IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Don Addington, et al., Plaintiffs, vs. US Airline Pilots Association, et al., Defendants.	No. CV-13-00471-PHX-ROS **ORDER**

A group of pilots formerly employed by America West Airlines, Inc., and their new union, have a long-standing disagreement regarding pilot seniority. Unfortunately, there is no perfect solution to that disagreement. The Court finds the former America West pilots have not established the new union breached its duty of fair representation. In addition, the former America West pilots are not entitled to participate in the upcoming statutory procedure required for the integration of the US Airways and American Airline pilots.

BACKGROUND[1]

A. US Airways and America West Merge

In 2005, US Airways merged with America West Airlines, Inc. ("America West")

[1] This abbreviated background does not contain a complete recital of the parties' interactions. Instead, this background represents only the most relevant aspects of the parties' dealings and is based either on the undisputed facts or the facts proven at the bench trial. (Doc. 206-1 at 13-34) (undisputed facts). Where appropriate, additional factual findings are found in the analysis section.

to form a single airline. The America West pilots are generally referred to as the West Pilots and the US Airways pilots are generally referred to as the East Pilots. At that time, both the West and East pilots were represented by the Air Line Pilots Association ("ALPA"). In connection with the merger, America West, US Airways, and ALPA entered into a "Transition Agreement" that set forth the "terms and conditions of employment" that would apply to both groups of pilots after the merger. (Doc. 206-1 at 13). In particular, the Transition Agreement contemplated negotiation of a "Single Agreement" "that would govern the employment of both East and West pilots." (Doc. 206-1 at 14). The Transition Agreement stated the two groups of pilots would "remain separate and covered by their respective collective bargaining agreements until" three events occurred: 1) the airlines obtained a single operating certificate; 2) the airlines created a single seniority list according to ALPA Merger Policy; and 3) the "Single Agreement" was negotiated. (Doc. 213-4 at 3); (Doc. 206-1 at 15).

After the merger, the West and East Pilots could not agree on how the two pilot seniority lists should be integrated and, pursuant to ALPA Merger Policy, the issue proceeded to arbitration. The arbitration decision, referred to as the Nicolau Award, was issued on May 1, 2007. The Nicolau Award created an integrated seniority list that placed approximately 500 of the most senior East Pilots at the top of the list but placed at the bottom all of the East Pilots who were on furlough at the time of the merger. It then blended the remaining pilots. To say the East Pilots were not pleased is an understatement.

Hoping to prevent the Nicolau Award from ever going into effect, a group of East Pilots formed a new labor organization known as the US Airline Pilots Association ("USAPA"). USAPA's core goal was ensuring the integrated pilot seniority list determine seniority based on date-of-hire. USAPA eventually won a representation election and became the certified bargaining representative for all pilots at the merged airline. USAPA then began negotiating a collective bargaining agreement with US Airways. During those negotiations, USAPA proposed a seniority list based on date-of-hire but no collective bargaining agreement was ever finalized.

In 2008, a group of West Pilots sued USAPA claiming USAPA breached its duty of fair representation by refusing to insist on the Nicolau Award during negotiations with US Airways. The case was certified as a class action and proceeded to trial. The West Pilots won. On appeal, however, the Ninth Circuit concluded the case was not ripe and directed the district court to dismiss the case.

Shortly after that dismissal, US Airways filed a declaratory judgment action against the West Pilots and USAPA. That case also proceeded to summary judgment where this Court made two rulings relevant to the present suit. First, the Court ruled USAPA was "bound by the Transition Agreement" but the Transition Agreement could "be modified at any time by written agreement of [USAPA] and [US Airways]." (CV-10-1570-PHX-ROS, Doc. 193 at 6-7). Second, the Court held:

> [I]f USAPA wishes to abandon the Nicolau Award and accept the consequences of this course of action, it is free to do so. By discarding the result of a valid arbitration and negotiating for a different seniority regime, USAPA is running the risk that it will be sued by the disadvantaged pilots when the new collective bargaining agreement is finalized. An impartial arbitrator's decision regarding an appropriate method of seniority integration is powerful evidence of a fair result. Discarding the Nicolau Award places USAPA on dangerous ground.

(*Id.* at 7).

The West pilots and USAPA drew very different conclusions from these two rulings. The West Pilots concluded the Nicolau Award was still a possibility while USAPA concluded it was free to ignore the Nicolau Award. Based on these conflicting interpretations, the parties' disagreement continued to fester.

B. US Airways and American Discuss and Complete Merger

Before the Court issued its ruling in the second litigation, US Airways and AMR Corp. (the parent company for American Airlines) had begun discussing the possibility of merging. In early 2012, US Airways had begun "negotiating labor contract terms with the Allied Pilots Association ('APA'), the union for American Airlines pilots, that would go into effect if and when there was a merger." (Doc. 206-1 at 20). US Airways subsequently agreed to include USAPA in those negotiations. Eventually, the negotiating entities agreed

to a proposed agreement. (*Id.* at 21). The agreement was sent to USAPA's Board of Pilot Representatives for consideration. That board identified "deficiencies" and directed USAPA "to negotiate further to address those deficiencies." (*Id.* at 21).

