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## Employment Law - A Union's Duty of Fair Representation in Pilot Seniority Negotiations

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**EMPLOYMENT LAW—A UNION’S DUTY OF  
FAIR REPRESENTATION IN PILOT  
SENIORITY NEGOTIATIONS**

KELLY ALMETER\*

I. INTRODUCTION

**P**ILOT SENIORITY CLAIMS are some of the most vehemently contested and highly sensitive duty of fair representation claims throughout the airline industry.<sup>1</sup> The U.S. Supreme Court has recognized that a union’s duty of fair representation is a “statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.”<sup>2</sup> Additionally, “a union’s actions are arbitrary only if, in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a ‘wide range of reasonableness’ as to be irrational.”<sup>3</sup> By holding that the US Airline Pilots Association (USAPA) breached its duty of fair representation in *Addington v. US Airline Pilots Ass’n*,<sup>4</sup> the Ninth Circuit incorrectly reversed the decision of the U.S. District Court for the District of Arizona. The Ninth Circuit’s holding was incorrect, especially in light of the clear error standard of review, because (1) incorporation of Paragraph 10(h) of the Memorandum of Understanding Regarding Contingent Collective Bargaining Agreement (MOU) was crucial in order to solidify ratification of the MOU; and (2) the America West Airlines,

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<sup>1</sup> See *Addington v. US Airline Pilots Ass’n*, 791 F.3d 967, 979–80 (9th Cir. 2015) (*Addington II*).

<sup>2</sup> *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

<sup>3</sup> *Air Line Pilots Ass’n, Int’l v. O’Neill*, 499 U.S. 65, 67 (1991) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)).

<sup>4</sup> 791 F.3d at 967.

Inc. pilots' (West Pilots) involvement in the MOU negotiations and voting results indicated vast support from West Pilots for the ratification of the MOU.<sup>5</sup>

## II. FACTUAL BACKGROUND

US Airways merged with America West Airlines in 2005,<sup>6</sup> and the resulting seniority negotiation between their pilots is best described as a ten-year "bitter seniority dispute."<sup>7</sup> The US Airways pilots (East Pilots) and the West Pilots were both represented by the Air Line Pilots Association (ALPA) when the airlines merged.<sup>8</sup> The East Pilots, West Pilots, and ALPA Transition Agreement stated that the new seniority list would take effect when the following transpired: "(1) US Airways obtained a single operating certificate (this occurred in 2007); (2) the two pilot groups created a single seniority list . . . ; and (3) the pilots and the new airline negotiated a Single Agreement."<sup>9</sup> Until all three requirements were fulfilled, the East and West pilots' separate seniority lists would remain effective.<sup>10</sup>

There were 5,100 East Pilots and only 1,900 West Pilots, but America West "was a newer and financially stronger airline . . . [with] better wages and greater job security."<sup>11</sup> Throughout negotiations, the East Pilots' proposal urged for seniority based on date of hire and would place a number of West Pilots at the bottom of the seniority list, even below furloughed East Pilots.<sup>12</sup> The West Pilots' proposal advocated for the seniority list to reflect the strength of the pilot's pre-merger airline and would give less deference to date of hire and instead focus on "pilot rank and career prospects."<sup>13</sup> After the East and West pilots' negotiations failed, an arbitration panel (Nicolau Arbitration) incorporated both parties' demands, but did not adopt a single proposal in its entirety, when it placed 500 East Pilots at the top of the list and the 1,700 furloughed East Pilots at the bottom of the list (Nicolau Award).<sup>14</sup> Displeased with the Nicolau Award,

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<sup>5</sup> *Id.* at 994–98 (Tashima, J., dissenting).

<sup>6</sup> *Id.* at 970 (majority opinion).

<sup>7</sup> *Id.* at 971.

<sup>8</sup> *Id.* at 970.

<sup>9</sup> *Id.* at 972.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 971–72.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 972.

the East Pilots used their majority numbers to establish and elect a new union, the U.S. Airline Pilots Association (USAPA), which would base seniority on a pilot's date of hire and, thus, relocate West Pilots to the bottom of the seniority list.<sup>15</sup>

In 2008, the West Pilots sued USAPA for breach of its duty of fair representation, and the U.S. District Court for the District of Arizona ruled in favor of the West Pilots.<sup>16</sup> On appeal, the Ninth Circuit dismissed the case because it was not yet justiciable.<sup>17</sup> US Airways then filed a declaratory judgment action in 2010 against both the West Pilots and USAPA, "seeking guidance as to whether it could be held liable for assisting in a breach of USAPA's duty of fair representation if it entered into a collective bargaining agreement that did not implement the Nicolau Award."<sup>18</sup> The district court held that (1) USAPA was bound by the Transition Agreement, but the Agreement could be modified if there was a consensus between USAPA and US Airways; and (2) USAPA's "seniority proposal [did] not breach its duty of fair representation provided it [was] supported by a legitimate union purpose."<sup>19</sup>

