

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL ACTION NO. _____

US AIRWAYS, INC.,

Plaintiff,

v.

US AIRLINE PILOTS ASSOCIATION and
MICHAEL J. CLEARY,

Defendants.

**BRIEF IN SUPPORT OF PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

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I. PRELIMINARY STATEMENT

US Airways, Inc. (“US Airways” or the “Company”) seeks a preliminary injunction under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (the “RLA”), against the US Airline Pilots Association (“USAPA”) and its officers and members to prohibit them from engaging in an ongoing, unlawful pilot slowdown campaign. The purpose of USAPA’s campaign is to cause nationwide flight delays and cancellations in order to put pressure on US Airways in its current collective bargaining negotiations with USAPA. USAPA recently intensified its campaign, resulting in a significant change in pilot behavior, which in turn is now disrupting US Airways’ operations and the travel plans of many thousands of members of the public — primarily at Charlotte and US Airways’ other east coast hubs. These actions are illegal.

The status quo obligation in Section 2, First, of the RLA not only prohibits USAPA from instigating or encouraging a slowdown, it also requires that USAPA make all reasonable efforts to prevent or stop a slowdown that is occurring. USAPA has utterly failed to meet its obligation. The lead Court of Appeals decisions addressing this status quo obligation all arise in the identical context of a union attempting to put pressure on an airline in contract negotiations and expressly confirm that, under the facts presented here, an injunction must issue.

Indeed, as confirmed by the applicable legal precedent, USAPA’s attempt to put pressure on US Airways in ongoing contract negotiations by disrupting operations is a blatant violation of its status quo obligations under Section 2, First, of the RLA. USAPA is directly instigating the illegal slowdown by encouraging pilots to delay flight departures, not complete certain training requirements, decline to fly on the basis of fatigue, increase maintenance write-ups, and generally slow down in the performance of their duties — and also by threatening to expose and retaliate against those pilots who do not participate in the slowdown. Although USAPA is

encouraging pilots to change their behavior under the guise of “safety,” USAPA’s own communications confirm the true purpose of its campaign is illegally to slowdown US Airways’ operation in order to gain leverage in contract negotiations. For example, USAPA encourages pilots to “Fly Safe” and “slow it down!” in a publication describing what it will take for US Airways’ pilots to win their “battle” for a new contract. And USAPA’s Strike Preparedness Committee — not its Safety Committee — issued a publication stating that “it is time for us to make a concise and powerful statement that we will no longer tolerate unfair working conditions” by “MEET[ING] OR EXCEED[ING]” all “safety standards” “in every single decision that we make” and concluded by stating that “[a] storm approaches.”

The applicable case law recognizes that a union’s initiation and repeated emphasis on safety in the midst of collective bargaining negotiations is code for a slowdown. *See, e.g., United Air Lines, Inc. v. Int’l Ass’n of Machinist & Aerospace Workers*, 243 F.3d 349, 355-57 (7th Cir. 2001) (publications stressing “safety first” and encouraging union members to “work safe” are “commonly recognized signals . . . for a work slowdown”). This is an intuitive point, especially as to pilots. US Airways’ pilots are highly trained professionals and do not need to be told that they should not fly an unsafe aircraft — they know that. So when USAPA repeatedly emphasizes safety to its members in the midst of labor negotiations, pilots understand that USAPA is telling them to slowdown in order to disrupt the operation. This is particularly so where, as here, USAPA does so while also telling pilots there are “strong implications beyond just safety” and “flying safe” is necessary to get the contract they deserve. The true purpose of USAPA’s campaign is further confirmed by the fact that the only participants are the “East” pilots. The East pilots worked for US Airways prior to its merger with America West Airlines in 2005, and are domiciled in Charlotte, D.C., and Philadelphia, and their allegiance to USAPA is

generally stronger than that of the “West pilots,” who worked for America West prior to the merger, and are domiciled in Phoenix.

USAPA’s slowdown campaign is having the union’s intended effect: the change in East pilot behavior has dramatically impacted numerous aspects of US Airways’ operations leading to flight delays and cancellations, particularly at its Charlotte hub (US Airways’ largest operation). These changes are all “statistically significant,” meaning that they cannot be explained by chance. For example, since May 1, 2011, the percentage of the Company’s flights flown by East pilots that arrive at their scheduled arrival time has dropped by more than 11 percentage points (after controlling for weather and other factors). Based on conventional statistical analysis, the odds that this drop in on-time arrivals by East pilots is random in nature is less than 1% (*i.e.*, it is more than 99% certain that this is the result of concerted activity). When there is an increase in late arriving flights, there is a subsequent increase in the number of passengers who miss their connecting flights and/or whose bags do not make it to a connecting flight. For example, since May 1, the number of bags that do not make it onto a passenger’s connecting flight has increased by more than 45% for every 1,000 connecting passengers at Charlotte — while operations remain normal in Phoenix.

East pilots are causing these disruptions by engaging in the specific delay tactics encouraged by USAPA, such as slowing down when they taxi aircraft. The average historical “taxi-in” time (when a pilot taxis the aircraft to the gate after landing) and “taxi-out” time (when a pilot taxis the aircraft from the gate to take off) for East pilots have increased dramatically since May 1. Also, there has been a similar dramatic increase in flight departure delays attributed to East pilots — another tactic encouraged by USAPA. Historically, 1.31% of US Airways’ flights flown by East pilots are delayed for reasons attributable to those pilots. Since

May 1, however, that rate has more than doubled to 2.85%. During this same time, these operational metrics have been within normal ranges for West pilots.

The requirements for issuance of a preliminary injunction are plainly met. As to the merits, USAPA's directives to slow down under the guise of safety cannot be seriously disputed — and those directives are patent violations of USAPA's obligations under Section 2, First, which prohibit a union from instigating or encouraging a slowdown, and also require a union to make all reasonable efforts to prevent or stop a slowdown by its members.

The irreparable injury showing that is typically required to obtain injunctive relief does not apply under the RLA. *See Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299, 303-04 (1989). But even if irreparable injury were a requirement, it is satisfied here: USAPA and the East pilots' actions have caused, on average, nine to ten flight cancellations a day since May 1. This means that the travel plans and daily lives of approximately 1,173 passengers a day are being disrupted by USAPA's campaign — or 105,500 members of the traveling public to date. This harm to the public alone warrants issuance of a preliminary injunction. Cancellations of this magnitude also directly translate into incalculable irreparable harm to US Airways' customer goodwill and business reputation in an industry in which customers have a choice and make decisions based on reliability and reputation. And there can be no claim of harm to USAPA or its members in issuing an injunction because it would simply prohibit them from engaging in illegal activity.

US Airways has attempted to resolve this dispute by repeatedly putting USAPA on notice of its violations of the RLA and demanding that it make all reasonable efforts to stop the slowdown as required by the RLA. In response, USAPA has only intensified its campaign, thus requiring US Airways to seek injunctive relief.

For the reasons set forth below, in this situation, Section 2, First, of the RLA requires the issuance of a preliminary injunction.

II. STATEMENT OF FACTS

A. The Parties to This Action

1. Plaintiff US Airways

Plaintiff US Airways is a commercial air carrier, headquartered in Tempe, Arizona, with domestic and international operations. (Declaration of Kerry F. Hester (“Hester Decl.”) ¶ 5.) US Airways is a “common carrier by air” as defined in the Federal Aviation Act of 1958 and a “carrier” as defined by the RLA. (*Id.*)

In May 2005, the respective holding companies of America West Holdings Corp. (“America West”) and US Airways announced the merger of America West and US Airways with an effective date of September 27, 2005. (Declaration of E. Allen Hemenway (“Hemenway Decl.”) ¶ 5.) Under the Merger Agreement, US Airways Group, Inc., which was then operating under Chapter 11 bankruptcy protection, would be reorganized, and the reorganized entity, known as “US Airways,” would own and control the former America West and US Airways. (*Id.*)

2. Defendants USAPA and Cleary

Defendant USAPA is an independent labor union, with its headquarters in Charlotte, North Carolina. (*Id.* ¶ 4.) USAPA has been the certified collective bargaining representative under the RLA of pilots at US Airways since April 18, 2008. (*Id.*) USAPA has four officers: a President, Vice-President, Executive Vice-President, and Secretary-Treasurer of USAPA. (*Id.*) USAPA maintains a large number of standing committees such as the Safety Committee and

Strike Preparedness Committee. (*Id.*) Defendant Michael J. Cleary (“Cleary”) is the President of USAPA. (*Id.*)

B. Background Regarding the East and West Pilots’ Seniority Dispute and the Parties’ Contract Negotiations

As noted above, the disruptions to US Airways’ operations are a result of the concerted actions of the East pilots only. This unique situation arises from a protracted seniority dispute between the East and West pilots. At the time of the 2005 merger of US Airways and America West, the East pilots (who were employed by pre-merger US Airways) and the West pilots (who were employed by pre-merger America West) were both represented by the Air Line Pilots Association (“ALPA”). (*Id.* ¶ 6.)

1. The Seniority Dispute

In connection with the merger, the East pilots, the West pilots, and the merging companies agreed, in a collectively-bargained multilateral agreement (the “Transition Agreement”), that the pilot workforces of the two airlines would be combined. (*Id.* ¶ 7.) The Transition Agreement supplements and amends the collective bargaining agreements that existed at the time of the merger.¹ (*Id.*) A dispute arose, however, between the East and West pilots as to their relative placement on an integrated pilot seniority list. The East pilots and the West Pilots, represented by separate counsel, arbitrated their seniority dispute before a neutral arbitrator, George Nicolau. (*Id.*)

Although US Airways was not a party to that arbitration, it agreed in the Transition Agreement to accept the resulting integrated seniority list so long as certain conditions were

¹ Those same collective bargaining agreements are currently in effect. (*Id.*) Under the RLA, collective bargaining agreements do not expire, but become “amendable” by the parties and remain in force until the RLA negotiation/mediation process is completed. (*Id.*) The collective bargaining agreement between US Airways and the West pilots became amendable on December 30, 2006, and the collective bargaining agreement between US Airways and the East pilots became amendable on December 31, 2009. (*Id.*)

satisfied. (*Id.* ¶ 8.) The arbitrator issued an award, referred to as the “Nicolau Award,” in May 2007. (*Id.*) According to ALPA’s constitution, the results of the arbitration were to be “final and binding” as between the East pilots and the West pilots. (*Id.*) The East pilots perceived the Nicolau Award to be less favorable to them as a group than the “date-of-hire” integrated seniority list they had sought from Arbitrator Nicolau. (*Id.*) Pursuant to the Transition Agreement, ALPA presented to the Company the integrated seniority list based on the Nicolau Award, and US Airways was obligated to accept that seniority list. (*Id.*) US Airways did so in late 2007. (*Id.*)

2. The Formation of USAPA

In response to the Nicolau Award, the East pilots formed a new labor union, USAPA, whose constitution expressly mandates a “date-of-hire” integrated seniority list and prohibits implementation of the Nicolau Award. (*Id.* ¶ 9.) The East pilots significantly outnumber the West Pilots and, in that context, USAPA won an election among all of the pilots and was certified as the labor union for both the East and West pilots on April 18, 2008. (*Id.*) The West pilots allege that USAPA was formed solely for the purpose of evading the obligation to include the Nicolau Award in the collective bargaining agreement with US Airways. (*Id.*) According to USAPA, the Nicolau Award, which directly conflicts with the “date-of-hire” seniority mandated by USAPA’s Constitution, grants “super seniority to more junior West pilots” at the expense of more senior East Pilots. (*Id.*) The West pilots, by contrast, regard the Nicolau Award as “an equitable integration of the seniority lists,” and regard “a date-of-hire seniority list as inequitable.” (*Id.*)

3. The Addington Lawsuit

In 2008, following a dramatic spike in the price of fuel, US Airways announced that it

would be forced to furlough pilots. (*Id.* ¶ 10.) Some of the pilots to be furloughed were West pilots, who would not have been subject to furlough if a single collective bargaining agreement (“CBA”) incorporating the Nicolau Award were in place at the time. (*Id.*) The West pilots brought suit in federal court in Phoenix against USAPA, asserting a claim for breach of USAPA’s duty of fair representation based on its refusal to adopt the Nicolau Award in its negotiations with US Airways for a single CBA that would be applicable to the combined pilot workforce. (*Id.*, Ex. 1) A jury found that USAPA had violated its duty of fair representation because it “cast aside the result of an internal seniority arbitration solely to benefit the East Pilots at the expense of the West Pilots,” and “failed to prove that any legitimate union objective motivated its acts.” (*Id.*, Ex. 1.) See *Addington v. US Airline Pilots Ass’n*, 2009 U.S. Dist. LEXIS 61724, at *23-24 (D. Ariz. July 17, 2009).

USAPA appealed, and the Ninth Circuit reversed without reaching the merits, finding that the West pilots’ action for breach of the duty of fair representation was not yet ripe. (Hemenway Decl. ¶ 11, Ex. 2.) See *Addington v. US Airline Pilots Ass’n*, 606 F.3d 1174, 1179-80 (9th Cir. 2010).