Negotiations continued through January 2013. During the additional negotiations, USAPA made changes to a provision regarding seniority rights. The original agreement had contained a provision stating "This [agreement] is not intended to nor shall it constitute the 'Single Agreement' referred to in Paragraph VI.A. of the September 23, 2005 Transition Agreement." (Doc. 206-1 at 22). While there is no definitive evidence why this provision was included, USAPA likely believed this provision was necessary because completion of a "Single Agreement" would have triggered obligations under the Transition Agreement, including implementation of the Nicolau Award. During the additional negotiations, USAPA replaced that provision with one directly addressing post-merger seniority. (*Id.*). The new provision, found at Paragraph 10(h) in the revised agreement, stated:

> US Airways agrees that neither this Memorandum nor the [Joint Collective Bargaining Agreement] shall provide a basis for changing the seniority lists currently in effect at US Airways other than through the process set forth in this Paragraph 10.

Pat Szymanski, counsel for USAPA, was the driving force behind the original provision as well as Paragraph 10(h). (Transcript at 86-88). Mr. Szymanksi did not sit for a deposition nor did he testify at trial. But inappropriately during the trial, from the well of the courtroom, Mr. Szymanski tried to offer testimony about why USAPA proposed these provisions. The Court refused to allow Mr. Symanski to offer unsworn statements about his motivations and invited him to take the stand, testify under oath, and be subject to cross-examination. He declined.[2] The evidence establishes, however, that Mr. Szymanski was motivated in large

---

[2] Mr. Szymanski's actions on this point have been troubling. Pursuant to Arizona Rule of Professional Conduct 3.7, incorporated here by Local Rule 83.2(e), "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless . . . the testimony relates to an uncontested issue . . . the testimony relates to the nature and value of legal services . . . or . . . disqualification of the lawyer would work substantial hardship on the client." It does not appear that any of these exceptions apply and, given his central role

part simply by a desire to ensure the Nicolau Award never take effect.

At the conclusion of the additional negotiations, US Airways, American Airlines, USAPA, and APA entered into a "Memorandum of Understanding Regarding Contingent Collective Bargaining Agreement" ("MOU"). The MOU dictated the working conditions that would apply to all pilots once the merger was consummated. The MOU contained the revised Paragraph 10(h) outlined above. The MOU also stated "[a] seniority integration process consistent with McCaskill-Bond[3] shall begin as soon as possible" after the merger.[4] (Doc. 213-2 at 7). Finally, the MOU required US Airways and American Airlines "remain neutral" on the seniority issue during the McCaskill-Bond process.

Having agreed to the MOU, USAPA set out to convince its members to ratify the MOU. In oral presentations to pilots, USAPA representatives, including Mr. Szymanski, made very different statements depending on whom was being addressed. For example, when Mr. Szymanski was speaking to East Pilots, he explained the MOU was beneficial because, in effect, it confirmed the Nicolau Award was "dead." (Transcript at 166). But when talking to West Pilots, Mr. Szymanksi stressed that the MOU was merely "neutral" regarding seniority. (Transcript at 54, 95). In its written statements, USAPA reiterated this alleged neutrality: "West pilots should not vote in favor of the MOU because they believe it will revive the Nicolau Award, and the East pilots should not vote against it because they are concerned it will cause the Nicolau Award to be implemented." (Doc. 206-1 at 41). In general, the West Pilots accepted USAPA's oral and written representations that the MOU

---

in crafting the crucial portion of the parties' agreement, Mr. Szymanski likely should have withdrawn from this case.

[3] "McCaskill-Bond" refers to a federal statute that governs how merging airlines must deal with seniority integration. It is addressed in detail in the Analysis section.

[4] It is crucial to note the terms of the MOU state that if arbitration pursuant to McCaskill-Bond is needed, it will not occur until *after* a new collective bargaining representative for all pilots is certified. (Doc. 206-1 at 27, ¶¶ 135, 137). In other words, before a seniority arbitration can occur, a new certified representative will be in place for all the pilots. US Airways shares this view of the timing issue. (Doc. 212 at 12 n.6).

was neutral and they voted to ratify the MOU. The East Pilots also voted to ratify the MOU, meaning the MOU easily obtained enough votes for ratification.

After a delay due to other litigation, on December 9, 2013, "US Airways Group, Inc., the corporate parent of US Airways, became a wholly-owned subsidiary of American Airlines Group, Inc." (Doc. 292). The completion of the merger triggered the MOU, meaning all the pilots from US Airways and American Airlines must soon begin a "seniority integration process consistent with McCaskill-Bond." (Doc. 213-2 at 7).