In 2012, US Airways and American Airlines agreed to pursue a merger.<sup>20</sup> Both airlines and their respective unions, USAPA (represented by a committee consisting of two West Pilots and two East Pilots), and the Allied Pilots Association (APA) negotiated the MOU.<sup>21</sup> The contested section of the MOU, which was proposed by USAPA, is Paragraph 10(h), and it states: "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 the McCaskill-Bond Amendment."<sup>22</sup> USAPA tailored its MOU presentations to its particular audiences when educating pilots on the negotiated proposal and urging its ratification.<sup>23</sup> When standing before the West Pi-

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<sup>15</sup> *Id.* at 973.

<sup>16</sup> *Id.* at 973-74 (citing *Addington v. US Airline Pilots Ass'n*, No. CV 08-1633, 2009 WL 2169164, at \*1 (D. Ariz. July 17, 2009)).

<sup>17</sup> *Id.* at 974 (citing *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1179 (9th Cir. 2010)).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 974-75 (citing *US Airways, Inc. v. Addington*, No. CV 10-01570, 2012 WL 5996936, at \*4 (D. Ariz. Oct. 11, 2012)).

<sup>20</sup> *Id.* at 975.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 976.

<sup>23</sup> *Id.*

lots, USAPA described the MOU as “neutral with respect to seniority.”<sup>24</sup> However, before the East Pilots the USAPA said the MOU was “beneficial because, in effect, it confirmed that the Nicolau Award was dead.”<sup>25</sup> Nevertheless, both the East and West Pilots recognized that the MOU had economic incentives for all pilots, specifically pay increases.<sup>26</sup> The MOU was later ratified, and “[o]f the 1,041 West Pilots who voted, 1,017 voted in favor of the MOU.”<sup>27</sup>

Later, in 2013 some of the West Pilots filed suit claiming that, among other things, USAPA breached its duty of fair representation when it ignored its obligation to implement the Nicolau Award.<sup>28</sup> The district court held that USAPA did have a legitimate union purpose for entering into the MOU because “[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.”<sup>29</sup>

### III. APPELLATE DECISION

On appeal, the Ninth Circuit reversed the district court’s judgment and held that Paragraph 10(h) was incorporated into the MOU with only the intent of benefiting the East Pilots at the expense of the West Pilots because it made the Nicolau Award unenforceable and, thus, was not a legitimate union purpose.<sup>30</sup> The Ninth Circuit held that the district court erred because (1) there was no evidence in the record indicating that Paragraph 10(h) was incorporated in exchange for economic benefits for both East and West Pilots; (2) the district court could not rely on USAPA’s argument that Paragraph 10(h) was added to avoid further conflict because the East Pilots, through USAPA, created the conflict itself; and (3) USAPA’s motive to ensure that the Nicolau Award would not take effect was clearly discriminatory.<sup>31</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 975–76.

<sup>27</sup> *Id.* at 976.

<sup>28</sup> *Addington v. US Airline Pilots Ass’n*, No. CV 13–00471, 2014 WL 321349, at \*6 (D. Ariz. Jan. 10, 2014) (*Addington I*) (unpublished).

<sup>29</sup> *Id.* at \*7.

<sup>30</sup> *Addington II*, 791 F.3d at 989–90.

<sup>31</sup> *Id.* at 988–90.

In support of its argument, a majority of the Ninth Circuit cited *Barton Brands, Ltd. v. NLRB*.<sup>32</sup> In *Barton Brands*, Glencoe and Barton agreed to dovetail their seniority lists, but after Barton's expansion plans fell through, the union reconfigured the seniority list to place all Glencoe employees below Barton employees.<sup>33</sup> The Seventh Circuit held that the union breached its duty of fair representation because it "acted solely on the grounds of political expediency in reducing the former Glencoe employees' seniority . . . [and] such decisions may not be made *solely* for the benefit of a stronger, more politically favored group over a minority group."<sup>34</sup>

Additionally, the court relied on *Bernard v. Air Line Pilots Ass'n*.<sup>35</sup> There, the court held that the union breached its duty of fair representation by not allowing Jet America Airlines pilots to partake in the union negotiations with Alaska Airlines after the two airlines merged and by not following its own merger policy.<sup>36</sup>

However, the dissent in *Addington* advocated for affirming the district court's finding because "of the deference [the] court owes to USAPA as the then-certified bargaining representative, and to the district court as finder of fact," especially in light of the "clear error" standard of review.<sup>37</sup> First, the dissent recognized that neither the USAPA, nor the district court, stated that Paragraph 10(h) was incorporated directly in turn for a pay increase.<sup>38</sup> Instead, the dissent highlighted that "USAPA could not secure additional compensation for its employees if it could not get the MOU ratified, and it could not get the MOU ratified if the MOU implicated the seniority issues that had divided USAPA's membership since 2007."<sup>39</sup> Additionally, the dissent asserted that USAPA inherited the seniority dispute, and "[h]ad USAPA's leadership decided to support the Nicolau Award, they had every reason to believe they would have been voted out like ALPA before them."<sup>40</sup> Lastly, the dissent emphasized that

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<sup>32</sup> *Id.* at 985 (citing *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793 (7th Cir. 1976)).