4. Events Following the Ninth Circuit’s Decision in *Addington*

US Airways anticipated that the *Addington* case would provide clarification—one way or the other—regarding the legality of entering into an agreement with USAPA for a non-Nicolau seniority list. (Hemenway Decl. ¶ 12.) But, given the Ninth Circuit’s ruling on ripeness, that clarification was not provided. (*Id.*)

After the Ninth Circuit issued its opinion, USAPA and the West pilots each insisted that US Airways take its side in the seniority dispute—or face dire consequences. (*Id.* ¶ 13.) The West pilots assert that the Ninth Circuit’s opinion merely postpones a decision on their duty of

fair representation claim and authorizes them to sue USAPA and US Airways if agreement is reached on a non-Nicolau seniority list. (*Id.*) And their counsel has sent US Airways multiple letters threatening to sue US Airways under the RLA for, *inter alia*, “facilitat[ing]” or “assist[ing]” USAPA’s breach of the duty of fair representation if US Airways accepted USAPA’s seniority demands. (*Id.*)

USAPA, on the other hand, interprets the Ninth Circuit decision as authorizing agreement to a non-Nicolau seniority list and as specifically allowing it to insist on a “date-of-hire” seniority list. (*Id.* ¶ 14.) If US Airways rejects USAPA’s seniority position and refuses to negotiate a non-Nicolau seniority list, USAPA has made clear that it will initiate a work stoppage at its “earliest opportunity.” (*Id.*)

Faced with this Hobson’s choice, in July 2010, US Airways filed a declaratory judgment action against USAPA and the class of West pilots seeking a judicial determination of the parties’ rights and obligations. (*Id.* ¶ 15.) That case, *US Airways, Inc. v. Addington*, No. 2:10-cv-01570-ROS, is currently pending in the District of Arizona. (*Id.*) USAPA moved to dismiss on ripeness grounds, and in June 2011, the court denied that motion, finding that the case was ripe because absent judicial relief, US Airways would be subject to a real threat of litigation by the West pilots, or a real threat of a strike following completion of the RLA negotiation process by the East pilots. (*Id.*, Ex. 3.) See *Addington*, No. 2:10-cv-01570-ROS, Order Denying Motion to Dismiss, at 4-8.

5. The Parties’ Contract Negotiations

US Airways began negotiating with ALPA for a single CBA in November 2005. (Hemenway Decl. ¶ 16.) Those negotiations were not successful in part because the East pilots withdrew from the negotiations in August 2007 after issuance of the Nicolau Award. (*Id.*)

Following USAPA's certification in April 2008, US Airways and USAPA began meeting regarding a single CBA in June 2008. (*Id.*) Since January 2010, these negotiations have been mediated by the National Mediation Board ("NMB"). (*Id.*) The NMB has authority to determine the pace of negotiations, including where and how often negotiations occur. The NMB has the unfettered authority to release the parties from negotiations if and when it determines that agreement cannot be reached, and, only following such a release (and a 30-day "cooling off" period), would USAPA be permitted to engage in a work stoppage. In the current negotiations, USAPA continues to insist on a non-Nicolau seniority list. (*Id.*) USAPA has repeatedly expressed its frustration with the length of the current negotiations and the failure of the parties to reach agreement on a single CBA.² (*Id.*)

C. The Evidence of USAPA's Encouragement of the Illegal Slowdown

There is significant and compelling evidence that USAPA is encouraging pilots to engage in an illegal slowdown in order to put pressure on US Airways in these ongoing negotiations, with much of the disruption in Charlotte. USAPA is carrying out its illegal slowdown campaign under the guise of "safety" — by encouraging pilots to alter the status quo based on a series of communications that purport to promote safety. USAPA has not always stayed "on message," however, and its communications often reveal USAPA's true intent. Indeed, through these communications, USAPA has made it clear to US Airways' pilots that USAPA believes US Airways will accede to USAPA's bargaining demands — but only if the pilots engage in an illegal slowdown that forces US Airways to do so.

USAPA has an extensive system of communications that it maintains among its members,

² On or about May 27, 2011, USAPA filed a lawsuit against US Airways in the Eastern District of New York alleging, among other things, that US Airways has failed to "exert every reasonable effort" to negotiate a new collective bargaining agreement with its pilots. USAPA's claims are without merit and US Airways has initiated a Motion to Dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

including regular meetings, electronic messages, internet sites available only to union members, and telephone trees. (Declaration of Lyle Hogg (“Hogg Decl.”) ¶ 25.) USAPA possesses a large number of confidential communication mechanisms to which US Airways does not have access, including its password protected internet site. (*Id.*)

1. USAPA Links “Safety” and “Flying the Contract” to Obtaining Leverage in Contract Negotiations

While safety became the primary focus of USAPA’s campaign in the fall of 2010, USAPA tied “safety” and “flying the contract” to its efforts to obtain a new contract much earlier.³ (Hemenway Decl. ¶ 18.) For example, on April 12, 2009, USAPA’s Charlotte domicile issued an update that addressed the status of contract negotiations, stating that USAPA must “demand an industry standard contract.” (*Id.*, Ex. 4.) The update then stated that obtaining an industry standard contract “takes work from all of us; stay informed, and continue the campaign of remaining Good Union Pilots.” (*Id.*) Immediately after telling pilots that they would have to “work” and be “Good Union Pilots” to get a new contract, USAPA then told pilots that they have “the latitude to stop the operation if in their mind safety standards are compromised.” (*Id.*)

Similarly, in a December 18, 2009 publication issued by USAPA’s Charlotte Domicile, just before the East pilots’ labor contract became amendable on December 31, 2009, USAPA directly linked the “fight” for a new contract to “Fly[ing] Safe” and “flying the contract.” (*Id.* ¶ 19, Ex. 5.)

And in February 2010, USAPA issued an update encouraging pilots to take other steps to slow down the operation: “Pilots are reminded to review FOM 1.3.4 Captains Authority: If the Captain is dissatisfied with any aspect of the aircraft’s airworthiness

³ As set forth in the Argument section, “flying the contract” is recognized as code for instructing pilots to adhere strictly to every provision in the collective bargaining agreement and not waive any provisions in order to put pressure on the airline. *See, e.g., United Air Lines, Inc. v. Air Line Pilots Ass’n, Int’l*, 563 F.3d 257, 263 (7th Cir. 2009).

and/or maintenance status, or if he is not sure the operation can be safely executed, then the operation will stop until he is completely satisfied. Please remember we have 224 pilots on furlough. Fly safely, Act Your Wage and be a Good Union Pilot.” (*See id.* ¶ 20, Ex. 6.)

2. USAPA Attempts to Eliminate Voluntary Flying by Check Pilots

Following these early communications linking safety and “flying the contract” to contract negotiations, USAPA explicitly attempted to put pressure on US Airways by directing check pilots to reject voluntary flying. (*Id.* ¶ 21.) Check pilots are pilots who also conduct periodic tests of other pilots required by the Federal Aviation Administration (“FAA”). (Hogg Decl. ¶ 5.) Under the collective bargaining agreement governing East pilots, US Airways may employ a procedure of voluntary flight assignments known as “FCR flying” — which means Flying at Company Request — if the Company is unable to cover all its flights with regular or reserve pilots. (*Id.*) This is one of several processes that is used to staff “open flying” — that is, flights that do not have a pilot assigned to them, generally because the pilot originally assigned to the flight has called in sick — by offering that flight to a check pilot. (*Id.*)

Under status quo conditions, many US Airways check pilots will seek out this work because it allows them to increase their income. (*See id.* ¶ 6.) Historically, US Airways has not had any difficulty finding check pilots to accept these voluntary flight assignments. (*Id.*)

USAPA’s communications initially directed check pilots to refuse voluntary flight assignments. USAPA then went a significant step further, however, by supporting “sanctions” against check pilots taking such assignments and making their names available to “outraged” pilots. Specifically, in April 2010, USAPA informed its members that because “line pilots continue to express displeasure with . . . check airman [*sic*] flying at company request on days off,” USAPA has “increase[d] its oversight of . . . Check Airmen that fly on their days off at

company request . . . [and] that the names of pilots that participate in this activity [will] be published.” (Hemenway Decl. ¶ 22, Ex. 7.) The April 2010 communication also indicated that a USAPA committee “will begin seeking feedback from our line pilots to determine your level of resentment against those pilots willing to ‘help out’ with understaffing issues when we have pilots on furlough . . . [and] soliciting your suggestions on other sanctions that may be appropriate to deter this activity.” (*Id.*)

The Company’s labor relations group did not learn about these communications until December 2010. (*Id.* ¶ 23.) Shortly thereafter, US Airways sent a letter to Mike Cleary, USAPA’s President, stating that “USAPA’s on-going campaign to persuade Company pilots not to perform voluntary flying authorized by our collective bargaining agreement violates its status quo obligations under the Railway Labor Act.” (*Id.*, Ex. 8) The letter demanded that USAPA and each of its authorized committees comply with their legal obligations. (*Id.*) In response, USAPA did not agree to comply with its obligations and even argued that its campaign was somehow justified because it was motivated by a desire to minimize furlough. (*Id.* ¶ 24, Ex. 9.) US Airways then made clear in an additional letter that the RLA contains no exception for status quo violations that are accomplished in order to minimize furloughs. (*Id.*, Ex. 10.) Notably, following USAPA’s campaign, check pilots often do not accept FCR requests and this flying has declined significantly (from 7.5 flights per month to 2.3 flights per month). (Hogg Decl. ¶ 6.)

3. USAPA Disrupts US Airways’ Operations by Distributing False Safety Information Regarding the Airbus Fleet

In late November/early December 2010 (including over the Thanksgiving holiday weekend, one of the busiest travel periods of the year), USAPA issued a number of communications falsely advising pilots that small holes known as “inspection holes” on the underside of the flaps of certain aircraft (the Airbus A-319, A-320, and A-321) must be covered

in order for the aircraft to be operated in accordance with requirements established by the FAA, and that this maintenance item could not be deferred. (*Id.* ¶ 8.) When these aircraft are new and in proper repair, these inspection holes are covered with tape. (*Id.*) Under FAA regulations, an airline is entitled to defer maintenance on a variety of equipment items — known as “deferrable,” “minimum equipment list,” or “MEL” items — that do not affect flight safety. (*Id.* ¶ 7.)

Specifically, on November 30, 2010, USAPA’s Safety Committee Chairmen issued an “Airbus Safety Alert” stating that if covers were missing from these inspection holes it had an effect on the aircraft’s airworthiness. (*Id.* ¶ 9, Ex. 1.) The publication stated that pilots are required to enter any missing inspection hole covers in the Flight Deck Maintenance Log (a manual found in every cockpit which is reviewed by the maintenance department for each flight). (*See id.*) USAPA’s publication stated that while a missing inspection hole cover could not be deferred via the MEL process, the inspection holes could be temporarily repaired with tape, provided that a different permanent repair was completed within 48 hours. (*Id.*) It also stated that if a pilot were to fly an aircraft with a missing inspection hole cover, the pilot was “at risk from both a safety and [FAA] violation perspective.” (*Id.*)

The information contained in USAPA’s November 30, 2010 Airbus Safety Alert was false. (*Id.* ¶ 10.) Moreover, at no time prior to USAPA’s dissemination of this Safety Alert did USAPA confer with anyone from the Company to determine the actual requirements regarding the inspection hole covers. (*Id.*) As long ago as 2004, the Company was advised by Airbus (the manufacturer of the aircraft) that inspection hole covers on these aircraft did not create an

airworthiness issue, and can be restored “at the next convenient opportunity.”⁴ (*Id.* ¶ 11, Ex. 2.) US Airways, however, self-imposed a restriction of 100 flight hours within which the repair should be made. (*Id.* ¶ 11.) Moreover, the permanent repair, contrary to USAPA’s alert, is simply to re-apply tape over the inspection hole cover. (*Id.*) That advice was also reconfirmed with the aircraft manufacturer following USAPA’s alert. (*Id.*, Ex. 3.) Thus, in response to USAPA’s November 30, 2010 Airbus Safety Alert, the Company sent a message to all crewmembers on that same day in order to correct the misinformation disseminated by USAPA. (*Id.* ¶ 12, Ex. 4.)

In response to the Company’s message, on December 1, 2010, USAPA released an “Update on Airbus Safety Alert” that was sent to all pilots. (*Id.* ¶ 13, Ex. 5.) This Alert also contained false information. (*Id.*) The Alert claimed that, “[i]n response to [the Safety Committee’s November 30 Alert], the Company has obtained relief to allow up to 100 flight hours of operation without the inspection ports being covered.” (*Id.*) But Airbus never suggested that inspection hole covers were in any way related to the airworthiness of an aircraft, and the Company never sought any relief to allow the aircraft to operate with the covers missing. (*Id.*) The 100-hour flight restriction was implemented by the Company on its own accord. (*Id.*)

As a result of the misinformation from USAPA regarding the inspection hole covers, an inordinate number of pilots wrote up the Airbus aircraft for missing inspection hole covers in the FDML, and refused to operate scheduled flights until repairs (which could have been deferred, and under normal circumstances would have been deferred) had been made. (*Id.* ¶ 14.) In all,

⁴ For issues related to specific aircraft, such as this, the manufacturer of the aircraft makes the determination and issues guidance as to whether there is any impact as to the airworthiness of the aircraft. (*Id.* ¶ 11.) The FAA does not go into that level of detail, and the manufacturer’s guidance is controlling absent contravening guidance from the FAA. (*Id.*)

the false communications issued by USAPA in late November/early December 2010 caused 19 flight delays totaling 1,047 minutes, with the average delay lasting 55 minutes. (*Id.* ¶ 15.)

