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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

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

Plaintiffs,

vs.

US Airline Pilots Ass'n, an unincorporated association; and US Airways, Inc., a Delaware corporation,

Defendants.

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

DEFENDANT US AIRWAYS, INC.'S POST-HEARING SUPPLEMENTAL BRIEF

Pursuant to this Court's direction, defendant US Airways, Inc. ("US Airways"), by and through its undersigned counsel, hereby submits this Supplemental Brief. (*See* Transcript of May 14, 2013 Preliminary Injunction Hearing, at pp. 79:17-80:13.)[1]

I. WEST PILOTS' PARTICIPATION IN MCCASKILL-BOND SENIORITY-INTEGRATION PROCEEDINGS

For the reasons set forth below, this Court should enter an order confirming that the West Pilots have party status and the right to participate fully (with counsel of their own choice) in the McCaskill-Bond seniority-integration process described in Paragraph 10 of the Memorandum Of Understanding Regarding Contingent Collective Bargaining Agreement ("MOU").

A. Background Of McCaskill-Bond And The *Allegheny-Mohawk* Labor Protective Provisions.

The McCaskill-Bond amendment to the Federal Aviation Act ("McCaskill-Bond"), which mandates a process for integrating employee seniority lists following an airline merger, was signed into law in late 2007. *See* 49 U.S.C. § 42112. McCaskill-Bond was enacted in response to the experience of Trans World Airlines, Inc. ("TWA") employees after TWA's assets were acquired by American Airlines, Inc. ("American"), where half of the TWA pilots and all of the flight attendants were placed at the bottom of the post-acquisition integrated seniority list. *See Comm. of Concerned Midwest Flight Attendants for Fair and Equitable Seniority Integration v. Int'l Bhd. of Teamsters*, 662 F.3d 954, 957 (7th Cir. 2011) ("[McCaskill-Bond] grew out of American Airlines' acquisition of Trans World Airlines" and the "contentious" seniority integration of TWA's former employees that followed). The McCaskill-Bond amendment provides, as relevant to the pending merger between US Airways and American, that "sections 3 and 13 of the labor protective provisions imposed by the Civil Aeronautics Board in the Allegheny-Mohawk merger (as

[1] AMR Corporation and American Airlines, Inc. have filed a motion for intervention, which is pending before the Court. (*See* Doc. No. 56.) They have authorized US Airways to represent that they concur in the views expressed in this Post-Hearing Supplemental Brief.

published at 59 C.A.B. 45) shall apply to the integration of covered employees of the covered air carriers." 49 U.S.C. § 42112(a).

The Civil Aeronautics Board ("CAB") existed from 1940 to 1985. It was responsible for overseeing the economic regulation of the airline industry, including the approval of airline mergers and similar transactions. Although the CAB did not view itself as a labor board, in order to mitigate "the hardships borne by adversely affected employees" as a result of airline mergers, it developed labor protective provisions ("LPPs") and imposed them on carriers as a condition of its approval of mergers. *United-Western, Acquisition of Air Carrier Prop.*, 11 C.A.B. 701, 708 (1950), *aff'd sub nom. Western Air Lines v. Civil Aeronautics Bd.*, 194 F.2d 211 (9th Cir. 1952).[2] The LPPs developed over time, but a constant theme was a preference for negotiation between affected parties followed by arbitration (if necessary) before an experienced labor arbitrator. *See, e.g. Delta-C&S Seniority List*, 29 C.A.B. 1347, 1350 (1959) ("the Board's policy in seniority integration matters contemplates that there be voluntary agreement between the carriers and the labor groups involved or, failing agreement, that such problems be settled by arbitration."). The CAB eventually standardized its LPPs in the *United-Capital Merger Case*, 33 C.A.B. 307, 341-347 (1961), and then slightly modified them in the *Allegheny-Mohawk Merger Case*, 59 C.A.B. 19, 45-49 (1972). The *Allegheny-Mohawk* LPPs were imposed as a condition of the CAB's approval of airline mergers until the airline industry was deregulated by Congress in 1978 and the CAB was disbanded. *See Thomas v. Republic Airways Holding, Inc.*, No. 11-cv-01313-RPM, 2012 WL 683525, *1-2 (D. Colo. March 2, 2012).