C. Procedural History

In March 2013, shortly after the MOU was ratified but before the merger was completed, a group of West Pilots, on behalf of themselves and others similarly situated, filed the present suit alleging various claims against USAPA. As stated in the amended complaint, the West Pilot's first 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 13). Because the only seniority integration that will occur will be during the McCaskill-Bond process, the exact claim is formulated as "USAPA breached the duty of fair representation when it entered into the MOU because the MOU does not require USAPA use the Nicolau Award in the McCaskill-Bond process." (Doc. 122 at 4). In addition to this claim, the West Pilots also seek a declaration "that they have party status and the right (but not the obligation) to participate fully (with counsel of their own choice) in the [McCaskill-Bond process]."[5]

Neither party requested a jury trial and the Court consolidated the request for a preliminary injunction with the trial of the merits. (Doc. 122). Less than two weeks before trial, USAPA filed a motion for summary judgment on all the claims. US Airways also filed a motion for summary judgment but only on the claim regarding the West Pilots' participation in the McCaskill-Bond process. Approximately one week before trial, USAPA

[5] The complaint also contains a claim against US Airways that was later dismissed and a claim for attorneys' fees. (Doc. 134).

filed a "Motion to Continue Trial Date Due to Serious Illness of Principal Witness/Party Designee [Gary Hummel]." That motion was denied and trial commenced on October 22, 2013. At the conclusion of the West Pilots' case, USAPA made an oral motion for directed verdict. The motion was taken under advisement and the trial continued. After the trial, the Court ordered the parties to complete the briefing on the portions of the summary judgment motions presenting legal issues and to submit summaries of the evidence presented at trial. All briefing is complete.

ANALYSIS

There are two central issues the Court must decide: first, whether the West Pilots have established USAPA breached its duty of fair representation by entering into the MOU, and second, whether the West Pilots are entitled to participate in the McCaskill-Bond process. The first issue turns on questions of fact but the second is largely a matter of statutory interpretation. Before reaching either of these issues, however, the Court must first address USAPA's request to include in the record the declaration of Gary Hummel.

A. The Court Will Not Consider the Declaration of Gary Hummel

Gary Hummel is the President of USAPA and its Chief Executive Officer. Mr. Hummel was scheduled to testify at the trial but had heart surgery shortly before trial and was unable to attend. USAPA sought to delay the trial until Mr. Hummel could attend but that request was denied. One week after the trial ended, USAPA submitted a lengthy declaration from Mr. Hummel. That declaration allegedly recounts all the facts Mr. Hummel would have testified to if he had been able to attend the trial. The West Pilots object to the Court considering Mr. Hummel's declaration. (Doc. 257).

Before directly addressing Mr. Hummel's declaration, some context is important. During the course of this case, USAPA employed almost every conceivable delaying tactic. A brief recap of USAPA's tactics includes a motion to transfer venue and suspend deadlines (later withdrawn); a motion to dismiss for failure to state a claim and lack of jurisdiction (denied); opposition to the West Pilots' motion to accelerate trial on the merits (West Pilot's motion granted); opposition to class certification (class certified); a renewed motion to

dismiss based on ripeness (denied); and a petition for mandamus to the Ninth Circuit seeking dismissal of the case (denied). As evidenced by the record, keeping the case on track for the expedited trial required substantial effort by both the West Pilots and the Court. In light of its past actions, USAPA's last-minute request to continue the trial was viewed with some skepticism.

USAPA filed its motion to continue the trial on October 15. (Doc. 221). Two days later, the Court held a hearing on that request. (Doc. 231). At that hearing, the Court heard from the parties and Mr. Hummel's physician. The physician indicated Mr. Hummel could participate in the trial by phone. In light of that, as well as USAPA's general failure to establish how Mr. Hummel's physical presence was truly critical to its case, the Court denied the request to continue the trial.

USAPA later claimed the Court had misunderstood Mr. Hummel's physician and Mr. Hummel simply could not participate at all in the trial. Indeed, Mr. Hummel did not testify during trial. During the trial, USAPA maintained that Mr. Hummel was crucial to its defense and that it was being prejudiced by not having Mr. Hummel present. In an attempt to broker a compromise, at the end of the trial the Court ordered USAPA to proffer to the West Pilots the testimony Mr. Hummel would have provided. If the West Pilots reviewed that testimony and concluded there was no need for cross-examination, the Court would then consider a declaration from Mr. Hummel. Unfortunately, the declaration proffered by USAPA is very different from what the Court anticipated.

Mr. Hummel's proposed declaration, filed one week after the trial, shows Mr. Hummel was able to review the entirety of the trial transcript and craft a declaration addressing many perceived shortcomings in USAPA's evidence.[6] Even assuming USAPA's

---

[6] In seeking to continue the trial, USAPA's counsel stated Mr. Hummel would not be well enough to meaningfully participate until six weeks after the trial's scheduled date. USAPA has not explained whether that representation was inaccurate at the time or if Mr. Hummel simply made a remarkable recovery. But in light of USAPA's past practices, it is hard not to think Mr. Hummel's illness was exaggerated as an attempt to further delay the trial.

counsel was acting in good faith in seeking the continuance, the extent of information Mr. Hummel addresses in his proposed declaration means substantial cross-examination would be needed. Therefore, consideration of the declaration would be inappropriate. The hearsay declaration will not be considered nor will any evidence that relies on that declaration. *See* Fed. R. Evid. 802.