On December 23, 2010, US Airways wrote a letter to USAPA summarizing the Company's findings and conclusion that USAPA purposely deceived pilots into refusing to fly safe airplanes in order to cause disruptions to US Airways' flights. (Hemenway Decl. ¶ 25, Ex. 11.) The letter asked that the USAPA Safety Committee immediately retract and correct the November 30 and December 1 Safety Alerts. (*Id.*) USAPA refused to do so at that time — and still refuses. (*Id.*)

4. USAPA Commissions a "Safety Culture Survey"

In the fall of 2010, USAPA commissioned a "Safety Culture Survey" to be conducted by a third-party, Illumia Corporation. (Declaration of Paul Morell ("Morell Decl.") ¶ 5.) The survey was conducted in October/November 2010. (*Id.*) The survey included a number of questions asking pilots to rate, on a seven-point scale, whether pilots agreed or disagreed with various statements. (*Id.*, Ex. 1.)

In December 2010, USAPA informed the Company that the Safety Culture Survey was completed and asked for a meeting with the Company. (*Id.* ¶ 6.) On January 25, 2010, representatives of US Airways attended a meeting with USAPA and a representative of Illumia. (*Id.*) At the conclusion of the meeting, US Airways was provided with a copy of the "abridged analysis of the survey results."⁵ (*Id.*) After reviewing and considering the analysis, on February 11, 2011, Paul Morell, US Airways' Vice President, Safety & Regulatory Compliance, sent a letter to USAPA conveying the Company's belief that USAPA was inappropriately using the

⁵ The abridged analysis of the survey results provided to US Airways are stamped "NOT FOR PUBLIC RELEASE." While the Company did not agree to treat the document confidentially, in order to avoid a dispute, it has not attached a copy to its public filings. Should the Court wish to review this document, however, US Airways can provide a copy to the Court.

survey to characterize pilots' concerns about seniority and contract negotiations as safety issues. (*Id.* ¶ 7, Ex. 2.)

The Company's conclusion was driven in part by the make-up of the survey participants. (*Id.* ¶ 8.) Although West pilots comprise 34% of US Airways' overall crew force, only 14% of the survey participants were West pilots — whose allegiance to USAPA is weak. (*Id.*) And nearly 50% of those pilots who responded to the survey are based in Charlotte, where USAPA's headquarters is located and ties to the Union are much stronger, even though just 29% of US Airways' pilots are based there. (*Id.*)

In its letter, the Company explained that, as USAPA knows, US Airways has implemented and invested very significant resources in numerous industry safety programs, including: the Aviation Safety Action Program (ASAP); Flight Operational Quality Assurance (FOQA); and Advance Qualification Program (AQP) — all of which the Company participates in voluntarily. (*Id.* ¶ 9, Ex. 2.) US Airways also is the industry leader in the FAA's Safety Management System (SMS) pilot program — a program developed in conjunction with the FAA to identify safety hazards and risks, develop risk mitigation strategies, and monitor their effectiveness. (*Id.* ¶ 9.) Indeed, US Airways is one of only two airlines in the United States to complete the program with a fully functioning SMS program, and the Company's SMS program is now serving as the model for the FAA as well as for other airlines. (*Id.*)

The Company also explained that, to the extent pilots have legitimate safety concerns, such concerns can and should be reported to US Airways through the reporting systems maintained specifically for that purpose — reporting systems of which USAPA is well aware and that its members have used effectively. (*Id.* ¶ 10, Ex. 2.) And these reporting systems are extensive and robust. (*Id.* ¶ 10.) Pilots at US Airways can report safety concerns in a number of

ways, including: submitting an online ASAP Report Form pursuant to the Aviation Safety Action Program; calling the Safety Hotline; completing an event report form (which goes directly to the Company's Safety Department for processing); reporting any safety issues to the pilot's supervisor or Chief Pilots; and reporting any safety issues to USAPA's safety officials. (*Id.*)

The Company also explained that the Aviation Safety Action Program or "ASAP" program was specifically designed for pilots systematically to identify and correct potential safety hazards and was developed with input from the pilots' predecessor union and renewed with input from USAPA. (*Id.* ¶ 11, Ex. 2.) The ASAP program is memorialized in a Memorandum of Understanding between the Company, USAPA, and the FAA. (*Id.* ¶ 11.) The ASAP program establishes an Event Review Committee (consisting of one management member, one USAPA member, and one FAA member) that reviews all ASAP reports to determine if an issue reported warrants further investigation or action. (*Id.*) If the Event Review Committee determines that an ASAP report warrants further action, the Committee will work to determine the cause and appropriate corrective action. (*Id.*) Notably, the ASAP program is the agreed-upon method for pilots to report safety issues at most airlines in the United States. (*Id.*)

Safety concerns reported through the other reporting systems are evaluated by the Company's Flight Data Analysis Group, comprised of representatives from various groups within the Company (including Safety, Flight Operations, Flight Technical, and Flight Training) as well as representatives of USAPA and the FAA. (*Id.* ¶ 12, Ex. 2.) And, by any standard, the Company's safety programs and reporting systems are effective and working. (*Id.* ¶ 13, Ex. 2.)

5. USAPA Confirms That It Is Using the Safety Survey as "Cover" to Engage in an Illegal Slowdown

The Company firmly believes that the alleged issues raised by the Safety Culture Survey simply reflect the fact that the participants were primarily disgruntled East pilots based in

Charlotte. But regardless of the Company's opinion, USAPA is using the survey results for an improper purpose. USAPA has not "stayed on message" with respect to its "safety" campaign, and USAPA's own publications confirm it is using the survey as a "cover" to engage in an illegal slowdown. USAPA first made clear that its intent behind commissioning the "Safety Culture Survey" was something other than safety when, on September 30, 2010, before the survey was even conducted, USAPA informed its members that its upcoming "Safety Culture Survey" would "have strong implications beyond just safety." (*See* Hogg Decl. ¶ 26, Ex. 10.)

And the real purpose behind the survey is confirmed in a March 1, 2011 publication issued by USAPA's Charlotte domicile, which includes comments made by USAPA's Safety Committee Chairman, Thomas J. Kubik ("Kubik"), to USAPA pilots in Charlotte. (*See id.* ¶ 27, Ex. 11.) In regards to the Safety Culture Survey, Kubik states:

- "This report gives us carte blanche authority to take back our airline"; and
- "Peer pressure is very important, our profession is under attack. Speak up to your fellow pilots and let them know they need to be good union pilots."

(*Id.*) A union "tak[ing] back [their] airline" has no relation to safety. (*See id.*) And there is certainly no reason to encourage pilots to exert "peer pressure" on other pilots to be "good union pilots" in terms of operating a safe airline. (*See id.*) But peer pressure to force each pilot to be a "good union pilot" is common in slowdown campaigns — and the reference to being a "good union pilot" has frequently been used by USAPA in its publications discussing contract negotiations. (*See id.*)

Notably, the same March 1, 2011 publication issued by USAPA's Charlotte domicile encourages pilots to fly "safe" and "slow" it down!" in the middle of a discussion of what it will take for US Airways' pilots to win their "battle" for a new contract. (*Id.*) That publication also

states: “We can only prevail when we collectively demonstrate to Doug Parker [US Airways’ CEO] and his minions who actually is running this airline. The sooner this occurs, the sooner the fight to your contract will be over. . . . The throttles and flight controls are in our hands . . . Fly Safe, remain focused, stay healthy, and if rushed slow it down!” (*Id.*)

6. USAPA Releases a Series of “Safety” Videos Encouraging the Illegal Slowdown

USAPA then started circulating additional communications to pilots regarding “safety” issues, including a series of videos addressing on-time “pressure distractions,” pilot fatigue as related to hotel and scheduling issues, MEL issues, and taxi issues. (*Id.* ¶ 28.) These communications demonstrate the concerted nature of the illegal slowdown as well as USAPA’s orchestration of that illegal slowdown. Virtually all of these communications focus only on purported safety concerns that, in the opinion of USAPA, require US Airways’ pilots to slowdown in the performance of their duties or otherwise could result in flight delays or cancellations. These videos show USAPA making direct efforts to change pilots’ behavior in a manner that impacts the operation. (*Id.*)

The first video, released on March 23, 2011, addresses on-time performance pressure and ground crews approaching aircraft. (*Id.* ¶ 29; Declaration of Sloane Giddon (“Giddon Decl.”) ¶ 3, Ex. 1.) In the video, Kubik encourages pilots to delay pre-flight procedures by “notify[ing] the flight attendants that [they] have numerous pre-flight checks that cannot be disturbed.” (Hogg Decl. ¶ 29; Giddon Decl. ¶ 3, Ex. 1.) By lengthening the pre-flight process, a pilot can delay the takeoff of the flight — a common technique in slowdown campaigns recognized in the case law. (*See* Hogg Decl. ¶ 29.) The video continues: “[I]n order to make that happen, you are going to close the flight deck door and [ensure that it will remain closed] until you have completed your pre-flight checks. Make absolutely certain that the closed door is your signal to

the flight attendants that the cockpit is sterile . . . Once [that] is complete, open the door. Any issues that have arisen during your sterile cockpit pre-flight duties can be handled once the flight deck is set up and ready to go.” (Giddon Decl. ¶ 3, Ex. 1.)

Next, on March 30, 2011, USAPA’s Safety Committee released a video addressing pilot fatigue. (Hogg Decl. ¶ 29; Giddon Decl. ¶ 4, Ex. 2.) In the video, Kubik states: “[i]f you are fatigued, you are done flying . . . If you are a reserve pilot, don’t accept a trip if you are fatigued. If you are called for a ridiculous pairing that you know will put you in a fatigued state, don’t accept.” (Giddon Decl. ¶ 4, Ex. 2.) The video also explicitly states that: “When enough of our pilots fully understand this requirement, and more importantly, act upon this requirement, then our substandard hotel situation will disappear with a speed you likely thought was not possible.” (*Id.*)

USAPA’s Safety Committee released yet another video on April 4, 2011, directing pilots to change their normal behavior and not accept aircraft with MELs — much like it did in November 2010 with respect to inspection hole covers. (Hogg Decl. ¶ 29; Giddon Decl. ¶ 5, Ex. 3.) The video stated, in part, that: “**Use your experience and judgment when confronted with an MEL.** Do not accept one that puts you and your crew into the yellow and compromises safety. Take all factors into consideration and never be intimidated by anyone whether from dispatch, maintenance, or the Chief Pilots’ office. Our safety culture is flawed, and we must put a stop to it. **We** make the final call on the MEL items we accept. Every item in the MEL is legal. Not every item in the MEL is safe. That is your decision, and your decision alone. Make the call and allow us to back you up if you are harassed or pushed. We must educate this management of our duties, our authority, and our total commitment to safety.” (Giddon Decl. ¶ 5, Ex. 3.) (emphasis in original video)

7. USAPA's Intensifies Its Campaign, and Anonymous Communications — That Track USAPA's Campaign Slogans — Also Encourage the Illegal Slowdown

USAPA's campaign for an illegal slowdown under the pretense of safety then further intensified. In approximately April 2011, USAPA started distributing yellow lanyards that pilots wear and use to carry their identification cards that state "Safety First" and "I'm on Board." (Hogg Decl. ¶ 30.) In response to an inquiry from West pilots regarding the "Safety First/I'm on Board" lanyards, USAPA's Communications Chairman stated that: "The lanyards are not however just a 'party gift' handed to everyone; they are handed to those, from any domicile, who have first demonstrated that they are onboard with the idea that safety comes before everything else . . . there are pilots roaming the system giving them out to those who demonstrate they are on board. If you're flying, demonstrate in some fashion that you're on board and have one of these pilots in the back, I would imagine you'll get one." (*Id.*, Ex. 12)

Notably, the same "Safety First" and "I'm on Board" slogans on the USAPA-issued lanyards also appear in other anonymous communications calling for a concerted, illegal slowdown (in the form of recorded calls to pilots, personal calls to pilots, text messages, and e-mails). For example, there were several calls made to pilots expressly encouraging them not to complete their "distance learning" by the FAA-imposed deadline of May 31, 2011. (*See id.* ¶ 17.) Pursuant to FAA requirements, pilots at US Airways (and other commercial airlines) are required to complete certain online training programs, known as "distance learning," by set deadlines each quarter. (*Id.* ¶ 16.) If a pilot does not complete the required training by the deadline, he or she will not be "legal" to fly until the training is completed. (*Id.*) Thus, if a pilot is scheduled to fly a flight but has not completed his or her required training, the Company will have to find a pilot who has completed the training to fly the trip. (*Id.*) If a significant number

of pilots collectively waited until just before the deadline or until after the deadline to complete the training, US Airways' operations would be disrupted. (*Id.*)

Beginning in mid-April 2011, however, US Airways' pilots began receiving both live and pre-recorded phone calls instructing pilots to do just that. (*Id.* ¶ 17.) Some callers read from a script, but all conveyed the message that the pilot should not finish his or her distance learning by the end of May 2011 to send a message to management. (*See id.*) At least one caller stated that he was given a list of phone numbers to call and was calling everyone on the "phone tree." (*Id.*)

In both the recorded calls and the live calls, the callers referenced "safety first," stated "I'm on board," and asked if the recipient of the call was "on board" — the same slogans found on the lanyards distributed by USAPA and included in other official USAPA-communications. (*Id.* ¶ 18.) For example, in one recorded call, the caller stated:

This is the captain with a safety action update. I'm on board, and we need you on board, too. The distance learning deadline's approaching on May 31st. I am asking that you do not finish this module until the deadline of May 31st. The same request is being made of every pilot on the east coast, and it's very important that you join in the effort. I want to thank you in advance for your participation. This action is part of what will be an inspiring [*sic*] campaign to restore our careers. The result of this first safety action on our operation is unknown, however the purpose is to send a clear message to management.