The full set of *Allegheny-Mohawk* LPPs consisted of thirteen sections, but McCaskill-Bond enacted only Sections 3 and 13 into federal law. Those two sections govern the process for negotiation and, if necessary, arbitration of seniority-integration disputes. Section 3 provided:

[2] All CAB decisions cited herein are attached as Exhibits to the Declaration of Chris A. Hollinger, filed contemporaneously herewith.

> Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the ***representatives of the employees affected***. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.

Allegheny-Mohawk, 59 C.A.B at 45 (emphasis added). Section 13, in turn, provided for arbitration, which "shall be final and binding ***on the parties***," if negotiations under Section 3 failed to result in an agreement. *Id.* at 46 (emphasis added).

Although Sections 3 and 13 of the *Allegheny-Mohawk* LPPs did not expressly define the term "parties," or explain who may serve as "the representatives of the employees affected" and whether affected employees with divergent interests could be separately represented, CAB decisions interpreting and applying Sections 3 and 13 of the LPPs recognized that, in appropriate circumstances, a subgroup of employees with unique seniority interests, who comprised a portion of a union-represented bargaining unit, could participate as a separate party in the seniority-integration process through representatives of their own choosing. Because McCaskill-Bond expressly incorporates Sections 3 and 13 of the *Allegheny-Mohawk* LPPs and specifically cites the CAB's decision, it is appropriate to infer that, absent statutory text to the contrary, Congress intended for those provisions of the LPPs to be implemented in a manner consistent with the CAB's prior decisions thereunder. McCaskill-Bond itself contains no express guidance regarding who may participate in the seniority-integration proceedings, and CAB decisions interpreting and applying Sections 3 and 13 should, therefore, be given substantial weight in the determination of who is entitled to participate in the US Airways/American seniority-integration process pursuant to the McCaskill-Bond amendment.

Because Congress did not re-create the CAB, and did not expressly designate another tribunal (whether a government agency or arbitration panel) to interpret and apply the McCaskill-Bond seniority-integration provisions, the federal courts – and only the federal courts – have the authority to perform the role previously performed by the CAB with respect to the interpretation and application of the statute incorporating the

Allegheny-Mohawk LPPs. That role includes making determinations as to whether employee subgroups are entitled to separate representation in the proceedings mandated by McCaskill-Bond, a federal statute. *See, generally*, *Rea v. United States*, 350 U.S. 214, 217 (1956) ("Federal courts sit to enforce federal law.").

B. CAB Authority Confirms The West Pilots' Right To Participate Fully, And To Be Separately Represented, During The McCaskill-Bond Process.

CAB decisions demonstrate that employee subgroups have the right to separate participation in the negotiation and arbitration stages of the seniority-integration process, where there is a compelling reason for the subgroup's separate participation and the subgroup requests such participation at the outset of the seniority-integration process. Such an approach furthers the fairness interests that the CAB sought to protect through the *Allegheny-Mohawk* LPPs and that Congress sought to protect through McCaskill-Bond.

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." *See also National Acquisition, Unions' Arbitration Petitions*, 97 C.A.B. 565 (1982) (after integrated seniority list had been developed through arbitration, CAB granted petition for arbitration of an additional seniority-related issue largely because the affected employee subgroup seeking arbitration had not participated in the prior arbitration proceeding), *aff'd, Transport Workers Union v. Civil Aeronautics Bd.*, 725 F.2d 775 (D.C. Cir. 1984).