B. Breach of Duty of Fair Representation

Having resolved the outstanding evidentiary issue, the Court now turns to whether the evidence establishes USAPA breached its duty of fair representation ("DFR") when it entered into the MOU. The MOU does not contain a provision adopting a particular seniority regime. Thus, while the West Pilots' DFR claim is ripe, it is an exceptionally difficult claim to prove because no "new" seniority regime has been adopted. That is, the Court cannot compare the Nicolau Award to a new and different seniority list. Instead, the Court must compare the Nicolau Award to the facially neutral seniority provision in the MOU. Despite the difficulty in making this comparison, USAPA's actions are sufficiently disturbing to make this a very close call. Viewed as a whole, however, the present record does not establish the facially neutral provision was *completely* divorced from legitimate union objectives. Therefore, the West Pilots have not proven their DFR claim.

i. Standard for DFR Claim

The duty of fair representation is meant to ensure that a union "serve[s] the interests of all members without hostility or discrimination toward any . . . exercise[s] its discretion with complete good faith and honesty [and] avoid[s] arbitrary conduct." *Beck v. United Food and Commercial Workers Union*, 506 F.3d 874, 879 (9th Cir. 2007) (quotation omitted). Accordingly, to prevail on a DFR claim, a plaintiff must show the challenged action was "arbitrary, discriminatory, or in bad faith." *Id.* (quotation omitted). This is a difficult standard to meet because collectively bargained agreements often require "the interests of a few individuals . . . give way to the interests of the group." *Bernard v. Air Line Pilots Ass'n*, 873 F.2d 213, 216 (9th Cir. 1989). Thus, "[b]argaining has winners and losers," and the "losers" cannot prove a DFR claim merely by showing they were disadvantaged by the

ultimate result. *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1530 (7th Cir. 1992). Instead, the "losers" must show the ultimate result did not serve "the interests of labor as a whole." *Id.* at 1533.

In the particular context of seniority disputes, courts have recognized "that a union may not take away the seniority of some employees for no reason other than that the losers have too few votes to affect the outcome of an intra-union election, or that they opposed the union's leadership." *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1530 (7th Cir. 1992) (citing *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 798-800 (7th Cir. 1976)). In other words, "a union may not juggle the seniority roster for no reason other than to advance one group of employees over another." *Id.* at 1535. Any change in seniority "must rationally promote the aggregate welfare of employees in the bargaining unit." *Id.* This low standard means that so long as a Court can find *some* legitimate union purpose motivating a seniority change, the union has not breached its duty of fair representation.

ii. Legitimate Purpose for MOU Provision

Turning to the present case, the West Pilots claim USAPA breached its duty of fair representation by "abandoning the existing obligation to use the Nicolau Award." (Doc. 267 at 11). For present purposes, the Court will assume such an obligation existed. Therefore, the question is whether USAPA had a legitimate union purpose for that abandonment. As mentioned earlier, this would be an easier inquiry if USAPA had abandoned the Nicolau Award in favor of a different seniority regime. The Court could then compare the Nicolau Award to the new seniority regime and evaluate USAPA's reasons for adopting the new regime. But the complicated state of affairs means that, at present, there is no new seniority regime directly comparable to the Nicolau Award. And, in fact, there never will be. The merger with American Airlines, combined with the terms of the MOU, means a new seniority regime will exist only after the McCaskill-Bond process is complete. That new seniority regime will include the thousands of pilots from American Airlines and it will be difficult to compare that regime to the Nicolau Award. Thus, the only question the Court can answer

at this time is whether USAPA had a legitimate union purpose for entering into the MOU. It did.

As conceded by a West Pilot who testified at trial, the drafting and negotiation of the MOU consisted of a "give and take." (Transcript at 114). For example, the MOU required the East Pilots give up a beneficial "change in control" provision that would have granted the East Pilots–and the East Pilots only–a temporary increase in compensation.[7] (*Id.* at 54, 139). On the other hand, the MOU contained significant compensation increases for both the West and East Pilots. (*Id.* at 114). In light of the increased compensation provisions, there is no doubt that legitimate union objectives motivated *some* aspects of the MOU.

Because the MOU is beneficial in many respects, the West Pilots ask the Court to focus exclusively on Paragraph 10(h) and decide whether there was a legitimate union purpose supporting its inclusion. (Doc. 267 at 11, "USAPA . . . must have a objectively legitimate union purpose for putting ¶ 10.h into the MOU."). It is unclear whether agreement terms can, as a practical matter, be analyzed in this way. Given the nature of bargaining, analyzing every provision of an agreement in complete isolation will often result in a distorted picture of the overall situation. During bargaining, parties' positions and agreement provisions evolve. It may inappropriately enmesh courts in the minutiae of collective bargaining if unions can be required to justify every provision without regard to the overall beneficial nature of an agreement.

But accepting for present purposes that the West Pilots are correct and Paragraph 10(h) should be examined in isolation, the question is whether there was a legitimate union purpose behind it. Or, in other words, does 10(h) "rationally promote the aggregate welfare" of the pilots at US Airways. *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1535 (7th Cir. 1992). Paragraph 10(h) requires the existing seniority regimes remain in place pending

---

[7] There was some possibility the change in control provision would not be triggered by the merger with American Airlines. (Transcript at 202). Thus, one witness discounted the value of the provision by 40 percent. (*Id.*). But even with that discount, the provision undoubtedly had *some* value.

a final integration of all pilots. A rational person could conclude that making the MOU explicitly neutral served the legitimate union purpose of securing the additional compensation contained in the MOU while putting off to another day the question of the appropriate seniority regime.[8] The fact that USAPA might have, in truth, been motivated by a desire to weaken the chances of eventual adoption of the Nicolau Award is not enough.[9] *See id.* ("[A] 'bad' motive does not spoil a collective bargaining agreement that rationally serves the interests of workers as a whole . . . ."). The presence of a rational reason for Paragraph 10(h) means the West Pilots have not established their DFR claim.