I know that participation will require a small sacrifice in our pay and schedules, but a small sacrifice now will pay large dividends in the end. I need to know if you're on board and if you plan on participating now and in the future. If so, would you please provide me with your preferred contact number? Please leave a voicemail at this number with your best contact number for future communications. Thank you.

(*Id.*; Giddon Decl. ¶ 7, Ex. 5.)

US Airways has investigated the source of these calls. (Hogg Decl. ¶ 19.) While the Company was able to obtain telephone numbers for some of the calls from "caller ID," and US Airways' corporate security team took measures in an attempt to determine an owner's name for

each of these telephone numbers, the Company was only able to confirm that the calls were from telephone numbers associated with untraceable pre-paid calling cards and disposable mobile phones — making clear that the caller did not want his or her identity obtained. (*See id.*) Indeed, in one of the recorded calls, there are two persons speaking and at the end of the recorded message, one caller confirms with the other: “it doesn’t say your name right?” (*Id.*; Giddon Decl. ¶ 7, Ex. 5.) Anonymous pilots also have placed stickers in US Airways’ pilot crew rooms and aircraft with the words “Distance Learning” with a circle around it and line through it — the well-known symbol for “No.” (Hogg Decl. ¶ 20, Ex. 6.)

In an effort to stop this aspect of the illegal slowdown, US Airways issued a written message to all pilots on May 19, 2011, stating that it was aware of the campaign to disrupt US Airways’ operations by delaying completion of distance learning, and informing pilots that such an illegal job action would not be tolerated. (*Id.* ¶ 21, Ex. 7.)

On May 24, 2011, USAPA responded to US Airways’ message by stating that it was “unaware of any concerted action in this regard” and that it did not “condone[] any action in violation of the status quo provisions of the Railway Labor Act.” (*Id.* ¶ 22, Ex. 8.) USAPA also posted a short note on its password-protected website, “advis[ing] that it is not USAPA’s policy to direct its members to collectively schedule their Distance Learning for the purpose of disrupting the Company’s flight schedule.” (*Id.* ¶ 22, Ex. 9.) USAPA, however, failed affirmatively to direct its pilots to complete distance learning as the RLA requires. (*See id.* ¶ 22.)

USAPA’s cursory posting was completely ineffective. (*Id.* ¶ 23.) As of May 28, 2011 (three days before the FAA-imposed distance learning deadline), 897 pilots (896 of whom were East pilots) had not completed their distance learning. (*Id.*) Three days before the deadline is relevant because US Airways assigns pilots to “trips” that sometimes last four days — and a pilot

that has not completed his training three days before the deadline could not be assigned to such a trip. (*Id.*) Because the program is online, the Company was able to ascertain that 60% of these 897 pilots had completed 94% of the training module questions, suggesting that the pilots were simply waiting until the deadline or sometime thereafter to answer the last few questions. (*See id.*) As a result, and in order to ensure that there were enough pilots to fly scheduled flights, the Company requested and was granted an allowance from the FAA to extend the qualifications of those pilots who had not completed the required training beyond the initial deadline of May 31. (*Id.* ¶ 24.) Absent this extension from the FAA, the Company would have had to cancel numerous flights. (*Id.*)

There also have been anonymous e-mails to pilots blatantly encouraging pilots to delay completion of their distance learning and engage in a variety of other job actions under the false pretense of safety — including the same safety issues and phrases that USAPA has addressed in its official communications. (*See id.* ¶ 31.) For example, on April 25, 2011, an e-mail was sent to pilots with the subject line “I’M ONBOARD” from an e-mail address (“pilotsarepissedoff@gmail.com”) not associated with an identifiable individual. (*Id.*, Ex. 13) Among other things, the e-mail asked pilots, beginning on May 1, 2011, to engage in slow taxi, stay home if they are fatigued, and refuse aircraft with legal MELs with the express purpose of “prov[ing] that [the pilots] are willing to endure a summer of inconvenience in exchange for decent wages.” (*Id.*)

The references in the e-mails to “Safety First” and “I’m On Board” match the lanyards with these same statements being distributed by USAPA. (*Id.* ¶ 32.) Moreover, several of the proposed job actions in the anonymous e-mails match the formal publications being issued by

USAPA, including the request that pilots write up all discrepancies when and where they occur, not accept aircraft with MELs, and call in fatigued. (*Id.*)

During this same time, decals were placed on aircraft and clipboards at US Airways with a frowning face, the words “HAD ENOUGH YET?!!,” and “+16” or “Had enough of Parker? Time to get serious about a contract BLOCK + 16.” (*Id.* ¶ 33, Ex. 14.) The reference to Parker is to Doug Parker, US Airways’ Chief Executive Officer, and “+16” is a reference to the fact that flights that arrive at least 15 minutes after their scheduled arrival time are considered late and count against an airline’s on-time performance record under the DOT’s standards. (*Id.* ¶ 33.)

A USAPA publication entitled “The Iron Compass” issued on April 27, 2011, addresses this same issue under the heading “This Week’s Safety First Review Items.” (*Id.* ¶ 34, Ex. 15.) The USAPA publication states: “The Department of Transportation counts a flight as on-time if it arrives less than 15 minutes after the scheduled time shown in the Computer Reservations System; therefore arrivals within 14 minutes (hence, A 14) are considered on-time.” (*Id.*) There is no reason for USAPA to include statements regarding the DOT’s standards for an on-time flight as a safety issue — other than to send a message to pilots to arrive later than 14 minutes to disrupt US Airways’ operations. (*Id.* ¶ 34.)

During this same April/May 2011 time period, Safety Committee Chairman Kubik started providing advice to US Airways’ pilots regarding aircraft operations in contradiction of the Company’s Standard Operating Procedures (“SOPs”). (Morell Decl. ¶ 14.) The Company’s SOPs have been developed as part of its safety program, and have been approved by the FAA. (*Id.*) In a March 31, 2011 communication entitled “What is Safety Culture and Why is it so important,” Kubik stated that his “guidance [to US Airways’ pilots] will, at times, differ, from SOPs.” (*Id.*, Ex. 3.) Since that time USAPA and Kubik have indeed issued several publications

that contradict the Company's SOPs, including in regards to gate hold procedures and specific SOPs regarding single engine taxiing. (*Id.* ¶ 15, Exs. 4-5.) Kubik's guidance to pilots has also mischaracterized how the Minimum Equipment List is to be applied and used by the Company and its pilots. (*Id.* ¶ 15, Ex. 6.) As to this issue, Kubik's advice attempted to change the long-standing FAA-sanctioned process regarding the Minimum Equipment List that has been used for many years by all airlines operating under the FAA's oversight. (*Id.* ¶ 15.)

As a result of Kubik's communications contradicting the Company's SOPs, on July 1, 2011, US Airways sent Kubik a letter advising him that he has no authority to advise pilots to disregard the Company's SOPs or to create different operating procedures for its pilots. (*Id.* ¶ 16, Ex. 7.) The letter also directed Kubik not to contradict the Company's SOPs, and explained that if USAPA or Kubik believes the Company's SOPs should be modified in any way, recommendations should be brought to the Company through USAPA's representation in US Airways' Safety Management System. (*Id.*) Kubik responded in a letter dated July 27, 2011, claiming that he is "a safety guy, period" and does not "get involved in politics . . . [or] contract negotiations." (*Id.* ¶ 17, Ex. 8.) As set forth herein, however, the evidence demonstrates otherwise.

On April 28, 2011, as a result of the general increase in communications encouraging the slowdown, US Airways sent a letter to USAPA demanding that it take immediate steps to stop this unlawful activity as required by the RLA. (Hemenway Decl. ¶ 26, Ex. 12.) USAPA, however, simply continued on its course. (*Id.* ¶ 27.) Instead of taking steps to stop the slowdown, USAPA released another safety video on May 11, 2011. (*See* Hogg Decl. ¶ 35; Giddon Decl. ¶ 6, Ex. 4.) This time, the video addressed "Chief Pilots," stating that "[i]f the Captain is dissatisfied with any aspect of the aircraft's airworthiness and/or maintenance status,

if he is not sure the operation can be safely executed, then the operation will stop until he is completely satisfied.”⁶ (Hogg Decl. ¶ 35; Giddon Decl. ¶ 6, Ex. 4.) The video emphasized that the purpose is to stop the operation: “Please make sure you understand this part. The operation will stop until he is completely satisfied. That satisfaction has nothing to do with the Chief Pilot. That decision is yours and yours alone.” (Hogg Decl. ¶ 35; Giddon Decl. ¶ 6, Ex. 4.)

In addition and despite the Company’s letter, USAPA even began using its “Strike Prep Committee” to disseminate purported safety information. On May 3, 2011, USAPA’s Strike Prep Committee released a publication linking USAPA’s purported safety campaign to working conditions, stating in part that: “it is time for us to make a concise and powerful statement that we will no longer tolerate unfair working conditions at our airline. What should you do? There are many things that we must focus on as we move forward. First and foremost is the safety culture. . . . We must MEET OR EXCEED the safety standards of the FOM [Flight Operations Manual] and FARs [Federal Aviation Regulations] in every single decision that we make. . . . A storm approaches, my friends.” (Hemenway Decl. ¶ 27, Ex. 13.)

Around the same time, USAPA also issued a hard-copy publication, entitled “Safety Committee Operational Guidance,” which was mailed to pilots’ homes and tracked the videos described above regarding maintenance write-ups and otherwise slowing down the operation. (Hogg Decl. ¶ 36, Ex. 16.) And on May 9, 2011, in further attempt to obtain leverage, USAPA issued a press release, which called for the termination of US Airways’ Vice President of Safety and Regulatory Compliance, Paul Morell, and attempted to garner media attention calling into question US Airways’ operations. (*See id.* ¶ 37, Ex. 17.)

⁶ Chief Pilots manage the pilots in their respective domiciles and also have responsibility for flight operations at their specific locations. (Hogg Decl. ¶ 35.) Chief Pilots play a role in ensuring pilots are safe, operate efficiently, and represent US Airways in a professional manner. (*Id.*)

Then, on May 10, 2011, USAPA responded to the Company's April 28 letter demanding that it stop the unlawful actions. (Hemenway Decl. ¶ 28, Ex. 14.) USAPA asserted that it did not endorse any concerted action in regards to pilots not completing distance learning, but that "[s]afety is another matter." (*Id.*) Instead of addressing the Company's contention that USAPA is engaged in a slowdown campaign under the guise of safety, USAPA's letter defended its actions and instructions to pilots with respect to slowing down the operation. (*Id.* ¶ 28.)

Next, on May 12, 2011, an e-mail was sent to US Airways' pilots from the e-mail address "thecaptain.safetyfirst@hotmail.com" containing a fake press release ("dated" June 26, 2011), which announces that US Airways has acquiesced to a new collective bargaining agreement as a result of pilots disrupting the operation and the traveling public choosing other airlines: "The announcement of an agreement seemingly came overnight [T]he frustration felt by the pilots over the slow pace of negotiations appears to have negatively affected the daily operations of the carrier to the point where passengers are 'booking away' from the airline potentially costing the carrier hundreds of millions in future revenue. After a stellar performance in 2010 and again in the first half of 2011, when US Airways' led the industry in on-time and completion factor the carrier recently plummeted to dead-last in on-time, flight completions and customer complaints. . . . (Does this intrigue you? Then forward it to your peers and get Onboard!)" (Hogg Decl. ¶ 38, Ex. 18.)

