agree to provide certain resources to each Merger Committee and to advance
9 funds to each Committee against \$4 million that the Company had agreed to reimburse the merger
10 representatives once the ISL decision had been implemented. Exhibits 4 (MOU) and 5 (APA
11 memos describing how APA would advance the funds). APA agreed to advance these funds
12 knowing that the newly established West Merger Committee would receive no funding from
13 USAPA.¹

15 Consistent with the terms of the Protocol Agreement, the three pilot committees presented
16 their preliminary written positions on how they believed the three pilot seniority lists should be
17 integrated on June 19, 2015. The formal integration arbitration, before a panel entirely different
18 from that which had conducted the preliminary arbitration, was to commence on June 29, 2015.
19 However, on June 26, 2015, the Ninth Circuit panel issued its decision holding that USAPA and
20 its USAPA merger committee could not advocate a position that did not honor the dictates of the
21 Nicolau arbitration decision. Upon being informed of the decision, the arbitration panel stayed the
22 formal opening of the process and set June 29, 2015, for an off the record discussion of the
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25 ¹ As a matter of uniform practice, neither APA nor ALPA provides financial support to the
26 Merger Committees. The respective pilot groups are expected to raise the necessary funds. The
27 West Merger Committee did not have the institutional support that the pre-merger American
28 pilots or the USAPA merger committee enjoyed, so APA agreed to front funds to the committees
against a receivable from the Company at the very end of the process. APA and the Company did
agree to divide the arbitrators’ fees, the court reporter and the hotel expenses.

1 impact of the *Addington* decision. Representatives of the three pilot committees appeared at that
2 discussion, as did representatives of APA and American.

3 At the outset of the discussion, the USAPA committee representatives announced that
4 USAPA and its committee were irrevocably withdrawing from the arbitration and walked out.
5 After further discussion, the McCaskill-Bond Board of Arbitrators asked the parties to brief three
6 questions:
7

- 8 1. Whether APA should engage in best efforts to establish a new merger committee to
9 represent legacy U.S. Airways East pilots (“East Merger Committee”)?
- 10 2. Whether a new East Merger Committee, if any, should be deemed bound by the Ninth
11 Circuit’s decision in *Addington*?
- 12 3. What shall be the revised schedule for the ISL hearing (including, without limitation,
13 the schedule for establishing a new East Merger Committee, if any)?

14 APA did not advocate for a new East Merger Committee but it did argue that the Board of
15 Arbitrators had the authority under the McCaskill-Bond statute and the Protocol to address the
16 questions. After receiving briefs from the four entities, the arbitration panel issued a decision on
17 July 5, 2015. Exhibit 6. In that decision, the panel ruled that APA should use its best efforts to
18 designate a new committee to represent the East pilots. In the absence of an actual injunction
19 regulating the presentation the new APA East Merger Committee might make in the arbitration,
20 the panel decided to put no limitations on that presentation. Finally, the panel made necessary
21 adjustments to the arbitration schedule.
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23 Consistent with the order of the panel, the APA requested that committee members be
24 selected by the domicile representatives at the Charlotte and Philadelphia bases, which were
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1 composed of former US Air East pilots.² When the names were provided, APA President Keith
2 Wilson designated those people as the East Merger Committee on July 21, 2015.

3 The APA East Merger Committee consists of: (1) Chairman Kelly Ison, a ten year
4 member of the ALPA U.S. Airways Master Executive Council's ("ALPA MEC") Negotiating
5 Committee. Between 2004 to 2011, he was not an active line pilot but worked as a consultant to
6 other airlines. (2) Phillip Osterhus, served for ten years as Secretary-Treasurer of the ALPA MEC
7 and opposed the USAPA decertification effort. (3) Pete Gall, the technical computer modeler for
8 the Committee. He has been an inactive pilot since 2006 and is currently an engineering professor
9 at West Virginia University. (4) Rick Brown, hired by U.S. Airways in 2011, was put on the
10 USAPA Merger Committee in 2015, following APA's designation of a West Merger Committee.
11 He is responsible for data compilation and analysis. Consistent with its obligations under the
12 Protocol Agreement, APA may not involve itself with a Merger Committee's choice of legal
13 counsel or the positions that a Merger Committee may assert in the arbitration process.³
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16 The arbitration process is set to begin on September 29, 2015, with the parties submitting
17 position statements on September 19, 2015.

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19 _____
20 ² While APA Board members are fiduciaries for all American pilots and not their particular
21 pilot demographic, APA has, on occasion, looked to Board members from particular pilot
22 domiciles to recommend and advise APA on issues peculiar to those domiciles. APA has done
23 this with the former TWA pilot Board members in St. Louis, as well as the former U.S. Air pilots
24 who now represent the Phoenix, Charlotte and Philadelphia domiciles where the West and East
25 pilots are based.

