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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

12 Don Addington; et al.,
13 Plaintiffs,

14 vs.

15 US Airline Pilots Ass'n, et al.,
16 Defendants.

No. CV-13-00471-PHX-ROS

**PLAINTIFFS' TRIAL
MEMORANDUM ON REMEDY**

MEMORANDUM OF POINTS AND AUTHORITIES

I. Overview

20 The Court should consider three remedies for USAPA's breach of the duty of fair
21 representation (the "DFR"). The first remedy is to order USAPA to use the Nicolau
22 Award seniority list in the MOU seniority integration process. The second remedy, in the
23 alternative to the first, is to order USAPA to conduct a neutral arbitration to decide
24 between using the Nicolau Award list that was arbitrated in 2007 or a date-of-hire list. In
25 either alternative, the Court should grant a third remedy, awarding Plaintiffs reasonable
26 attorneys' fees and expenses pursuant to common benefit doctrine.

1 II. Legal Argument

2 A. First Alternative: Order USAPA to use the Nicolau Award.

3 Courts have authority to order a union to use a defined seniority order to remedy a
4 DFR breach. In *Ramey v. Dist. 141, Int'l Ass'n of Machinists*, for example, the Second
5 Circuit upheld a “judgment [that] included an injunction requiring IAM to negotiate with
6 USAir to amend the seniority roster and provide plaintiffs with their Eastern start dates.”
7 378 F.3d 269, 276 (2d Cir. 2004). This Court has similar authority to order USAPA to
8 use the Nicolau Award seniority list during the MOU seniority integration process if
9 USAPA’s refusal to use the Nicolau Award is a DFR breach.

10 USAPA’s refusal to use the Nicolau Award would be a DFR breach if it did not
11 have a legitimate purpose for doing so and/or if it failed to use a fair, neutral process to
12 create an alternative to the Nicolau Award. In such circumstances, the remedy would be
13 an order mandating that USAPA use the Nicolau Award seniority list when the US
14 Airways pilots are integrated with the American Airlines pilots.

15 Proposed wording for such an order is as follows:

16 US Airline Pilots Association and US Airways, Inc., (and their successors)
17 must participate in the pilot seniority integration process as specifically
18 provided for in the Memorandum of Understanding Regarding Contingent
19 Collective Bargaining Agreement and, in so doing, must use the Nicolau
Award to define the seniority order of the US Airways pilots.

20 B. Second Alternative: Order USAPA to conduct a neutral arbitration 21 to determine whether to use the Nicolau Award or a date-of-hire list.

22 Courts also have authority to directly correct a union’s failure to use a fair, neutral
23 process to create an integrated seniority list among workers that the union represents. In
24 *Bernard v. Air Line Pilots Ass’n, Int’l*, for example, the Ninth Circuit upheld an order to
25 “compel the parties” to conduct ALPA Merger Policy procedures (akin to the Nicolau
26 arbitration) to create an integrated seniority list, where the union’s failure to do so was a
27 DFR breach. 873 F.2d 213, 218 (9th Cir. 1989). This Court has similar authority to
28 compel USAPA to arbitrate if USAPA has not used a fair, neutral process to address the

1 East-West seniority dispute. USAPA has failed to use a neutral process because it has
2 allowed the East Pilot majority to control its position on seniority integration.

3 There were two ways that USAPA could have used a fair, neutral process to address
4 seniority. It could have adopted the Nicolau Award because a union does not breach its
5 DFR by using an integrated seniority list created in such a manner. *See Air Wisconsin*
6 *Pilots Protection Committee v. Sanderson*, 909 F.2d 213, 216-17 (7th Cir. 1990) (holding
7 that ALPA satisfied the DFR by implementing a seniority list created is a fair arbitration
8 process). USAPA could also have used a fair, neutral process to decide whether to use the
9 Nicolau Award. It has not done either.