Indeed, despite US Airways' attempts to get USAPA to stop its campaign, USAPA has become even more brazen in its encouragement of pilots to cause delays. For example, on May 11, 2011, just as the summer heat was descending upon Charlotte and US Airways' east coast operations, USAPA issued a publication to pilots entitled "APU Usage and FOM Compliance." (*See id.* ¶ 39, Ex. 19.) The publication encouraged pilots to delay flights if the aircraft cabin was

not at a comfortable temperature: “If your passengers are boarded onto a hot aircraft prior to your arrival, it may be prudent to stop the boarding and have the flight attendants survey those already onboard the aircraft for signs of these symptoms. If they are observed, use your judgment as to the need to remove all passengers from the aircraft and have the paramedics called to evaluate the health of those that appear to be afflicted . . . If you are unable in spite of your best efforts to provide a comfortable aircraft for your passengers you may be left with no choice but to delay the flight until such time as another aircraft is available” (*Id.*)

In the June 22, 2011 edition of “The Iron Compass,” USAPA once again addressed “on-time pressures,” much like it did in its March 23, 2011 video on the same topic. (*Id.* ¶ 40, Ex. 20.) This time, USAPA expressly instructed pilots “to stop the operation” in response to such pressures. (*Id.*)

Most recently, USAPA purchased a full page advertisement in the Money Section of *USA Today* entitled “US Airways’ Unwritten Policy: Revenues First, Safety Second?,” which was published on July 22, 2011. (Morell Decl. ¶ 18, Ex. 9.) In the advertisement, USAPA alleged that, on June 16, 2011, certain US Airways pilots were pressured to ignore their safety concerns and fly a plane that needed maintenance. (*Id.*) Contrary to USAPA’s assertions, the FAA issued a statement with respect to the incident stating that it “found no violation of Federal Aviation Regulations” and that “US Airways followed their approved MEL procedures, and all maintenance procedures were followed in accordance with the operator’s approved maintenance program.” (*Id.* ¶ 19, Ex. 10.) US Airways was also compelled to issue a statement in response setting forth the Company’s position that “USAPA has embarked upon a smear campaign that in reality is all about contract negotiations, not safety” and is “the latest in a series of misguided efforts to put pressure on the Company as part of [contract] negotiations . . . us[ing] safety as a

negotiating tactic.” (*Id.* ¶ 19, Ex. 11.)

In addition to the recent increase in official USAPA publications, there has also been an increase in anonymous e-mails encouraging the slowdown. (Hogg Decl. ¶ 41.) On July 16, 2011, an e-mail was sent with the subject line “Meaning of being ‘ON BOARD’” from the e-mail address “bus321pilot@gmail.com.” (*Id.*, Ex. 21.) The e-mail stated that “[b]eing ‘ON BOARD’ means . . . do[ing] what you can to help our cause,” including being “15 MINUTES LATE EVERYWHERE.” (*Id.*) The e-mail also stated that pilots who do not take these actions should “GET OUT AND STOP BITCHING ABOUT A CONTRACT.” (*Id.*)

The communications encouraging the slowdown are also now being sent to pilots by text message. (*Id.* ¶ 42.) On approximately July 10, 2011, a note was found in the flight deck of a US Airways’ aircraft stating that: “ALL FUTURE MESSAGES AND ALERTS WILL BE COMMUNICATED VIA TEXT MESSAGE[.] Please text your name and cell number to: 704-249-6660[.] You will be added to the communication list[.] Management is very upset about the deteriorating performance of our airline. It’s time to turn up the heat. WE WILL Prevail[.] Pass this along to another pilot that you know is “ON BOARD[.]” (*Id.*, Ex. 22.)

And on July 22, 2011, an e-mail was sent from an e-mail address “angrypilots@gmail.com.” (*Id.* ¶ 43, Ex. 23.) The e-mail noted that a future “action” will take place, and that pilots who have joined the “text network” will receive a text message with the date of the “action” and that it would be “profoundly effective.” (*Id.*) Until that time, the e-mail asked pilots to harm the Company’s on time performance numbers by “arriv[ing] at least 16 minutes late most of the time,” writing up maintenance issues “no matter how small they must seem,” and engaging in slow taxi, among other things. (*Id.*) The e-mail also thanked pilots “for being on board” and encouraged the use of that phrase in official pilot communications. (*Id.*)

Also on July 22, 2011, an e-mail was sent from the e-mail address “b767pilotdriver@gmail.com” directing pilots to “Remember to SLOW DOWN for safety!!!” (*Id.* ¶ 44, Ex. 24.) After instructing pilots as to various actions they should take to disrupt operations, the e-mail concluded with: “We have them on the run. Time for the knock out punch.” (*Id.*)

8. USAPA Intimidates Pilots Who Do Not Participate in Its Illegal Slowdown Campaign

USAPA has intimidated pilots who refuse to acquiesce in the union’s illegal activities. On June 23, 2011, USAPA’s Charlotte domicile issued an update asking pilots to report their colleagues who accept flight assignments from the scheduling department referred to in the East pilot collective bargaining agreement as POTA (Priority of Trip Assignments). (Hemenway Decl. ¶ 29, Ex. 15.) The publication instructs pilots not to answer calls from the scheduling department, and goes on to state that the names of pilots who accept POTA assignment will be published to the union membership and that such pilots will be nominated for “The Doug Parker Golden Bonus Award” — described by USAPA as an award “to be given in recognition of any pilot who goes above and beyond the call of duty to make sure Doug Parker and his management team continues to ‘earn’ their hefty bonuses.” (*Id.*) The update provided examples of certain pilots who were nominated, including a pilot who answered a call from the scheduling department and accepted a POTA assignment in order to prevent a flight cancellation (which USAPA sarcastically referred to as “valiant efforts”). (*See id.*)

Then on July 24, 2011, an anonymous text message was sent to East pilots stating: “Seems like we have our first winner for the COMPANY SUCK UP AWARD... PINK PANTY AWARD or whatever you want to call it. This A330 CAP on Reserve, on July 15th had 1 Day Available, suddenly on July 16th he is on a FRA 3 day trip. Congratulations go to [rank and file

US Airways pilot] TOM BELTZ as our first winner. Keep up the good work by screwing all your fellow pilots that are trying to get a contract we deserve. If you have a good reason please let everyone know.” (*Id.* ¶ 30, Ex. 16.) Around this same time, a card was placed in a pilot’s mailbox stating: “CONGRATULATIONS! You’re a WINNER! Your heroic effort to help management achieve their bonus checks has earned you the Pretty Pink Panties award[.] Do you want a new contract? EARN IT[.]” (*Id.* ¶ 31, Ex. 17.)

Other anonymous e-mails have also been distributed threatening pilots who do not participate in USAPA’s campaign. (*Id.* ¶ 32.) For example, on July 16, 2011, an anonymous e-mail stated that it would publish the names of pilots who did not “drop trips” — a process by which pilots can reduce their schedule and which if done collectively can force the Company to cancel flights. (*Id.*, Ex. 18.) And a July 22, 2011 anonymous e-mail instructing pilots to take steps to hurt the Company’s on time performance measures expressly stated that “[p]eer pressure is an important aspect of [the] effort.” (*Id.* ¶ 33, Ex. 19.) The e-mail stated that the author “will make sure that all of our pilots know who is not strong enough to walk the walk. . . and this is no place for pansies,” noting that while the on time performance of individual crews is being monitored, pilots can submit nominations for “company pilot of the week” to “captainsonboard@aol.com.” (*Id.*) And another anonymous e-mail from July 22, 2011 (from the e-mail address “b767pilotdriver@gmail.com”) stated that the sender of the e-mail had obtained a list of the names of pilots who accepted voluntary flying and stating that “We will be watching these same individuals” (*Id.* ¶ 34, Ex. 20.)

9. West Pilots Have Recognized and Communicated to the Company That USAPA’s Campaign Is an Illegal Slowdown

West pilots have recognized USAPA’s campaign as the illegal slowdown that it is. On May 1, 2011, a West pilot sent an e-mail to US Airways’ Chief Executive Officer and its

President, stating:

Mr. Cleary [USAPA's President] has transformed his vocal criticism of US Airways' safety culture into an organized and illegal job action complete with ID lanyards and a phone tree. We've received numerous reports from pilots whom [sic] have received anonymous phone calls and text messages cryptically calling for an organized work action. They must believe that by illegally sabotaging the operation and jeopardizing the financial health of our airline that Mr. Parker will cede to USAPA's demands for an industry standard contract and DOH. We the west pilots think its time to stop this.⁷

(*Id.* ¶ 35, Ex. 21.)

And on May 10, 2011, a West pilot sent an e-mail to US Airways' Chief Executive Officer stating, in part:

I cannot speak for the rest of the "West" pilots. However, I think each one of them would agree that the actions of our so called union USAPA are not only inappropriate, but often down right embarrassing. I do not support USAPA's so called "onboard" campaign. I do not support USAPA's efforts to publicly suggest that US Airways is an unsafe airline. In my opinion these are simply the actions of a desperate group trying to make a mis-placed political statement.

(*Id.* ¶ 36, Ex. 22.)

And on July 1, 2011, a West pilot sent a letter praising US Airways' "strong, vibrant, and adaptive safety culture" and noting that USAPA's publications and specifically its Safety Committee is only "intended to politicize the safety process" and its communications contain an "implicit message" to "violate federal law by engaging in fruitless and illegal job actions." (*Id.* ¶ 37, Ex. 23.)

D. USAPA's Illegal Slowdown Has Irreparably Injured US Airways and the Traveling Public

1. USAPA and the East Pilots' Actions Have Caused Operational Disruptions That Cannot Be Explained by Chance

The evidence demonstrates that USAPA's directives to its membership have been

⁷ To protect the West pilots from intimidation and harassment, their names have been redacted from US Airways' public filings.

effective, and these changes in the status quo cannot be explained by “chance.” US Airways has an elaborate system for tracking and compiling detailed data regarding delayed departures, taxi times, maintenance write-ups, and a number of other variables that impact the operations of US Airways. (Hester Decl. ¶ 6.) This data demonstrates that the East pilots have been engaged in a concerted effort to alter the status quo and illegally slow down the operation, and the West pilots have not altered their behavior.

In accordance with the May 1 start date set forth in certain of the e-mails encouraging the illegal slowdown, pilots began to disrupt the operation on May 1 by delaying departures, engaging in slow taxi, increasing the frequency of their maintenance write-ups, and calling in fatigued. The rate of delayed flights caused by pilots as tracked by the Company, which is historically just over 1.31%, began to rise sharply on May 1 and has averaged approximately 2.85% since that time. (Expert Report of Darin N. Lee, Ph.D. (“Lee Report”) ¶ 6.)

There also has been a dramatic increase in “taxi” times (the time it takes a pilot to taxi an aircraft to and from the gate). Historically, the average “taxi in” time (when a pilot taxis the aircraft to the gate after landing) for East pilots is 6.26 minutes. (*Id.* ¶ 31.) Since May 1, however, the average has increased by 0.63 minutes (after controlling for weather and other factors). (*Id.* ¶ 6.) And “taxi out” times (when a pilot taxis from the gate to the runway) have similarly increased. Historically, the “taxi out” time for East pilots is 19.35 minutes, but since May 1, that has increased by 0.90 minutes (after controlling for weather and other factors). (*Id.* ¶ 31.) The chance of this being random is also less than 1%.

A comparison of US Airways’ East operations with its “Express” operations (those performed by US Airways’ regional carrier partners whose pilots are represented by a different union and have not been part of USAPA’s campaign) also demonstrates that the increase in taxi

times is a result of concerted action. This comparison is important because US Airways' Express operations are subject to the same weather and any other airport specific issue that would impact taxi time performance, but the pilots for Express operations are not members of USAPA. (*Id.* ¶ 23.) In general, Mainline taxi times tend to be longer than Express taxi times. (*Id.* ¶ 24.) Historically, the difference between East and Express "taxi in" times is 0.24 minutes, but this has increased to 1.14 minutes since May 1 — nearly four times the historical average. (*Id.* ¶¶ 24-25 n.32.) By way of example, the probability of the observed difference between East Mainline and Express taxi-in times for the week ending July 26, 2011 being random as opposed to the result of concerted activity is approximately one in 6,179. (*Id.* ¶ 25.) The gap between East and Express taxi out times has similarly widened from a historical average of approximately 2 minutes to nearly 3.5 minutes since May 1.

The number of maintenance write-ups by East pilots also has increased dramatically. Pilots have authority and discretion to write-up any maintenance item. (*See* Hogg Decl. ¶ 7.) While there is no prohibition against pilots writing up any and all maintenance items, including very minor items (e.g., broken passenger light, a non-essential placard, or a host of other items), in normal circumstances, pilots exercise their authority and discretion to not write up deferrable minor items when it could produce a delay or cancellation of a flight. (*Id.*) For the week ending July 26, 2011, the percentage of flights for which East pilots wrote up maintenance issues was over 33% compared to a historical average of approximately 24%. (Lee Report ¶ 6.) Based on a statistical analysis of US Airways' detailed historical data, the chance of this being random — as opposed to concerted activity — is approximately one in 800,000. (*Id.*) Notably, the rate at which East pilots are increasing their use of maintenance write-ups is far greater at airports where US Airways does not have its own maintenance personnel — thus making such write-ups

much more likely to result in a flight delay or cancellation. (*Id.* ¶ 16.)

Calls from pilots who are reporting that they are too fatigued to fly have also increased sharply. Historically, only 17.5% of all days have had an East pilot fatigue call, but that number has increased to 42% since May 1. (*Id.* ¶ 19.) Put another way, prior to May 2011, there were fewer than seven East pilot fatigue calls per month. (*Id.* ¶ 20.) In May and June of this year, however, there were 17 and 19 fatigue calls by East pilots, respectively. (*Id.*) The probability that the level of fatigue calls observed in May and June is the result of random statistical variation is less than 0.26% and 0.03%, respectively. (*Id.*)

All of the increases in operational metrics described above are considered “statistically significant.” (*Id.* ¶ 6.) In other words, these increases were all well in excess of what conventional statistical analysis would consider to be “random” occurrences. (*Id.*) As explained in the Lee Report, economists and statisticians routinely rely upon a variety of statistical techniques to determine the likelihood that an observed outcome lies within the range of random variation by comparing observed values of the data to the statistical distribution of a “control” period. And applying these techniques here confirms that these changes are the result of collaborative pilot action. Indeed, for each of these changes, there is more than a 99% confidence level (*i.e.*, statistician applied widely-accepted standards would conclude that there is a less than 1% chance that the changes were random in nature rather than the result of concerted activity) or a 95% confidence level (*i.e.*, statistician applied widely-accepted standards would conclude that there is a less than 5% chance that the changes were random in nature rather than the result of concerted activity). (*Id.* ¶ 13 n.24.)