In applying this principle of separate representation, the CAB's decisions supported the right of groups of employees to choose their own representatives and did not limit this representation to the employees' unions under the Railway Labor Act ("RLA"). Although employee groups were often represented in seniority-integration proceedings under the LPPs by their unions, in other cases groups of employees with separate and distinct seniority interests were represented by committees not affiliated with the unions that represented those employees for collective bargaining purposes. *See, 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). The CAB, moreover, made statements confirming 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]").[3]

In the *Delta Air Lines* case, the CAB also further clarified that collective bargaining representatives were not always appropriate Section 3 and 13 representatives for seniority-integration purposes. *See* 63 C.A.B. at 702. Prior to the merger of Northeast Airlines, Inc. ("Northeast") and Delta Air Lines, Inc. ("Delta"), the flight attendants and clerical employees at Northeast were represented by the Transport Workers Union ("TWU") and they 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 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*. The CAB did, however, state that the "TWU may ultimately

[3] 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 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, the CAB's decision does not support the proposition that employees can only be represented by their unions.

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 East and West pilots, and, as a result, the McCaskill-Bond negotiation/arbitration process will necessarily have to determine the relative seniority of East and West pilots as part of the overall process of integrating the US Airways pilots with the American pilots.[4] And, as almost five years of litigation makes abundantly clear, the West Pilots and East Pilots (as reflected in USAPA's constitution) have strongly-held and sharply-conflicting views on how their relative seniority should be determined. Under the CAB's decisions, 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.

In arguing that it is the exclusive seniority-integration representative for all US Airways pilots, USAPA is expected to rely on its current status as the exclusive collective bargaining representative for US Airways pilots under the RLA. (USAPA's Reply Memorandum in Support of its Motion to Dismiss (Doc No. 65), p. 1 (p. 2 of the ECF filing).) Any such reliance would be misplaced. USAPA's status under the RLA is limited to negotiations between USAPA and ***US Airways*** (or its successor). As the Court is well aware, the McCaskill-Bond 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,

[4] For example, when the McCaskill-Bond arbitration panel decides how to integrate the US Airways pilots with the American pilots, as a threshold matter it will have to know the relative order of the US Airways pilots amongst themselves in order to achieve such an integration. The Nicolau Award provides one approach, and date-of-hire provides an entirely different approach.

USAPA's role as the exclusive collective bargaining representative is irrelevant to the question of whether the West Pilots are entitled to separate representation in the 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 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 West Pilots and USAPA on this subject, the West Pilots are entitled to participate throughout the McCaskill-Bond process through a representative of their own choosing.[5]

II. STIPULATION TO RELEVANT FACTS REGARDING WHETHER OR NOT THERE HAS BEEN A BREACH OF THE DUTY OF FAIR REPRESENTATION.

US Airways submits that it would be appropriate for plaintiffs and USAPA to reach a stipulation of relevant facts regarding whether or not USAPA has breached its duty of fair representation, and, in that regard, believes that the facts recited in Plaintiffs' Proposed Stipulated Facts (Doc. No. 94) are properly the subject of such a stipulation. The relevant facts, as opposed to their legal significance or how they are characterized by the parties, are essentially undisputed and can be proved through documentary evidence. Witness credibility is not at issue, and there is no need for an evidentiary hearing. The same is true with respect to the cause of action in plaintiffs' Complaint asserted against US Airways.

[5] 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."

III. APPROPRIATE REMEDY FOR A BREACH OF THE DUTY OF FAIR REPRESENTATION.

As set forth in prior briefing, neither plaintiffs' Complaint nor their motion for preliminary injunction provides any basis whatsoever for entering an injunction against US Airways. (US Airways, Inc.'s Response To Plaintiffs' Motion For Preliminary Injunction (Doc. No. 49), pp. 2-3 (pp. 3-4 of the ECF filing); US Airways, Inc.'s Reply In Support Of Motion To Dismiss (Doc. No. 54).)

As between USAPA and plaintiffs, if this Court were to conclude that USAPA has breached its duty of fair representation, US Airways is neutral regarding the appropriate remedy – except that any remedy should not delay or otherwise interfere with the initiation and completion of the McCaskill-Bond seniority-integration process and timetables described in Paragraph 10 of the MOU.

* * *

Dated: May 17, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2013, I caused to be electronically transmitted the attached Defendant US Airways, Inc.'s Post-Hearing Supplemental Brief.

/s/Robert A. Siegel

Robert A. Siegel

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