10 So if the Court finds that USAPA breached its DFR by failing to use a fair, neutral
11 process to create an integrated pilot seniority list, it has two options. One option is to use
12 Plaintiffs' first proposed remedy and order USAPA to use the Nicolau Award list. The
13 other option is to order USAPA, as was done in *Bernard*, to use the kind of fair, neutral
14 process that was required by *Allegheny-Mohawk* Labor Protective Provisions ("LPPs")
15 Sections 3 and 13 (59 C.A.B. 22, 45-49 (1972)) and that was done in the course of the
16 Nicolau arbitration.¹

17 Without finding a DFR breach, the Court could also look to the MOU for authority
18 to order USAPA to arbitrate. Section 20 of the MOU states that "any dispute over the
19 interpretation or application of this Memorandum . . . shall be arbitrated on an expedited
20 basis." The dispute over whether to use the Nicolau Award in the seniority integration
21 with the American Airlines pilots is one that concerns application of the MOU.
22 Consequently, as a party to the MOU, USAPA is bound to submit that dispute to
23 expedited arbitration. To the extent that the West Pilots are not so bound, they consent to
24 arbitration under these proposed terms:

25 ¹ As explained in the concurrently filed *Plts.' Trial Memo. on the Participation of*
26 *the West Pilots in the McCaskill-Bond Process*, McCaskill-Bond, which incorporates LPP
27 §§ 3 & 13, gives affected workers the right to demand such arbitration. But it does not
28 apply to the 2005 US Airways-America West merger. It does not provide authority,
therefore, to order the West Pilots to arbitrate.

1 1. The parties to this arbitration shall be a committee of 3 to 5 East Pilots
2 appointed by USAPA to represent East Pilot interests (the “East Committee”)
3 and a committee of 3-5 pilots appointed by Plaintiffs (the “West Committee”)
4 to represent West Pilot interests.

5 2. As per the MOU, US Airways shall bear all expenses of both sides in
6 this arbitration process equally, including payment of the arbitrator’s fees and
7 expenses, reasonable attorneys’ fees, pilot flight-pay loss, and other expenses
8 reasonably incurred.²

9 3. The outcome of this arbitration shall be final and binding under federal
10 law on all parties, and any successors to such parties that come about through
11 merger, change of bargaining representative, or union election. In addition,
12 pursuant to the MOU, the outcome of this arbitration shall be final and binding
13 without being put to a ratification vote by USAPA’s membership, USAPA’s
14 Board of Pilot Representatives, Plaintiffs, or the members of the proposed
15 West Pilot Class.³

16 4. USAPA, and its successor if there is a change of bargaining
17 representative, shall enforce implementation of the single integrated pilot
18 seniority list created by this arbitration.

19 5. In accordance with the Transition Agreement, US Airways shall make a
20 full transition to integrated flight operations using the single integrated pilot
21 seniority list created by this arbitration by February 8, 2014, twelve months
22 after ratification of the MOU.⁴

23 6. The arbitration ground rules shall be as follows:

24 a. Issue: “In connection with the 2005 Transition Agreement and the
25 McCaskill-Bond process for integration of the US Airways and American
26 pilots described in Paragraph 10 of the Memorandum Of Understanding
27 Regarding Contingent Collective Bargaining Agreement (“MOU”), shall the
28 single integrated pilot seniority list for the US Airways pilots (East and West)
be the seniority list attached to the Nicolau Award (as advocated by the West
Committee), or shall it be the Date-of-Hire seniority list (as advocated by the
East Committee)?”

² Doc. 14 at ¶ 114 (MOU ¶ 7 sets aside \$4 million for such expenses).

³ *Id.* ¶ 92 (MOU ¶ 27 disclaims all opportunity to ratify the outcome of seniority integration procedures).

⁴ *Id.* ¶ 16 (quoting TA § VI.A [App 094]).

1 b. Arbitrator's Jurisdiction: The arbitrator's jurisdiction shall be
2 limited to selecting one of the two options described in the above statement of
the issue.

3 c. Arbitration Procedures: Except as provided otherwise below, the
4 arbitration procedures shall be consistent, to the greatest extent possible, with
5 the procedures set forth in MOU Paragraph 20.

6 i. Parties/Participants: The parties shall be the West
7 Committee, as represented by counsel of their choice, the East
8 Committee as represented by counsel of their choice, and US Airways to
the extent that it needs to protect its rights under the TA. The Allied
Pilots Association shall have observer status.

9 ii. Arbitrator: As described in MOU Paragraph 20, the arbitrator
10 shall be Richard Bloch or Ira Jaffe, depending on who has the earliest
11 availability. In the event that Mr. Bloch and Mr. Jaffe are both unable to
12 complete such arbitration within 30 days of the filing of this order, the
arbitrator shall be Dana Edward Eischen if he is available sooner than
Mr. Bloch and Mr. Jaffe.