26 ³ In the event of oral argument, APA is prepared to discuss the East Merger Committee's
27 choice of legal counsel. The world of pilot seniority merger counsel is very small, and the most
28 well regarded advocates are involved in this McCaskill-Bond process. APA knows the firm of
Baptiste & Wilder well, as it tried to hire them in connection with a prior merger at American but
the firm ended up representing the then existing ALPA MEC. APA is confident that the East
Committee's selection of its merger counsel, as with the other committees' selection of merger
counsel, will aid in concluding the seniority list integration process in a manner that will allow the
involved pilots to accept the results and be satisfied they were fairly represented in the process.

1 **II. The Court should join the APA under Rule 19, and in no event substitute it**
2 **under Rule 25 as a Successor to USAPA.**

3 As described in more detail below, the Allied Pilots Association cannot be substituted for
4 USAPA under Rule 25(c), which applies only when “an interest is transferred” from the original
5 party to another party. Substitution under Rule 25(c) is inappropriate for several reasons,
6 including that USAPA continues to exist, with its own treasury, and that none of the cases cited
7 by Plaintiffs supports substitution in a case like this.

8 Nevertheless, as previously indicated, the APA does not oppose its joinder to the case, and
9 has accepted service of process. The straightforward route to joinder here is through Federal Rule
10 of Civil Procedure 19. Indeed, under that rule, the Association “*must* be joined” because it
11 “claims an interest relating to the subject of the action and is so situated that disposing of the
12 action in the [APA’s] absence may... as a practical matter impair or impede the [APA’s] ability
13 to protect the interest.” Fed. R. Civ. P. 19(a)(1) (emphasis added). Alternatively, the APA “*must*
14 be joined” under the same rule because its absence would prevent the court from “accord[ing]
15 complete relief among existing parties.” *Id.* (emphasis added).
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17 As to the first prong, as the certified representative of all of the pilots at the new American
18 Airlines, the Association has a strong interest in fulfilling its duty of fair representation to each
19 subgroup. The Association also has a strong interest in ensuring that the seniority integration
20 process by the federal statute is fair, efficient, and not susceptible to legal challenge in subsequent
21 litigation. Finally, the APA has an interest in fulfilling its obligations under the Protocol
22 Agreement, including its obligation not to interfere in the operations of any of the merger
23 representatives.
24

25 The pending injunction in this case implicates the Association’s interests, especially if the
26 Court is considering imposing obligations on the new East Merger Committee, which is a
27

1 committee of the APA. Even if the Court decides not to impose any obligation on the new East
2 Merger Committee, the APA still must oversee the seniority integration process (and live with its
3 results) and therefore has a strong interest in this case.

4 Alternatively, it appears to be the view of the Plaintiffs that the APA's absence would
5 prevent the Court from according them complete relief. Thus, the Plaintiffs' own arguments
6 demonstrate that the APA must be joined under Rule 19.

7 Because the APA can be straightforwardly joined under Rule 19, there is no need for the
8 Court to undertake the more difficult inquiry of whether the APA is a proper substitute party for
9 USAPA. In fact, the answer to that question is "no." USAPA has not been merged into APA, but
10 rather continues to operate as an independent organization, with its own treasury. Nor was APA
11 created to circumvent any obligation that USAPA may have incurred. For example, if USAPA
12 owed money on a tax bill from 2012, there would be no credible argument that the money could
13 be collected from the APA, rather than from USAPA's own treasury.

14 Each of the three cases cited by Plaintiffs to support substitution can be easily
15 distinguished. In one case, a district court granted a motion for substitution—which was
16 unopposed—where two unions had merged. *See Screen Actors Guild v. Federal Ins. Co.*, 957 F.
17 Supp. 2d 1157, 1165-66 (C.D. Cal. 2013). Here, there has been no merger. Another case involved
18 successors who had expressly assumed "responsibility for [the predecessor's] debts and
19 responsibilities." *Lynn v. Sheet Metal Workers' International Assoc.*, 804 F.2d 1472, 1477 n.2
20 (9th Cir. 1986). Again, that is not the case here; no debts incurred by USAPA have been
21 transferred to the APA nor have any liabilities incurred by USAPA been assumed by APA. The
22 third case involved a motion to substitute—again, unopposed—for the limited purpose of
23 enforcing a collective bargaining agreement by allowing a union to arbitrate a grievance. *Air Line
24 Pilots Ass'n v. Texas International Airlines*, 567 F. Supp. 78, 81 (S.D. Tex. 1983).