<sup>33</sup> *Barton Brands, Ltd.*, 529 F.2d at 795–96.

<sup>34</sup> *Id.* at 798–99.

<sup>35</sup> *Addington II*, 791 F.3d at 985 (citing *Bernard v. Air Line Pilots Ass'n*, 873 F.2d 213 (9th Cir. 1989)).

<sup>36</sup> *Id.* (citing *Bernard*, 873 F.2d at 216).

<sup>37</sup> *Id.* at 994 (Tashima, J., dissenting).

<sup>38</sup> *Id.* at 995.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 997.

USAPA designated two East Pilots and two West Pilots to serve as representatives while negotiating the MOU.<sup>41</sup> Also, 97.69% of the West Pilots who voted favored ratification of the MOU.<sup>42</sup>

#### IV. ANALYSIS

The Ninth Circuit incorrectly reversed the decision of the district court because (1) incorporation of Paragraph 10(h) was crucial in order to solidify ratification of the MOU; and (2) the West Pilots' involvement in the MOU negotiations, as well as the voting results, indicated vast support from West Pilots for the ratification of the MOU, thus showing that USAPA had a legitimate purpose in entering the MOU. Under a duty of fair representation claim, a plaintiff must show that the union's action was "arbitrary, discriminatory, or in bad faith."<sup>43</sup> Arbitrariness under a claim concerning a seniority list is found when a union organizes the seniority list with the sole intent to advance one group over another.<sup>44</sup> "[B]argaining has winners and losers, and the losers cannot prove a breach of duty of fair representation merely by showing that they were disadvantaged by the ultimate result."<sup>45</sup> Furthermore, the Supreme Court has recognized that a union's role in the context of a duty of fair representation claim is comparable to that of the legislature; some deference must be given to the union.<sup>46</sup> Lastly, "a 'bad' motive does not spoil a collective bargaining agreement that rationally serves the interests of workers as a whole."<sup>47</sup> "[S]o long as a Court can find [that] *some* legitimate union purpose motivat[ed] a seniority change, the union has not breached its duty of fair representation."<sup>48</sup>

When applying the clear error standard of review, the appellate court must defer to the decision of the lower court unless, when analyzing the record in its entirety, the reviewing court has a "definite and firm conviction that a mistake has been commit-

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Addington v. US Airline Pilots Ass'n*, No. CV 13-00471, 2014 WL 321349, at \*6 (D. Ariz. Jan. 10, 2014) (*Addington I*) (unpublished).

<sup>44</sup> *Addington II*, 791 F.3d at 984 (majority opinion) (citing *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1535 (7th Cir. 1992)).

<sup>45</sup> *Addington I*, 2014 WL 321349, at \*6 (citing *Rakestraw*, 981 F.2d at 1530).

<sup>46</sup> *See Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 75 (1991).

<sup>47</sup> *Addington I*, 2014 WL 321349, at \*6 (citing *Rakestraw*, 981 F.2d at 1535).

<sup>48</sup> *Id.*

ted.”<sup>49</sup> If the lower court’s analysis is plausible when examining all of the evidence, it cannot be clearly erroneous.<sup>50</sup>

The Ninth Circuit incorrectly reversed the decision of the district court because incorporation of Paragraph 10(h) was crucial to solidify ratification of the MOU.<sup>51</sup> The dissent emphasized that the language of Paragraph 10(h) was neutral and did not favor either side.<sup>52</sup> The West Pilots wanted the Nicolau Award to be implemented, and the East Pilots wanted all pilots ranked based on their date of hire.<sup>53</sup> Paragraph 10(h) did neither.<sup>54</sup> In order to secure the proposed pay increases for *all* pilots, USAPA needed to negotiate a draft of the MOU that would have been well received by East and West Pilots alike.<sup>55</sup> USAPA “could not get the MOU ratified if the MOU implicated seniority issues that had divided USAPA’s membership since 2007.”<sup>56</sup>

USAPA did not breach its duty of fair representation because unlike in *Barton*, the MOU was *not* negotiated for the sole purpose of advancing the East Pilots’ interests.<sup>57</sup> Even a West Pilot conceded that the MOU negotiations required “give and take.”<sup>58</sup> Specifically, “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.”<sup>59</sup> Instead, the MOU provided both the East Pilots and West Pilots with pay increases.<sup>60</sup>

The language of Paragraph 10(h) mandated that the East Pilots and West Pilots existing and separate seniority lists remain in effect until there was a final integration of all US Airways and American Airlines pilots.<sup>61</sup> The district court, as the fact-finder, held that “[a] rational person could conclude that making the MOU explicitly neutral served the legitimate union purpose of

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<sup>49</sup> *Addington II*, 791 F.3d at 995 (Tashima, J., dissenting) (quoting *SEC v. Rubera*, 350 F.3d 1084, 1093 (9th Cir. 2003)).