iii. USAPA's Ratification Argument is Wrong

In reaching its conclusion on the DFR claim, the Court must stress it is not adopting an argument USAPA has repeatedly proffered. According to USAPA, it has always been free to ignore the Nicolau Award because its members will refuse to ratify anything other than a strict date-of-hire system. (The East Pilots outnumber the West Pilots and the East Pilots allegedly will refuse to ratify any agreement deemed advantageous to the West Pilots.) In effect, this is an argument that USAPA is free to treat the West Pilots poorly because that is what the majority of its members wish it to do. That is not the law. USAPA owes duties to *all* of its members. It cannot justify its actions by claiming it is merely acting as the conduit for enacting the East Pilots' self-serving wishes. USAPA has never been free–and never will be free–to extract the maximum benefits for the East Pilots, regardless of the cost to the West Pilots.

C. Participation in McCaskill-Bond

The West Pilots seek a declaration that they are entitled to participate in the upcoming

---

[8] The West Pilots claim there is no evidence of a link between Paragraph 10(h) and the additional compensation. Even assuming that were true, USAPA could have rationally decided the neutral provision was necessary to prevent the drag-out fight that surely would have accompanied any non-neutral, seniority-related provision.

[9] As discussed earlier, USAPA undoubtedly played fast-and-loose with its members and changed its explanation of Paragraph 10(h) depending on its audience.

seniority integration process for all pilots at the post-merger airline. That process is governed by the McCaskill-Bond Amendment to the Federal Aviation Act, 49 U.S.C. § 42112 note ("McCaskill-Bond"). Under that statute, the West Pilots are not entitled to participate.

i. Background of Civil Aeronautics Board

McCaskill-Bond utilizes numerous specialized definitions, contains various exceptions, and incorporates rules from the long-defunct Civil Aeronautics Board ("CAB"). Fortunately, everyone agrees the statute's provisions are triggered and no exception applies. Therefore, the present dispute depends entirely on the meaning of McCaskill-Bond's incorporation of CAB rules.

McCaskill-Bond states that, in any qualifying merger between airlines, the integration of employee seniority lists is governed by "sections 3 and 13 of the labor protective provisions imposed by the Civil Aeronautics Board in the Allegheny-Mohawk merger." 49 U.S.C. § 42112 note. Understanding this provision requires a brief diversion into the history of airline regulation.

"Early in the development of the aviation industry Congress came to the conclusion that a system of unbridled competition . . . was not in the best public interest." *Price v. Trans World Airlines, Inc.*, 481 F.2d 844, 846 (9th Cir. 1973). Thus, Congress created CAB in 1938 to regulate the industry. *Id.* Once CAB was in place, airlines were required to obtain CAB approval for any agreement "relating to rates, fares or charges, or for controlling competition." *Id.* In fulfilling its regulatory duties, CAB often "conditioned approval of airline route transfers and mergers upon carrier acceptance of terms mitigating hardship to employees." *Braniff Master Exec. Council of Air Line Pilots Ass'n Int'l v. CAB*, 693 F.2d 220, 222 (D.C. Cir. 1982). The conditions CAB imposed on carriers came to be known as "labor protective provisions" or "LPPs."[10] *Id.*

Over time, CAB imposed a variety of LPPs depending upon the factual circumstances

---

[10] According to CAB, LPPs were "first imposed . . . in *United-Western, Acquisition Air Carrier Property*, 11 C.A.B. 701 (1950)." *United-Capital Merger Case*, 33 C.A.B. 307, 323 n.71 (1961).

at issue. In the specific context of seniority disputes, as early as 1951 CAB imposed an LPP requiring seniority integration occur in a "fair and equitable" manner. *N. Atl. Route Transfer Case*, 14 C.A.B. 910, 918 (1951). In subsequent years, CAB routinely imposed some version of this LPP. *See, e.g.*, *United-Capital Merger Case*, 33 C.A.B. 307, 343 (1961). CAB also began imposing an LPP requiring parties proceed to arbitration if they were unable to reach agreement regarding seniority integration. *See, e.g., id.* at 346-47. Eventually, the LPPs requiring "fair and equitable" seniority integration and arbitration came to be sections of the "standard" set of LPPs CAB imposed when approving transactions. *See Braniff*, 693 F.2d at 222 n.2 (referring to "standard LPPs"); *Pan Am. World Airways, Inc. v. CAB*, 683 F.2d 554, 556 (D.C. Cir. 1982) (same).