13 iii. Arbitration Schedule: Subject to the arbitrator's availability,
14 the arbitration hearing shall commence no sooner than ten (10) days after
15 the filing of this order but as soon as possible thereafter. The arbitrator's
16 decision shall be issued no later than 30 days after the first day of
17 hearing, unless the West Committee, East Committee, and US Airways
agree otherwise.

18 iv. Final and Binding Nature of Arbitration Decision: The
19 arbitration decision shall be final and binding on USAPA, its members
20 and officers, and any successor(s) thereto, and on the West Pilot Class,
and on its and their agents.⁵ The arbitration decision shall be final and
binding on US Airways and any successor(s) thereto.

21 v. Judicial Review of Arbitration Decision: The procedures and
22 standard for judicial review of the arbitrator's decision shall be the same
23 as for an airline-industry system board of adjustment decision under the
24 Railway Labor Act.

25 8. The pilot seniority order decided in this arbitration shall be the seniority
26 list used to integrate the US Airways pilots with the American Airlines pilots
27 throughout the MOU seniority integration process, including drafting the
Integration Protocol, integration negotiation, and arbitration if needed, as

28 ⁵ This requires prompt certification of the West Pilot Class.

1 described in Paragraph 10 of the MOU and that, in all stages of such
2 negotiation and arbitration, the West Pilots shall have separate representation
and “party” status.

3 **C. Additional Remedy: Award Plaintiffs attorneys’ fees and expenses**
4 **pursuant to common benefit doctrine.**

5 Whether the Court applies Plaintiffs’ first or second proposed remedy, it should also
6 award Plaintiffs the attorneys’ fees and other expenses that they reasonably incurred
7 protecting the DFR rights of all USAPA members. Courts make such awards where
8 litigation confers “a substantial benefit on the members of an ascertainable class, and . . .
9 the court’s jurisdiction over the subject matter of the suit makes possible an award that
10 will operate to spread the costs proportionately among them.” *See Mills v. Electric Auto-*
11 *Lite Co.*, 396 U.S. 375, 393-394 (1970). This applies where a worker successfully sues a
12 union, “because to allow the others to obtain full benefit from the plaintiff’s efforts
13 without contributing equally to the litigation expenses would be to enrich the others
14 unjustly at the plaintiff’s expense.” *Hall v. Cole*, 412 U.S. 1, 5-6 (1973) (internal
15 quotation and alteration marks omitted). In such matters, the union rank-and-file is
16 regarded as “the class that has benefited from [the litigation].” *Id.* at 8-9. Such fee
17 shifting is mandatory in DFR cases. *Harrison v. United Transp. Union*, 530 F.2d 558,
18 564 (4th Cir. 1975), for example, found error where the district court denied a fee award
19 in successful DFR litigation.

20 Because all pilots have an interest in seeing USAPA abide by its DFR, the entire
21 craft (USAPA members and non-members) benefitted from this litigation. Had Plaintiffs
22 not filed *Addington I* in 2008, defended in *Addington II* in 2010, and filed this action in
23 2013, USAPA could now be shielded by the six-month limitations on DFR claims. Each
24 of these three actions, therefore, is a phase of one course of litigation intended to defend
25 the Nicolau Award. The West Pilots are entitled to a common benefit award for that
26 entire course—from 2008 to the present. The Court, therefore, should include with the
27 remedies addressed above an order awarding reasonable fees and other litigation
28

1 expenses to Plaintiffs and directing them to submit an application pursuant to L.R.Civ.
2 54.2.

3 **III. Conclusion**

4 Plaintiffs propose two alternative remedies for USAPA's DFR breach: (1) order
5 USAPA to use the Nicolau Award in the MOU seniority integration process; or (2) order
6 USAPA to have East and West pilot representatives submit to a neutral arbitrator whether
7 the Nicolau Award list or a strict date-of hire list should be used in that process. Either
8 way, the Court should also award fees and expenses to Plaintiffs pursuant to common
9 benefit doctrine.

10 Dated this 17th day of May, 2013.

11 **POLSINELLI PC**

12 */s/ Andrew S. Jacob*

13 By _____

Marty Harper

Andrew S. Jacob

Jennifer Axel

15 *Attorneys for Plaintiffs*

16
17 **CERTIFICATE OF SERVICE**

18 I hereby certify that on this 17th day of May 2013, I electronically transmitted the
19 foregoing document to the U.S. District Court Clerk's Office by using the ECF System
20 for filing and transmittal.

21 */s/ Andrew S. Jacob*

By _____