Equally important is that, during this same time period of May 1 to the present, all these operational performance metrics for West pilots have remained consistent with historical

averages. (*Id.* ¶ 56.)

2. USAPA and the East Pilots' Actions Directly Translate into Irreparable Harm in the Form of Lost Customer Goodwill and Damage to US Airways' Reputation

The East pilots' dramatic changes in behavior directly translate into irreparable harm in the form of a tarnished reputation in the marketplace and lost customer goodwill as well as significant costs. US Airways' rankings in on-time performance have dropped dramatically since May 1. While US Airways has ranked either first or second among its peers in terms of on-time performance (as tracked by the DOT) in 2008, 2009, 2010, and in the first four months of 2011, it has ranked next to last since May of this year. (Hester Decl. ¶ 13; Lee Report ¶ 40, Ex. 17.) On a historical basis, the percentage of US Airways' flights (flown by East pilots) arriving on time (per the DOT's standard of within 14 minutes of the scheduled arrival time) has averaged 79%. (Lee Report ¶ 6.) Since May 1, however, this figure has dropped by almost 11 percentage points (after controlling for weather and other factors). (*Id.* ¶ 41.) And customers follow these rankings and make decisions based on them. (Hester Decl. ¶¶ 7, 12.) When an airline has strong operational performance, it attracts more customers, and an airline with weak operational performance attracts fewer customers. (*Id.* ¶ 7.)

In addition, since May 1, Dr. Lee estimates that East pilot actions have resulted in more than 1% of all East flights being cancelled. (Lee Report ¶ 6.) This amounts to nine to ten cancellations per day since May 1, caused by the East pilots' actions. (*Id.*)

And of course, late and cancelled flights make for unhappy customers and lost customer goodwill that cannot be replaced. Since May 1, this illegal slowdown has disrupted the plans in the form of a late arriving flight, a cancelled flight, a missed connection by a passenger, or a failure of a passenger's bags to make the connecting flight (late arriving flights often result in

passengers or bags missing connections) of many, many thousands of members of the traveling public. Cancelled flights alone have impacted an estimated 1,173 passengers a day — or 105,500 members of the traveling public since May 1. (*Id.*) And there has been an increase of more than five misconnected bags per thousand connecting passengers at Charlotte (the Company's largest connecting airport) since May 1 — which represents an increase of approximately 45% when compared to the historical average of 11.59 bags per thousand connecting passengers. (*Id.* ¶ 51 n.58.)

Many of these customers who have been directly impacted will undoubtedly question whether to fly US Airways in the future. (Hester Decl. ¶ 11.) If other things are equal, a passenger is more likely to choose an airline that he or she believes will arrive on-time and which the passenger has had a good experience with. (*Id.*) Moreover, unhappy customers talk to their family and friends about bad travel experiences, and often times broadly share their experience through social media, thus eroding goodwill of other customers or potential customers who were not directly impacted by the delay or cancelled flight. (*Id.*) And regardless of whether the operation is returned to normal, it is likely that certain of these passengers will never return. (*Id.*)

The pilots' concerted actions are also causing direct financial harm to the Company through increases in US Airways' costs and forgone revenue. Dr. Lee estimates that, should the current level of pilot job action persist, US Airways' damages from the illegal slowdown would be approximately \$377,000 per day. (Lee Report ¶ 54.) This represents approximately \$348,000 per day in forgone passenger revenue from the erosion of passenger goodwill and the decline in relative service quality, more than \$10,000 per day in costs associated with a passenger's bags missing a connection, and approximately \$18,800 per day in added fuel consumption, wages, and

engine maintenance costs from prolonged taxi times. (*Id.* ¶¶ 46, 49, 52.) Notably, this estimate is conservative in that it does not include costs associated with passenger missed connections.

(*See id.* ¶ 53.)

3. USAPA and the East Pilots' Actions Directly Translate into Irreparable Harm to the Traveling Public

USAPA's and the East pilots' actions are also causing irreparable harm to the traveling public. Each flight that is late or cancelled results in disruption to the passengers' daily lives, including adverse impact such as missing an important family or business event. (Hester Decl. ¶ 14.) This harm to the traveling public is real and in many situations extremely disruptive. (*See id.*)

4. USAPA and the East Pilots' Actions Directly Translate into Harm to US Airways' Other Employees

USAPA's campaign is also directly harming US Airways' employees. (*Id.* ¶ 15.) As part of its efforts to improve and maintain operational reliability, US Airways established the "Triple Play Program," which provides monthly bonuses to more than 30,000 eligible employees (including 8,000 US Airways' employees based in Charlotte) if US Airways achieves a first place ranking in any of three DOT-measured metrics (on-time arrival, mishandled bags, and customer complaints) relative to its primary competitors. (*Id.*) Under the program, employees receive \$50 for each first place ranking in each metric for each month — or up to \$150 per eligible employee per month. (*Id.*) This program has resulted in significant payouts to US Airways' employees — earning employees approximately \$24 million in 2010. (*Id.*) This translates into \$650 per employee in 2010. (*Id.*) Thus, because USAPA's campaign is having a significant impact on US Airways' operational performance in terms of these rankings, USAPA is also causing direct financial harm to US Airways' employees. (*Id.*)

E. US Airways Has Attempted to Resolve This Dispute Without Judicial Intervention

As detailed above, US Airways has made multiple attempts to get USAPA to stop its illegal conduct. Specifically, US Airways sent letters informing USAPA that its actions are a violation of the RLA and requesting that it take actions to stop the slowdown on December 23, 2010, February 11, 2011, April 28, 2011, and July 1, 2011. In response, USAPA denied that it was engaged in an illegal slowdown and, with the exception of a brief posting on its website regarding distance learning, has refused to take any action to stop the actions of the pilots. Rather, as explained above, the illegal slowdown has only intensified. The Company has also counseled, warned, and disciplined pilots engaging in slowdown tactics in an attempt to deter this activity. (Hogg Decl. ¶ 45.)

III. ARGUMENT

USAPA's attempt to put pressure on US Airways in ongoing contract negotiations by disrupting operations through the use of its safety campaign is a blatant violation of its status quo obligations under Section 2, First, of the RLA, as established by the applicable legal precedent. *See, e.g., United Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 563 F.3d 257 (7th Cir. 2009); *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 238 F.3d 1300 (11th Cir. 2001); *United Air Lines*, 243 F.3d 349. These cases all arise in the identical context as here — a union attempting to put pressure on an airline in order to gain leverage in contract negotiations by disrupting operations — and all expressly confirm that in this situation, an injunction must issue.

Any claim by USAPA that this is part of an actual safety campaign is not credible. First, in its safety publications, USAPA has not “stayed on message.” Indeed, USAPA has repeatedly conveyed its safety directives in the middle of publications discussing USAPA's “battle” for a new contract. Second, USAPA's safety campaign arose in the middle of contract negotiations

and coincides with the failure of the parties to reach an agreement after several years of negotiations. As confirmed by the case law, these facts alone are more than sufficient to demonstrate that USAPA's "Safety First" campaign is simply a guise to encourage pilots to slowdown. *United Air Lines*, 243 F.3d 349. Here, however, the true purpose of USAPA's campaign is further confirmed by the fact that it has only manifested itself in the behavior of the East pilots, while the same operational metrics remain within normal ranges for West pilots. In this situation, any claim by USAPA that its campaign is about actual safety concerns, and not a concerted, illegal slowdown, must be rejected.

A. USAPA's Slowdown Campaign Violates Its Status Quo Obligations under Section 2, First, of the RLA

The principal purpose of Congress in enacting the RLA was to prevent strikes or other interruptions to the nation's transportation systems. 45 U.S.C. § 151(a); *Tex & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 565 (1930). To this end, Section 2, First, of the RLA provides that "[i]t shall be the duty of all carriers, their officers, agents, and employees to exert *every reasonable effort to make and maintain agreements* concerning rates of pay, rules, and working conditions . . . *in order to avoid any interruption to commerce or to the operations of any carrier* growing out of any dispute between the carrier and the employees thereof." 45 U.S.C. § 152, First (emphasis added). The restrictions of Section 2, First, apply equally to individual members of the union as to the union itself. *See Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 238 F.3d 1300, 1308-09 n.19 (11th Cir. 2001).

The Supreme Court has described Section 2, First, as "[t]he heart of the Railway Labor Act." *See Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969). And the duty to make and maintain agreements without interruption to the carrier's operations is not "a mere statement of policy or exhortation to the parties." *See Chi. & N.W. Ry. Co. v. United*

Transp. Union, 402 U.S. 570, 577 (1971). It is an affirmative legal obligation, enforceable by injunction, without regard to the Norris-La Guardia Act, 29 U.S.C. § 101 *et seq.* (“NLGA”). *See id.* at 581.

Until completion of the RLA negotiation/mediation process (which has not occurred as explained below), the status quo obligation of Section 2, First (1) prohibits a union from instigating or encouraging a slowdown (or any other change in the status quo); and (2) requires a union to make all reasonable efforts to prevent or stop a slowdown. This has been repeatedly confirmed by the lead cases in this area. *See, e.g., United Air Lines, Inc.*, 563 F.3d 257; *Delta Air Lines, Inc.*, 238 F.3d 1300; *United Air Lines*, 243 F.3d 349. As explained below, USAPA is violating both of these obligations.

1. USAPA Has Violated Its Status Quo Obligations by Instigating and Encouraging a Slowdown

Section 2, First, prohibits either party from altering the status quo or otherwise attempting to employ economic self-help from the moment a union is certified until the parties have exhausted the negotiation and NMB mediation process provided for in Section 6 of the RLA. *See Consol. Rail Corp.*, 491 U.S. at 302-03; *see also Bhd. of Ry. & S.S. Clerks v. Fla. E. Coast Ry. Co.*, 384 U.S. 238, 244 (1966). Here, the parties are still in the midst of that process. Specifically, the parties are currently engaged in NMB-mediated negotiations — and these negotiations shall continue until the NMB determines that further efforts to bring about agreement through mediation will be unsuccessful.⁸

⁸ At that point, it will offer both parties the option of voluntary but binding arbitration — known as a “proffer of arbitration.” If either party declines arbitration, there is a “release” from mediation. Once the release has been issued, a 30-day cooling-off period is invoked. During the cooling-off period, the NMB normally invites the parties to continue to meet. These meetings are commonly referred to as “super mediation.” Unless a Presidential Emergency Board is created during the cooling-off period, self-help is permitted at the end of the cooling-off period. *See* 45 U.S.C. §§ 155, 156; *see also* <http://www.nmb.gov/mediation/faq-mediatio.html>.

But until the conclusion of that process, the status quo obligations of Section 2, First, require the parties “to preserve and maintain unchanged those *actual, objective working conditions and practices, broadly conceived*, which were in effect prior to the time the pending dispute arose,” regardless of whether the parties have a contractual right to change the existing practices. *See Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 153 (1969). The existing practices, not the parties’ contractual rights, define the status quo. *See, e.g., United Air Lines*, 243 F.3d at 361-62; *Delta Air Lines*, 238 F.3d at 1305 (same).

Thus, the prohibition against economic self-help by a union applies not only to strikes, but to any alteration of the status quo that is designed to put economic pressure on the carrier. Accordingly, federal courts are authorized under Section 2, First, “to enjoin not only strikes but also ‘union conduct . . . which has the consequences of a strike.’” *See United Air Lines*, 243 F.3d at 362 (citing *Air Line Pilots Ass’n Int’l v. United Air Lines, Inc.*, 802 F.2d 886, 906 (7th Cir. 1986)).⁹ And federal courts have routinely invoked this principle to enjoin slowdowns. *See, e.g., United Air Lines*, 243 F.3d at 361; *United Air Lines, Inc. v. Air Line Pilots Ass’n, Int’l*, 185 L.R.R.M. (BNA) 2562 (N.D. Ill. Nov. 17, 2008), *aff’d*, *United Air Lines*, 563 F.3d 257 (7th Cir. 2009); *Long Island R.R. Co. v. Sys. Fed’n No. 156, Am. Fed’n of Labor*, 368 F.2d 50 (2d Cir. 1966); *Tex. Int’l Air Lines, Inc. v. Air Line Pilots Ass’n Int’l*, 518 F. Supp. 203 (S.D. Tex. 1981).¹⁰

The fact that a slowdown campaign is carried out under the guise of “safety” does not

⁹ *See, e.g., Elevator Mfrs.’ Ass’n v. Local 1, Int’l Union of Elevator Constructors*, 689 F.2d 382, 386 (2d Cir. 1982) (“[t]hat the overtime was designated as voluntary in the contract does not . . . render the concerted refusal to perform it any less a strike”).