In 1972, CAB approved the merger of Allegheny Airlines, Inc. and Mohawk Airlines, Inc. *Allegheny-Mohawk*, 59 C.A.B. 19 (1972). In doing so, CAB imposed slightly modified versions of its standard LPPs. *Id.* at 31. Two of the LPPs imposed in that merger are the LPPs referenced by McCaskill-Bond. That is, McCaskill-Bond imposes Section 3 from the Allegheny-Mohawk merger requiring seniority integration occur in a "fair and equitable manner" as well as Section 13 requiring "final and binding" arbitration if no agreement can be reached. After the Allegheny-Mohawk merger, CAB continued to impose substantially similar LPPs up until CAB was abolished in 1984. *See, e.g.*, *W. Air Lines, Control by AFSI*, 93 C.A.B. 545, 574, 595 (1982).

ii. Plain Language of McCaskill-Bond

With the necessary background in mind, the question is what McCaskill-Bond means when it subjects airline mergers to "sections 3 and 13 of the labor protective provisions imposed by the Civil Aeronautics Board in the Allegheny-Mohawk merger." 49 U.S.C. § 42112 note. The starting point, as always, is the language of the statute. If the statute is unambiguous, "judicial inquiry is complete." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) (quotation omitted). Only when "the statutory text is ambiguous" can the Court "look to other interpretive tools . . . in order to determine the statute's best meaning." *In re HP Inkjet Printer Litigation*, 716 F.3d 1173, 1180-81 (9th Cir. 2013). Those other

interpretive tools include legislative history, established rules of construction, or any other "extrinsic materials" that "shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005).

Beginning with the statutory text, the question is whether the statute is so clear, interpreted using "the ordinary, contemporary, and common meaning of the words Congress used," that there is nothing to do other than enforce the language. *United States v. Gallegos*, 613 F.3d 1211, 1215 (9th Cir. 2010) (quotation omitted). The statute is far from so clear.

Section 3 from the Allegheny-Mohawk merger states:

> 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.

Using "the specific context in which [this] language is used," *United States v. Gallegos*, 613 F.3d at 1214, this section imposes on carriers an obligation to ensure a "fair and equitable" integration.[11] Section 3 contemplates carriers will often fulfill that obligation through "collective bargaining between the carriers and the representatives of the employees affected." This reference to collective bargaining *seems* to contemplate that only the carrier and the employee's certified representative will be involved in determining the proper method of integration because only a certified representative is capable of engaging in collective bargaining. *See Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d 1381, 1385 (9th Cir.

---

[11] Standing alone, the language of Section 3 does not make clear who must make "provisions" for a fair and equitable seniority integration process. But LPPs were imposed on carriers to "mitigat[e] hardship to employees." *Braniff Master Executive Council of Air Line Pilots Ass'n International v. Civil Aeronautics Board*, 693 F.2d 220, 222 (D.C. Cir. 1982). Thus, the larger context shows LPPs imposed obligations on carriers. *Great N. Pilots, Arb. Petition*, 91 C.A.B. 795, 799 (1981) ("Sections 3 and 13 impose upon the carrier a duty to integrate seniority listings fairly and equitably and a duty to submit certain disputes between it and its employees to arbitration.").

1984) (obligation to "bargain with the chosen representatives" of employees "exacts a negative duty to treat with no other"). But Section 3 does not state that such collective bargaining is the exclusive method a carrier may use. Rather, collective bargaining is contemplated only "where applicable." And there is no indication when such bargaining is "applicable."[12] Therefore, Section 3 does not have a plain meaning subject to simple application.

As for Section 13 from the Allegheny-Mohawk merger, it states:

> In the event that any dispute or controversy . . . arises with respect to the protections provided herein which cannot be settled by the parties . . . it may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for consideration and determination. . . . The salary and expenses of the arbitrator shall be borne equally by the carrier and (i) the organization or organizations representing the employee or employees or (ii) if unrepresented, the employee or employees or group or groups of employees. The decision of the arbitrator shall be final and binding on the parties.

The crucial phrases here are that "the organization or organizations representing the employee or employees" will bear part of the cost of arbitration but "if unrepresented, the employee or employees or group or groups of employees" must pay a portion of the cost. Again, this language can be viewed as stating that when a certified bargaining representative exists, only that representative will be involved in the arbitration. But Section 13 does not define "organizations representing . . . employees."

Based on one view, "organizations representing . . . employees" might be referring only to certified bargaining representatives. This interpretation is somewhat bolstered by the later reference that when employees are "unrepresented," they can participate on their own behalf. But there is no obvious reason why "organizations representing . . . employees" must

---

[12] The fact that Section 3 does not *always* require collective bargaining between the carrier and the employees is established by USAPA's own actions. According to the MOU, the post-merger carrier will remain "neutral" regarding seniority integration. In other words, the post-merger carrier will not engage in collective bargaining with the pilots to determine seniority. Therefore, Section 3's reference to collective bargaining is of little help in understanding its meaning.

be referring to certified bargaining representatives. The language itself does not make that clear. And unlike Section 3's explicit reference to "collective bargaining," Section 13 simply refers to "organizations" that represent employees. Thus, using a common definition, it is possible "organizations representing . . . employees" refers to any group who "stands for or acts on behalf" of certain employees. *Black's Law Dictionary* 1304 (7th ed. 1999) (defining "representative"). Under this latter reading, any employee who believed his interests were not being adequately "represented" by an existing organization could appear in the arbitration.