<sup>50</sup> *Id.* (citing *Rubera*, 350 F.3d at 1093–94).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 996.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 995.

<sup>56</sup> *Id.*

<sup>57</sup> Compare *Addington v. US Airline Pilots Ass’n*, No. CV 13–00471, 2014 WL 321349, at \*7 (D. Ariz. Jan. 10, 2014) (*Addington I*) (unpublished), with *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 798 (7th Cir. 1976).

<sup>58</sup> *Addington I*, 2014 WL 321349, at \*7.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*



securing the additional compensation contained in the MOU while putting off to another day the question of the appropriate seniority regime.”<sup>62</sup> The court further noted, “[t]he 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.”<sup>63</sup>

Lastly, the West Pilots involvement in the MOU negotiations, as well as the voting results, indicated that the MOU was intended to be neutral.<sup>64</sup> Unlike in *Bernard*, two West Pilots and two East Pilots represented the USAPA throughout the MOU negotiations—the East Pilots were not given any additional representation or negotiating advantage.<sup>65</sup> And, “[o]f the 1,041 West Pilots who voted, 1,017 voted in favor of the MOU.”<sup>66</sup> Of the West Pilots who voted, 97.69% favored ratification of the MOU,<sup>67</sup> showing that the majority of West Pilots believed that USAPA had a legitimate purpose in entering the MOU.

Seniority is crucial to pilots because it determines their pay, working conditions, the aircraft they fly, and their work schedules, and it also determines their likelihood of exposure to furloughs.<sup>68</sup> Because the pilots with the lowest seniority ranking are typically the first to be furloughed, “seniority can therefore mean the difference between being in or out of a job.”<sup>69</sup> Pilot seniority ranking is undoubtedly “a zero-sum game, where moving one pilot up the list necessarily requires moving another pilot down.”<sup>70</sup> As a result, “a winners-and-losers compromise does not mean that the union has violated its duty of fair representation.”<sup>71</sup> The Ninth Circuit’s holding has drastically limited a union’s ability to manage seniority ranking disputes in the wake of airline mergers. A losing minority numbered group can always argue that the union acted in bad faith and planned for them to lose.<sup>72</sup> In fact, the Seventh Circuit in *Rakestraw* empha-

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at \*7–8 (citing *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1535 (7th Cir. 1992)).

<sup>64</sup> *Id.* at \*3.

<sup>65</sup> *Addington v. US Airline Pilots Ass’n*, 791 F.3d 967, 975 (9th Cir. 2015) (*Addington II*).

<sup>66</sup> *Id.* at 976.

<sup>67</sup> *Id.* at 997 (Tashima, J., dissenting).

<sup>68</sup> *Id.* at 980 (majority opinion).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 983.

<sup>72</sup> *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1531 (7th Cir. 1992).

sized the potential ramifications that could arise by giving too much deference to this assertion when it warned:

Taken to its limits, the approach prevents the union from resolving differences internally and representing the interests of workers as a group. Yet one of the premises of the Railway Labor Act . . . is that unions act democratically to reach a collective decision—the majority is entitled to prevail.<sup>73</sup>

The Ninth Circuit did not give enough deference to USAPA in its role as representative of the East and West Pilots or to the district court in its role as fact-finder, especially under the clear error standard of review. Nevertheless, on August 24, 2015, a majority of the Ninth Circuit panel judges denied USAPA's petition for rehearing and petition for rehearing en banc.<sup>74</sup>

## V. CONCLUSION

The Ninth Circuit incorrectly reversed the decision of the district court because USAPA had a legitimate purpose in proposing Paragraph 10(h) of the MOU as its incorporation was crucial to solidify ratification and increase *all* pilots' compensation, and the West Pilots involvement in the negotiations, as well as the voting results, indicate vast support for the ratification of the MOU. The language of, and negotiations behind the incorporation of, Paragraph 10(h) highlight that USAPA at the very least had *some* legitimate purpose behind proposing and promoting the ratification of the MOU. Thus, USAPA did not breach its duty of fair representation.

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<sup>73</sup> *Id.*

<sup>74</sup> *Addington v. US Airline Pilots Ass'n*, No. 14–15757, 2015 WL 5157138, at \*1 (9th Cir. Aug. 24, 2015).