¹⁰ *See also Pan Am. World Airways, Inc. v. Transp. Workers Union*, 117 L.R.R.M. (BNA) 3350 (E.D.N.Y. 1984); *Trans World Airlines v. Int’l Ass’n of Machinists*, 87 L.R.R.M. (BNA) 2556 (W.D. Mo. 1974); *Pan Am. World Airways, Inc. v. Indep. Union of Flight Attendants*, 93 Lab. Cas. (CCH) ¶ 13,307 (S.D.N.Y. 1981); *Itasca Lodge 2029, Bhd. of Ry. & S.S. Clerks v. Ry. Express Agency, Inc.*, 391 F.2d 657, 663 (8th Cir. 1968); *Delta Air Lines*, 238 F.3d at 1311; *United Air Lines v. Int’l Ass’n of Machinists*, 54 L.R.R.M. (BNA) 2154 (N.D. Ill. 1963).

protect a union or otherwise alter the status quo obligations or the analysis to determine if there is a violation. In *United v. IAM*, for example, the Seventh Circuit held that the IAM (the union representing United’s mechanics) instigated and encouraged an illegal slowdown through publications issued under the guise of “safety.” *United Air Lines*, 243 F.3d at 355-57. The Seventh Circuit found the IAM’s publications stressing “safety first” and encouraging mechanics to “work safe” and “keep safety first” were “commonly recognized signals . . . for a work slowdown” and were intended to urge mechanics to engage in a work slowdown. *See id.* at 355-57, 366. The Seventh Circuit’s conclusion was based in part on the context of the “safety first” and “work safe” statements — which were included in discussions addressing the lack of progress in contract negotiations — and the prominent nature of the messages (*e.g.*, they were often in bold). *Id.* at 366-67. And although the same publications also urged members not to engage in a slowdown, “such statements [were] dwarfed by the messages to ‘work safe,’ leaving the clear impression that the relatively inconspicuous statements discouraging a slowdown were not meant to be taken at face value.” *See id.* Accordingly, the Seventh Circuit ordered the district court to enter a preliminary injunction.¹¹

Similarly here, USAPA has instigated and encouraged a slowdown under the guise of safety. Indeed, the name of USAPA’s campaign — “Safety First” — is one the same slogans that the Seventh Circuit found to constitute code for a slowdown. And just as the Seventh Circuit concluded that the context of the “safety” messages (in the middle of publications

¹¹ The district court had previously denied injunctive relief on the grounds that the temporary restraining order it issued was “somewhat ineffective” and that it would be “more effective” for United to try to resolve the problem by directly disciplining or terminating individual employees. *See id.* at 363, 369. The Seventh Circuit criticized this reasoning, holding that “[w]hether United can diminish or even stop the work slowdown through its own actions has nothing to do with the IAM’s enforceable duty to do everything reasonable to end it” and noting that United would otherwise be required “to assume IAM’s duty altogether.” *See id.* at 363.

discussing the status of contract negotiations) and the fact that the safety portions of the messages were in bold font demonstrated that the IAM's real intent was to encourage a slowdown, this Court should reach the same conclusion here. The Seventh Circuit's conclusion is intuitive as to aircraft mechanics (who are highly-trained professionals and know to work safe), and at least equally intuitive as to pilots (who are highly-trained professionals and know not to fly an unsafe airplane).

For example, a March 1, 2011 publication issued by USAPA's Charlotte domicile encourages pilots to fly "safe" and "slow it down!" in the middle of a discussion of what it will take for US Airways' pilots to win their "battle" for a new contract, and emphasizes the safety portion of the message in bold.¹² (Hogg Decl. ¶ 27, Ex. 11.) Indeed, the only difference between USAPA's publications and the IAM publications on which the Seventh Circuit relied in concluding the IAM was encouraging a slowdown is that the IAM publications also included statements discouraging a slowdown.

In addition to revealing its true intent by addressing safety in the context of negotiations, USAPA also has revealed its true intent by issuing "safety" publications addressing issues that have no relation to safety. For example, on April 27, 2011, under the heading "This Week's

¹² That relevant portion of that publication states: "We can only prevail when we collectively demonstrate to Doug Parker and his minions who actually is running this airline. The sooner this occurs, the sooner the fight to your contract will be over. . . . The throttles and flight controls are in our hands, and we are the ultimate gatekeepers to prevent these men from causing further harm to our company We are proud of this pilot group and know that when you collectively put your minds, hearts, and wills into the battle we will prevail. It is now first down and ten; it is time to give Mike Cleary the ball to lead us to the end zone. We are committed to get this done. It is time to go out and "win one for the Gipper"!! . . . Fly Safe, remain focused, stay healthy, and if rushed slow it down! Remain committed to the goal of no less than an industry-standard contract by delivering no more favors. . . . **Remember, it is your duty to always keep it in the green. We must all focus on meeting or exceeding all US Airways Safety Standards. It is time for all US Airways Pilots to engage in the fight of our careers. United we stand, divided we fall.**" (Hogg Decl. ¶ 27, Ex. 11.) (emphasis in original).

Safety First Review Items,” USAPA explained to pilots that the DOT counts a flight late if it arrives more than 14 minutes after its scheduled arrival time. (*Id.* ¶ 34, Ex. 15.) There is no reason for USAPA to include statements regarding the DOT’s standards for an on-time flight as a safety issue — other than to send a message to pilots to arrive later than 14 minutes to disrupt US Airways’ operations. (*Id.* ¶ 34.) And this official USAPA publication coincided with the appearance of stickers in pilot crew rooms stating “+16” and “Had enough of Parker? Time to get serious about a contract BLOCK + 16” — references to causing flights to arrive at least 15 minutes after the scheduled arrival time so that the flights would be considered late by DOT standards. (*Id.* ¶ 33, Ex. 14.)

Moreover, certain of USAPA’s publications containing safety messages are being issued by USAPA’s Strike Preparedness Committee, further confirming that the real purpose is to encourage a slowdown. For example, on May 3, 2011, USAPA’s Strike Prep Committee — not its Safety Committee — released a publication stating that: “We must MEET OR EXCEED the safety standards of the FOM [Flight Operations Manual] and FARs [Federal Aviation Regulations] in every single decision that we make.”¹³ (Hemenway Decl. ¶ 27, Ex. 13.) And instructing pilots to “MEET OR EXCEED” the safety standards of the Flight Operations Manual and Federal Aviation Regulations is well-known in the airline labor relations context to mean that pilots should slow down by strictly adhering to such rules. *See, e.g., United Air Lines, Inc.*

¹³ That publication states in relevant part: “Friends, it is time for us to make a concise and powerful statement that we will no longer tolerate unfair working conditions at our airline. What should you do? There are many things that we must focus on as we move forward. First and foremost is the safety culture . . . We must MEET OR EXCEED the safety standards of the FOM [Flight Operations Manual] and FARs [Federal Aviation Regulations] in every single decision that we make . . . Team Tempe is gloating that our customer complaints are down, and they think that our level of service is just fine. We pilots are the eyes and the ears of our company, and we know differently . . . A storm approaches, my friends.” (Hemenway Decl. ¶ 27, Ex. 13.)

v. Air Line Pilots Ass'n, Int'l, 185 L.R.R.M. (BNA) 2562, at *65-66 (N.D. Ill. Nov. 17, 2008), *aff'd*, 563 F.3d 257 (7th Cir. 2009).

Based on these publications (as well as the numerous other examples cited in the Statement of Facts), USAPA has blatantly violated its status quo obligations by encouraging pilots to engage in an illegal slowdown and by threatening to expose and retaliate against pilots who do not cooperate in the slowdown.¹⁴ And as set forth above, USAPA's encouragement and threats have been effective. The fact that USAPA has done so under the guise of safety makes no difference. Indeed, to allow a union to avoid its obligations under Section 2, First, by simply referencing safety in its communications encouraging a slowdown, as USAPA has done here, would eviscerate the "[t]he heart of the Railway Labor Act." *See Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969).

2. USAPA Has Violated Its Status Quo Obligations by Failing to Make Every Reasonable Effort to Prevent and Discourage the Slowdown

Even if a union does not directly instigate or encourage a slowdown, it "is statutorily bound to do everything possible to 'maintain' the CBA so that commerce is not in any way interrupted." *Delta Air Lines*, 238 F.3d at 1310. In *Delta*, the district court found that there was an ongoing concerted effort on the part of Delta's pilots to refuse overtime work, but refused to issue an injunction against ALPA based on the fact that ALPA did not support this effort and in fact counseled against it. *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 123 F. Supp. 2d 1356 (N.D. Ga. 2000).

On appeal, the Eleventh Circuit held that "[t]he duty of ALPA under the RLA is sufficiently high that even if it has not sponsored or ratified the unlawful job action by the pilots, it has a duty to end such unlawful action." *Delta Air Lines*, 238 F.3d at 1310 n.22. Indeed, while

¹⁴ *See, e.g.*, Hogg Decl. ¶¶ 36, 39-40 Exs. 16, 19-20; Hemenway Decl. ¶¶ 29-34, Exs. 15-20.

ALPA had counseled against the efforts of the pilots, ALPA's communications were not effective in suppressing the pilots' campaign, and "[b]ecause there [was] no showing that ALPA lack[ed] control over the pilots," the court found "that ALPA had not done enough to fulfill its statutorily mandated duty." *See id.* at 1310-11. Similarly, in *United Air Lines*, the court issued injunctive relief because, even assuming the union had not played a role in instigating the slowdown, the record made clear that the union did not "exert every reasonable effort" to stop the job action. 563 F.3d 257.¹⁵

Here, even if USAPA had not specifically instigated and encouraged the slowdown campaign — which it has — USAPA certainly has failed to make every reasonable effort to discourage the slowdown. The overwhelming statistical and anecdotal evidence demonstrating that US Airways' pilots are engaged in an illegal slowdown cannot seriously be disputed. And US Airways has repeatedly provided USAPA with notice and evidence of the pilots' ongoing, illegal slowdown and requested that USAPA take immediate steps, as required by the RLA, to prevent the action from continuing. The concerted activity, however, has continued unabated, and there is no evidence that USAPA has exerted *any* effort, much less "every reasonable effort," to discourage pilots from engaging in the slowdown.

Indeed, in response to one of US Airways' letters demanding that USAPA comply with its status quo obligations, USAPA suggested that its illegal actions were somehow justified because it was motivated by a desire to minimize furloughs. (Hemenway Decl. ¶ 24, Ex. 9.) But the RLA contains no such exception. And in response to US Airways' subsequent letters, USAPA's only response has been repeatedly to deny that there is any concerted activity. While

¹⁵ Numerous other courts have likewise confirmed that issuance of an injunction is proper under the RLA even if the union is not found to have authorized the unlawful action. *See, e.g., Nw. Airlines, Inc. v. Local 2000, Int'l Bhd. of Teamsters*, 163 L.R.R.M. 2460 (D. Minn. 2000); *Comair, Inc. v. Air Line Pilots Ass'n, Int'l*, No. 99-250, Order Granting Preliminary Injunction (E.D. Ky. Dec. 21, 1999).

USAPA posted a single, brief statement on its website stating that it does not endorse any concerted action with respect to delaying the completion of distance learning, this one note is wholly insufficient to comply with its obligations — as confirmed by the fact that it was completely ineffective given the number of pilots who did delay the completion of their distance learning. *See Delta Air Lines*, 238 F.3d at 1310-11; *United Air Lines, Inc.*, 185 L.R.R.M. (BNA) 2562, *96-101. Indeed, this one “relatively inconspicuous statement[]” regarding only one particular aspect of the illegal slowdown is dwarfed by the dozens of communications issued by USAPA encouraging numerous other aspects of the illegal slowdown. *See United Air Lines*, 563 F.3d at 270-71.

Thus, a preliminary injunction should be issued to force USAPA to undertake the efforts that it is required to take under the RLA in order to stop its members from engaging in illegal activity. *See id.* at 363 (“Once a court determines that such a concerted work action is occurring in violation of the RLA, an injunction can issue ordering the union to observe its statutory duty by trying to stop it”); *see also Delta Air Lines*, 238 F.3d at 1309.

B. This Court Should Issue a Preliminary Injunction Prohibiting USAPA’s Unlawful Conduct

A plaintiff seeking a preliminary injunction must make the following showing: (1) it is “likely to succeed on the merits,” (2) it is “likely to suffer irreparable harm in the absence of preliminary relief,” (3) “the balance of equities tips in [their] favor,” and (4) “an injunction is in the public interest.” *WV Ass’n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008)).

For the reasons set forth above, US Airways has demonstrated that it is likely to succeed on the merits. And for the reasons set forth below, US Airways has made more than the necessary showing on the other factors.

1. No Showing of Irreparable Injury Is Required to Obtain a Preliminary Injunction Against a Status Quo Violation under the RLA

In *Consolidated Rail*, the Supreme Court held that “[t]he district courts have subject-matter jurisdiction to enjoin a violation of the status quo pending completion of the required procedures, *without the customary showing of irreparable injury.*” 491 U.S. at 303 (emphasis added); *see also United Air Lines*, 243 F.3d at 362-64 (directing the district court to issue a preliminary injunction without any consideration of whether United had shown irreparable injury and rejecting the IAM’s argument that the district court properly denied an injunction on the grounds that United could deal with the job action by disciplining the individuals involved).