In short, neither Section 3 nor Section 13 has sufficiently clear language that the Court can stop with the language alone. The Court must continue to other methods of interpretation.

iii. No Meaningful Legislative History

The Court has been unable to locate any helpful legislative history. McCaskill-Bond "was enacted in December 2007 as a last-minute amendment to an unrelated budget bill, and was never considered in committee." *Seniority Integration in Airline Mergers Under the McCaskill-Bond Act*, Airline and Railroad Labor and Employment Law: A Comprehensive Analysis, American Law Institute (October 11-13, 2012). The limited information available establishes the statute "grew out of American Airlines' acquisition of Trans World Airlines." *Comm. of Concerned Midwest Flight Attendants for Fair and Equitable Seniority Integration v. Int'l Bhd. of Teamsters Airline Division*, 662 F.3d 954, 957 (7th Cir. 2011). And it was sponsored by two senators who believed the American Airlines and Trans World Airlines ("TWA") merger had been unfair to the TWA employees. As explained in a press release from one of the sponsors, the statute was meant to "ensure workers in the future don't suffer the same fate as the TWA workers." *Seniority Integration in Airline Mergers Under the McCaskill-Bond Act*, Airline and Railroad Labor and Employment Law: A Comprehensive Analysis, American Law Institute (October 11-13, 2012) (quoting Press Release, Sen. Claire McCaskill, McCaskill and Bond Work to Protect Airline Workers In Mergers (Dec. 17 2007)). Thus, McCaskill-Bond obviously was meant to protect workers but there is no

indication how Congress believed Sections 3 and 13 should be interpreted and applied to vindicate that goal.

iv. CAB Decisions Provide Guidance

With an ambiguous text and no useful legislative history, the next step is to look to any other reliable evidence that might illuminate the text's meaning. Both parties invoke the rule allowing the use of "extrinsic materials" to interpret the statutory language. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). In particular, the parties rely on decisions from CAB as providing useful guidance. That reliance is understandable, although the Court has some hesitation in relying on the decisions in light of it being entirely unclear whether Congress meant to adopt CAB interpretations. In general, however, there is a presumption that Congress is "familiar with the background of existing law when it legislates." *Abebe v. Gonzales*, 493 F.3d 1092, 1101 (9th Cir. 2007); *see also Lorillard v. Pons*, 434 U.S. 575, 581 (1978). Thus, Congress is presumed to have been aware of how Sections 3 and 13 from the Allegheny-Mohawk merger had been interpreted and those interpretations provide useful, but certainly not dispositive, guidance.

Neither the parties nor the Court has been able to locate authority from CAB providing definitive constructions of Sections 3 and 13. Instead, both parties point to CAB decisions supporting their view. For example, an early CAB decision recognized that under Section 3, the identity of the certified bargaining representative did not matter. *Braniff-Mid-Continent Merger Case*, 17 C.A.B. 19, 21 (1953). In that decision, CAB ruled it was "immaterial as to who [was] the certified representative, within the meaning of the Railway Labor Act. For, regardless of which representative is certified, there will still remain a dissident group, and [CAB was] unwilling to allow [the] protective conditions [of Section 3] to be used as a means for allowing one group to dominate the other." *Id.* Unfortunately, later CAB decisions, especially those from the merger of Pan American World Airways and National Airlines, seem to adopt the oppositive view.

In the Pan American and National Airlines merger, a group of employees had formed a group, known as the Janus Group, to advocate a specific seniority position. The members

of the Janus Group were also represented by a union but they believed their union was unlikely to represent the Janus Group's interests. The various unions had begun negotiating seniority but before that process was even complete the Janus Group asked CAB to grant it "separate arbitration rights under the LPPs." *Nat'l Airlines, Arbitration*, 84 C.A.B. 408, 476 (1979). The Janus Group believed it should be entitled to force the matter to arbitration if it concluded "its interests [had] not been adequately represented [during the seniority integration negotiations] by the unions charged with its representation." CAB refused to grant the Janus Group "independent arbitration rights" because doing so would "interfere with the established representation format and, in effect, set up another bargaining unit." *Id.* CAB did not wish to "tamper with and inevitably complicate the procedures used to negotiate seniority list integration." *Id.* at 476-77. CAB did not explain why it was reaching a conclusion different from that reached in *Braniff-Mid-Continent Merger Case*, 17 C.A.B. 19, 21 (1953).

Later CAB decisions, including in the National Airlines merger itself, seem to adopt a softer stance, allowing a limited type of participation by entities other than certified bargaining representatives. *See, e.g.*, *Nat'l Airlines Acquisition, Arbitration*, 95 C.A.B. 584, 588 (1982) (recognizing the Janus Group was allowed to make statements at arbitration); *Pan Am-TWA Route Exchange, Arbitration Award*, 85 C.A.B. 1825 (1980) (certified collective bargaining representative as well as three of its members participated in seniority arbitration); *S. Employees v. Republic/ALEA*, 102 C.A.B. 579 (1983) (committee of employees elected by employees, not certified bargaining representative, handled seniority integration). By the end of its existence, however, CAB seemed to express a preference, when the question was presented, that only certified bargaining representatives participate in seniority integration proceedings. *See Nat'l Airlines Acquisition, Arbitration Request*, 94 C.A.B. 433, 436 (1982) (noting CAB would not interfere to allow non-certified representative to demand arbitration of seniority integration).