1 Nor does its appointment of an APA East Merger Committee make the APA a successor
2 to USAPA. The Association’s role and interests with respect to the East Merger Committee are
3 different from USAPA’s: the APA is a neutral overseer of the process that has sought to be
4 scrupulously fair to every pilot subgroup party. USAPA did not mask its role as a partisan in that
5 process.

6
7 **III. The injunction should not bind the new APA East Merger Committee.**

8 The APA believes that the injunction directed by the Ninth Circuit should not be
9 expanded to the new APA East Merger Committee.⁴

10 First, under the “mandate rule,” a district court “when acting under an appellate court’s
11 mandate... cannot vary it, or examine it for any purpose other than execution; or give any other or
12 further relief.” *Matter of Beverly Hills Bancorp*, 752 F. 2d 1334, 1337 (9th Cir. 1984) (quoting *In*
13 *re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895)). Here, the Ninth Circuit’s mandate
14 incorporated the panel decision, which provided a very specific instruction: “enter an order
15 enjoining USAPA from participating in the McCaskill–Bond seniority integration proceedings,
16 including any seniority-related discussions leading up to those proceedings, except to the extent
17 that USAPA advocates the Nicolau Award.” *See Addington v. USAPA*, 791 F.3d 967, 991 (9th
18 Cir. 2015). Moreover, the Ninth Circuit expressly rejected a broader injunction. *See id.* at n.12.

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21 By granting the Plaintiffs’ proposed injunction, the Court would be significantly
22 expanding the Ninth Circuit’s directive in violation of the mandate rule.

23 Second, even if the Court has discretion to bind the new East Merger Committee, it should
24 not exercise that discretion. A decision to restrict the APA East Merger Committee will likely
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27 ⁴ Because the Plaintiffs have not asked for any other part of the APA to be bound by the
28 injunction (such as the merger committee representing the pre-merger American Airlines pilots),
the Association will not discuss that possibility.

1 create further delay of the seniority integration process, lead to additional litigation, and increase
2 the chance that the seniority integration award will ultimately be overturned. As the seniority
3 McCaskill-Bond Board of Arbitration explained, “[p]roviding the East pilots with a voice
4 increases the likelihood... that the final Award of this Board will be accepted by the pilots
5 themselves as well as by any reviewing court.” Exhibit 6 at 13. APA seeks to avoid a Versailles
6 Treaty outcome in which American and APA succeed to decades of hostility and resentment at
7 the airline. Moreover, the arbitrators acknowledged that they are “obligated... to consider and
8 give appropriate weight to *all* relevant facts and history when determining both an appropriate
9 methodology and when determining whether the resulting integrated seniority list is fair and
10 equitable.” *Id.* at 19 (emphasis added). That comprehensive consideration will proceed most
11 effectively if the panel is presented with all relevant viewpoints.
12

13
14 Finally, for the same reasons, an expanded injunction would frustrate the purposes of the
15 federal statute governing seniority integration in the airline industry, the McCaskill-Bond
16 Amendment, by creating delay and uncertainty in the seniority integration process. *See*
17 *Addington*, 791 F.3d at 978 & n.5.

18 Thus, as the representative of all of the pilots at American Airlines, the Association asks
19 the Court to issue an injunction limited to USAPA. To emphasize, the APA has not taken this
20 position based on an argument that USAPA has acted appropriately, or that the former America
21 West pilots have been treated fairly. Nevertheless, it is now best to move forward with a process
22 in which the newly constituted committee is allowed to advocate as fully as the other committees,
23 in order to permit the neutral arbitrators to select the fairest possible method for integrating the
24 seniority lists.
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27 Respectfully submitted,

28 JAMES & HOFFMAN, P.C.

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Date: September 14, 2015

By: s/ Edgar N. James
Edgar N. James*
Daniel M. Rosenthal*
JAMES & HOFFMAN, P.C.
1130 Connecticut Avenue, NW, Suite 950
Washington, DC 20036
(202) 496-0500
(202) 496-0555 (fax)
ejames@jamhoff.com
dmrosenthal@jamhoff.com

Stanley Lubin
LUBIN & ENOCH, P.C.
349 North 4th Avenue
Phoenix, AZ 85003-1505
(602) 234-0008
(602) 626-3586 (fax)
stan@lubinandenoch.com

Attorneys for Allied Pilots Association

*Admitted pro hac vice

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2015, I electronically transmitted the foregoing document to the Clerk’s Office using the CM/ECF system for filing and electronically served a copy of the same upon all parties by using the CM/ECF system.

s/ Edgar N. James
Edgar N. James