Thus, upon a showing that a union or its members have altered the status quo, a preliminary injunction should issue as a matter of course. USAPA’s express directives to the pilots to alter the status quo justify such relief without further analysis.

2. Even If a Showing of Irreparable Injury Were Necessary, US Airways Has Suffered, and Will Continue To Suffer, Irreparable Injury as a Result of USAPA’s Illegal Slowdown

Even assuming *arguendo* that a showing of irreparable injury is required, that showing is easily met here. Since May 1, this illegal slowdown has disrupted the plans (in the form of a late arriving flight, a missed connection by a passenger, or a failure of a passenger’s bags to make a connecting flight) of hundreds of thousands of members of the traveling public. Indeed, the cancelled flights alone resulting from the change in East pilot behavior has impacted an estimated 105,500 members of the traveling public. (Lee Report ¶ 6.)

And passengers make decisions based on service and reliability and have a choice of air carriers. Thus, every member of the traveling public whose travel plans are disrupted is a customer that US Airways could lose. “Slowdowns bring a potent form of pressure to bear upon a carrier because inconvenienced, irate passengers caught in the middle of such a war between an

airline and its employees are likely to take their business elsewhere, given the choice.” *See* McDonald & Asher, 55 J. Air L. & Com. at 359. And when passengers “book away” they may never return even if the operation is returned to normal, and thus there is simply no way to calculate the loss of customer goodwill and damage to reputation that US Airways has suffered. *See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) (“[W]hen the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied.”).

Further, US Airways’ rankings in on-time performance have dropped dramatically since May 1. While US Airways has ranked either first or second among its peers in terms of on-time performance (as tracked by the DOT) in 2008, 2009, 2010, and in the first four months of 2011, it has ranked next to last since May of this year. (Hester Decl. ¶ 13; Lee Report ¶ 40, Ex. 17.) The harm to US Airways’ brand and the exact future revenue that will be lost as a result also is impossible to calculate precisely.

USAPA’s campaign is also causing direct financial harm to US Airways through increases in US Airways’ costs. Should the job action persist, US Airways would incur \$377,000 on a daily basis, including forgone passenger revenue, costs from the increase in taxi time, and the increase in the number of bags that did not make it to connecting flights resulting from East pilots’ actions. (Lee Report ¶¶ 46, 49, 52, 54.) And these losses will continue unless the conduct is enjoined. *See Wesley-Jessen Div. of Schering Corp. v. Bausch & Lomb, Inc.*, 698 F.2d 862, 867 (7th Cir. 1983) (continuing financial harm sufficient to justify preliminary injunction). Indeed, some courts have held that monetary damages are not available to carriers for union violations of Section 2, First of the RLA. To the extent this reading of Section 2, First

is correct, then USAPA would be causing US Airways irreparable harm by inflicting even garden-variety monetary damages on US Airways, let alone the significant losses US Airways has suffered and that are continuing to accrue. Thus, without an injunction, US Airways would be left without any remedy for actions that plainly violate the RLA.

3. The Balance of the Equities Weighs Heavily in Favor of US Airways

A preliminary injunction requiring USAPA and its officers and members to refrain from altering the status quo imposes no legally cognizable harm whatsoever because it merely requires them to satisfy their existing, and indisputable, legal obligations under the RLA. *See United Air Lines*, 563 F.3d 257 (injunction “merely requires them to satisfy their existing legal obligations under the RLA”); *Nw. Airlines, Inc. v. Local 2000, Int’l Bhd. of Teamsters*, 163 L.R.R.M. 2460 (D. Minn. 2000) (injunction “would simply prohibit the Defendants from engaging in illegal activity”). In balancing the equities, therefore, the Court is weighing the enormous harm to US Airways and the traveling public, on one side, and USAPA’s “interest” in engaging in an illegal slowdown, on the other side.

Faced with this unfavorable balance, unions frequently argue that issuance of the injunction would raise safety concerns — for example, that the injunction would somehow force pilots to fly when the aircraft is unsafe. Given the nature of USAPA’s campaign, it will undoubtedly make that argument here. But that argument fails. As set forth above, there is overwhelming evidence of a concerted campaign to change pilots’ behavior in an attempt to disrupt operations, harm US Airways’ brand, and hurt US Airways’ passengers — including statistical evidence demonstrating a statistically significant change in pilot behavior.

And the relief sought by US Airways will merely prohibit USAPA from engaging in this illegal slowdown and require USAPA to take reasonable steps to stop this illegal slowdown. The relief sought in no way removes or limits an individual pilot’s discretion. US Airways’ pilots are

highly trained professionals and do not need to be told that they should not fly an unsafe aircraft or write up a maintenance issue — they know that. So when USAPA repeatedly tells that to pilots — particularly where, as here, USAPA does so with a wink and a nod, saying there are “strong implications beyond just safety” and it is necessary to get the contract they deserve — pilots understand that what USAPA really means is that pilots should slowdown the operation under the guise of safety. But the law does not permit fabrications regarding safety in order to inflict economic harm on US Airways in an attempt to obtain what USAPA believes would be a more favorable labor contract. Indeed, if the changes in operational metrics were arising from actual safety issues as opposed to an attempt to gain leverage in contract negotiations, these same changes in operational metrics would manifest on the West side of US Airways’ operations. As set forth above, however, all of the operational metrics for West pilots have remained within normal historical ranges for the relevant time period of May 1 to the present. (Lee Report ¶ 56.) Thus, any argument that safety would be impaired by ordering pilots to resume their normal operations is without merit.

4. The Public Interest Demands Issuance of a Preliminary Injunction to Prevent Further Harm to the Traveling Public

Although the harm to US Airways is significant, it is not the most important factor the Court should consider in issuing injunctive relief. The purpose of the status quo obligations under the RLA is not to protect carriers or unions; it is to protect the public by avoiding interruptions to commerce caused by labor disputes. Thus, the harm caused to US Airways’ customers by USAPA’s unlawful job action is an independent basis for injunctive relief, and the public interest alone demands that a preliminary injunction be issued.

Since May 1, 2011, approximately 105,500 members of the traveling public have had their flights cancelled because of USAPA’s illegal slowdown campaign. (*Id.* ¶ 6.) This does not

include the many thousands of passengers whose flights have arrived late, who missed a connecting flight, or whose bags missed a connecting flight because of USAPA's actions. While all of these passengers had their travel plans disrupted in some manner and were inconvenienced to some degree, there is undoubtedly some percentage of these passengers whose lives were disrupted or inconvenienced in a significant way that is irreparable. And absent an injunction, the irreparable harm to the traveling public will increase for each day that USAPA's slowdown campaign is allowed to continue. This impact to the traveling public alone requires issuance of injunctive relief. *See Winter*, 555 U.S. at 26 (emphasizing the "importance of assessing . . . the public interest in determining whether to grant a preliminary injunction"); *see, e.g., Am. Train Dispatchers Dept. v. Fort Smith R.R. Co.*, 121 F.3d 267, 268 (7th Cir. 1997) (strike in violation of RLA enjoined because of disruption to commerce and inconvenience to passengers); *Chi. River & Indian R.R. Co. v. Bhd. of R.R. Trainmen*, 229 F.2d 926, 932 (7th Cir. 1956), *aff'd*, 353 U.S. 30 (1957) (interruption to transportation system is, in and of itself, sufficient irreparable injury to justify injunction).

C. The NLGA Does Not Prohibit Injunctive Relief in This Case

In response to efforts to enjoin job actions under the RLA, unions frequently seek to divert attention from the requirements of the RLA to the requirements of the Norris LaGuardia Act (the "NLGA"). The NLGA, however, does not bar an injunction.

1. The Federal Courts Have Jurisdiction to Enjoin a Violation of the RLA, Notwithstanding the NLGA

It is well-established that in labor disputes governed by the RLA, the more specific provisions of the RLA take precedence over the general provisions of the NLGA. *See, e.g., Chi. & N.W. Ry.*, 402 U.S. at 581-82 n.18. "It is clear that the substantive legal duty of 45 U.S.C. § 152, First, is a 'specific provision' of the RLA and, moreover, is central to the purpose and

functioning of the RLA. Therefore, the provision takes precedence over the more general provisions of the NLGA.” *Delta Air Lines*, 238 F.3d at 1307; *Bhd. of R.R. Trainmen v. Chi. River & Ind. R.R. Co.*, 353 U.S. 30, 41-42 (1957); *Bhd. of R.R. Trainmen v. Howard*, 343 U.S. 768, 774 (1952). The Supreme Court has expressly held that the federal courts have subject matter jurisdiction to enjoin a violation of the status quo obligations under the RLA, notwithstanding the NLGA. *See Chi. & N.W. Ry.*, 402 U.S. at 582. Thus, the anti-injunction provisions of the NLGA do not apply.

2. While the Requirement of “Clear Proof” Under Section 6 of the NLGA Is Inapplicable in This Case, That Requirement Has Nevertheless Been Satisfied

Unions also frequently argue that Section 6 of the NLGA requires that there be “clear proof” that there has been authorization or ratification of unlawful conduct to hold a union or its officers “responsible or liable” for the acts of union members. The purpose of Section 6, as the Supreme Court noted in *United Brotherhood of Carpenters v. United States*, 330 U.S. 395 (1947), is to relieve unions “from liability for damages or imputation of guilt” for the unauthorized acts of individual officers or members. *Id.* at 403. Thus, “it is readily apparent that [Section 6] applies only (by its own terms) to liability for damages or criminal responsibility” and not to requests for injunctive relief. *Charles D. Bonanno Linen Serv., Inc. v. McCarthy*, 532 F.2d 189, 191 (1st Cir. 1976); *see also Mayo v. Dean*, 82 F.2d 554, 556 (5th Cir. 1936) (Section 6 “might prevent punishment for contempt or the recovery of damages, but clearly was not intended to apply to the issuance of an injunction to prevent future acts of coercion in a case where such relief would be proper”); *Suffolk Constr. Co. v. Local 67, United Bhd. of Carpenters*, 736 F. Supp. 1179, 1182 (D. Mass. 1990) (“the prohibition of § 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106, does not apply to injunctions but only to claims for damages”). If the rule were otherwise, a court could never enjoin a wildcat strike, but courts clearly have the authority to do

so. See, e.g., *Nat'l Airlines, Inc. v. Int'l Ass'n of Machinists*, 416 F.2d 998 (5th Cir. 1969).

Even if Section 6 required “clear proof,” however, that standard is satisfied here. In *United Air Lines*, the Seventh Circuit found clear proof of the IAM’s involvement in a slowdown among United’s mechanics based on far less evidence than exists in this case. In that case, the court found “clear proof” of the IAM’s involvement, as a matter of law, through documents posted on IAM bulletin boards that contained the term “work safe,” which was recognized as “code” for an illegal slowdown, and that using that term could only be interpreted to mean that employees should engage in a slowdown. See 243 F.3d at 366-67. The court stated that:

While some of these bulletins also contain statements urging members not to “engage in any job action,” such statements are dwarfed by the messages to “work safe,” leaving the clear impression that the relatively inconspicuous statements discouraging a slowdown were not meant to be taken a face value.

Id.

As discussed above, US Airways has presented dozens of formal communications, published on the USAPA website or distributed to US Airways’ pilots, which explicitly urge pilots to change their behavior under the false cover of safety.

3. The Requirement of “Clean Hands” Under Section 8 of the NLGA Does Not Preclude a Preliminary Injunction

A third section of the NLGA frequently cited by unions in an attempt to avoid issuance of injunctions against illegal slowdowns is Section 8, which prohibits injunctive relief where the complainant “failed to comply with any obligation imposed by law which is involved in the labor dispute” or has failed to make “every reasonable effort to settle such dispute” through negotiation, mediation, or arbitration. Any such argument by USAPA is without merits for two reasons.

First, the obligation under Section 8 to make “every reasonable effort to settle such

dispute” has no application where the “dispute” at issue is whether the union’s actions violate the RLA. If a carrier was required under Section 8 to seek to settle a dispute over the union’s violation of its status quo obligations, the union would be able to ask for concessions in exchange for ending an illegal slowdown. *See United Air Lines*, 243 F.3d at 364, 366-67. This would “render the union’s duty under 45 U.S.C. § 152, First, a nullity, and would run directly contrary to the policy rationales of the RLA’s status quo provisions.” *Id.* at 365.

Second, even if such an obligation applied, US Airways has exerted every reasonable effort to resolve the parties’ disputes consensually and only filed the current action as a last resort. Indeed, the Company repeatedly notified USAPA that its members were engaged in an illegal slowdown. And only when it refused to take any action, but actually intensified its campaign, was US Airways forced to seek relief.

IV. CONCLUSION

For the reasons set forth above, this Court should issue a preliminary injunction, in the form submitted herewith, barring Defendants from engaging in the illegal slowdown.

This the 29th of July, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** was served on Defendants US Airlines Pilots Association and Michael J. Cleary by depositing a copy with the United States Postal Service, certified mail, return receipt, postage prepaid, addressed to the following:

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This the 29th day of July, 2011.

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