v. Meaning of McCaskill-Bond

With the limited amount of guidance from CAB, and the parties offering no other

legal authority or materials that might help illuminate Congressional intent, the Court is left to arrive at the meaning of McCaskill-Bond on its own. Section 3 requires carriers provide a "fair and equitable" integration process. And Section 13 requires arbitration between "the organization or organizations representing the employee or employees." The Court is persuaded this statutory text should be interpreted in harmony with those CAB decisions allowing participation *only* by the employees' certified representatives. When a certified representative exists, that representative owes a duty of fair representation to all employees. A "fair and equitable" integration process will involve that representative acting on behalf of the represented employees. And when a certified bargaining representative exists, introducing an independent group, such as the West Pilots, would "interfere with the established representation format" and also "tamper with and inevitably complicate the procedures used to negotiate seniority list integration." *Nat'l Airlines, Arbitration*, 84 C.A.B. 408, 476 (1979). In addition, allowing the involvement of any employee or group of employees with sufficiently distinct interests would be an invitation to chaos; the seniority integration process cannot accommodate the participation of whoever might be affected by the final result. Therefore, the process contemplated by McCaskill-Bond allows *only* the certified bargaining representatives to participate in seniority integration proceedings.

vi. USAPA's Position is Unwise

USAPA has succeeded here but it is a Pyrrhic victory. As contemplated by the MOU, in the very near future an election will take place and a new representative will be chosen by all of the post-merger pilots.[13] It is almost certain USAPA will lose that election. Once that happens, USAPA will no longer be entitled to participate in the seniority integration proceedings.[14] The Court has no doubt that–as is USAPA's consistent practice–USAPA will

---

[13] Footnote 4 explains the Court's understanding of the timing issue.

[14] USAPA's own authority proves this point. As cited by USAPA, the order in *National Airlines Acquisition, Arbitration Request*, 94 C.A.B. 433 (1982) establishes the new representative of all the post-merger pilots will be the only proper party involved in determining seniority.

change its position when it needs to do so to fit its hard and unyielding view on seniority. That is, having prevailed in convincing the Court that only certified representatives should participate in seniority discussions, once USAPA is no longer a certified representative, it will change its position and argue entities other than certified representatives should be allowed to participate. The Court's patience with USAPA has run out. USAPA avoided liability on the DFR claim by the slimmest of margins and the Court has serious doubts that USAPA will fairly and adequately represent *all* of its members while it remains a certified representative. But all the Court can do at this stage is implore USAPA to, in the words of CAB, "make every effort to see that [the West Pilots'] are given extensive consideration, and that their interests are fairly and fully represented" during seniority integration. *National Airlines, Acquisition*, 84 C.A.B. 408, 477 (1979). And when USAPA is no longer the certified representative, it must immediately stop participating in the seniority integration.[15]

D. Request for Attorneys' Fees

The West Pilots' amended complaint included a separate claim for attorneys' fees. That request, however, is not a substantive cause of action but instead a form of relief if the West Pilots were to prevail. Because the West Pilots did not prevail, the claim will be dismissed.

E. Motion for Injunction

US Airways filed a "Motion for Injunction Against USAPA Pursuant to the All Writs Act." (Doc. 297). Resolution of the pending DFR claim and declaratory judgment claim render this motion moot.

---

[15] The parties have not explained how the process contemplated by the MOU could ever take effect. The MOU contemplates the need for arbitration but also requires the post-merger carrier remain neutral. Under the Court's reading of McCaskill-Bond, there will be no need for arbitration because, based on explicit language in the MOU, prior to the arbitration, there will have been an election and there will be only one certified representative for all pilots. Simply put, with the carrier having promised neutrality, there will not be two parties to go to arbitration. Whether the post-merger carrier's promise to remain neutral regarding seniority violates the obligations imposed on it by McCaskill-Bond is an open question and one not presented in this case.

Accordingly,

IT IS ORDERED the Motion for Preliminary Injunction (**Doc. 13**) is **DENIED AS MOOT**.

IT IS FURTHER ORDERED the Motions for Summary Judgment (**Docs. 211, 212**) are **DENIED**.

IT IS FURTHER ORDERED the Motion for Directed Verdict (**Doc. 239**) is **DENIED**.

IT IS FURTHER ORDERED the Motion to Include Declaration of Gary Hummel (**Doc. 256**) is **DENIED**.

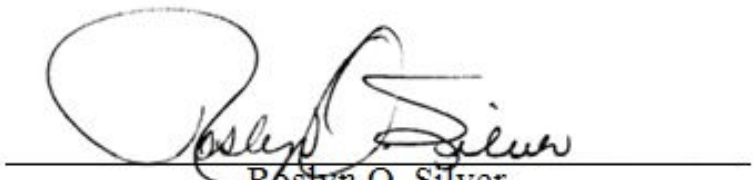
IT IS FURTHER ORDERED the Motion to Strike (**Doc. 257**) is **GRANTED IN PART AND DENIED IN PART**. Mr. Hummel's declaration, and the portions of subsequent filings that cite to it, are **STRICKEN** but it is not necessary to strike USAPA's motion (Doc. 256).

IT IS FURTHER ORDERED the Motion to Strike (**Doc. 283**) is **DENIED**.

IT IS FURTHER ORDERED the Motion For Injunction (**Doc. 297**) is **DENIED AS MOOT**.

IT IS FURTHER ORDERED the Clerk of Court is directed to enter judgment in favor of Defendant US Airline Pilots Association on Count I and Count IV, a judgment in favor of US Airways, Inc. on Count II, and a judgment of dismissal without prejudice on Count III.

DATED this 10th day of January, 2014.



Roslyn O. Silver
Senior United States District Judge