

CV-10-01570-PHX-ROS, February 9, 2011

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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3			
4	US Airways, Inc., a Delaware)	
5	corporation,)	
6)	
7	Plaintiff,)	
8)	
9	vs.)	CV 10-01570-PHX-ROS
10)	
11	Don Addington, an individual, et)	
12	al.,)	
13)	Phoenix, Arizona
14)	February 9, 2011
15	Defendant.)	2:10 p.m.
16)	
17	and)	
18)	
19	US Airline Pilots Association,)	
20)	
21)	
22	Defendants.)	
23)	
24	_____)	

BEFORE: THE HONORABLE ROSLYN O. SILVER, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

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United States District Court

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P R O C E E D I N G S

1 (Court was called to order by the courtroom deputy.)

2 (Proceedings begin at 2:10.)

3 THE COURT: Please be seated.

4 COURTROOM DEPUTY: This is case number CV-10-1570, *US Airways, Inc., vs. Don Addington, et al.*, on for oral argument. 02:10:53

5 Counsel, please announce for the record.

6 MR. SIEGEL: Good afternoon, Your Honor. Robert Siegel of O'Melveny & Myers for US Airways.

7 THE COURT: Thank you. 02:11:11

8 MR. HOLLINGER: Chris Hollinger, O'Melveny & Myers, for US Airways.

9 THE COURT: Thank you.

10 MS. GILLEN: Karen Gillen from US Airways.

11 MR. LUBIN: Stanley Lubin, Lubin & Enoch, for USAPA. 02:11:21

12 MR. SEHAM: Lee Seham, Seham, Seham, Meltz & Petersen, for USAPA.

13 MR. GRANATH: Nick Granath for USAPA.

14 MR. MIDDLEBROOK: Lucas Middlebrook of Seham, Seham, Meltz & Petersen, for USAPA. 02:11:36

15 MR. HARPER: Marty Harper from Polsinelli Shughart. We are here on behalf of the West Pilots, US Airways.

16 MR. JACOBS: Your Honor, Andrew Jacob of Polsinelli Shughart.

17 MS. FLOOD: And Kelly Flood of Polsinelli Shughart 02:11:56

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1 for the West Pilots. 02:11:57

2 MS. BROWN: Katy Brown from Polsinelli Shughart for
3 the West Pilots.

4 THE COURT: All right. Counsel, this is not an easy
5 one for me, as you know by the questions I have posed. 02:12:07

6 Generally, when I have oral argument, I provide you a
7 proposed opinion. I was unable to do so in this case.

8 Let's start with this. You do not need to repeat the
9 facts. I am more than well-acquainted with what happened
10 previously and what happened in the Ninth Circuit. Very 02:12:29
11 simply, how is this case any different now that we have -- this
12 is in the posture of a declaratory judgment action?

13 All right. Let's hear, Mr. Siegel, are you speaking
14 on behalf of US Air?

15 MR. SIEGEL: Yes, I am, Your Honor. 02:12:53

16 THE COURT: And there are other issues here. There
17 are Rule 11 violations. There is a question about whether or
18 not the cross-claim should proceed, and that is not something
19 for you to argue today.

20 MR. SIEGEL: Your Honor, I have some comments I was 02:13:15
21 going to make to the Court. May I do so or would you like me
22 to go straight to the questions?

23 THE COURT: Go ahead and if I decide that I don't
24 need to hear it, then I'll let you know and then you can decide
25 whether or not to stop. 02:13:32

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1 MR. SIEGEL: Thank you. I'll pay attention to that. 02:13:33

2 Your Honor, I would like to do, first of all, just a
3 very brief marker as to the legal standard applicable to the
4 ripeness issue and then explain why we think the legal standard
5 is met here for our complaint and then explain why we think the 02:13:50
6 Addington Ninth Circuit decision does not change that analysis.

7 But, again, without repeating extensively from the
8 briefs, I do think it is important to ground the discussion in
9 the legal standard established by the U.S. Supreme Court and by
10 the Ninth Circuit. The two cases that we have principally 02:14:09
11 relied on for ripeness in our declaratory judgment action is
12 the Supreme Court case in *MedImmune* and of course the Ninth
13 Circuit case in *NBA*.

14 I'm sure the Court is aware of both of those cases,
15 but the fundamental standard is whether or not a declaratory 02:14:27
16 judgment plaintiff has a real and reasonable apprehension of
17 harm. I think that has to be the inquiry today given all of
18 the circumstances and all of the allegations we've made in the
19 complaint.

20 I can say that in both of those cases, one was the 02:14:45
21 patent infringement issue in *MedImmune* and the other was the
22 move of the Clippers basketball team in the *NBA* case. There
23 was an underlying unripe claim that was raised by the
24 defendants as a reason why the declaratory judgment action
25 should not be ripe as well. 02:15:08

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1 And in both of those cases, the courts analyzed the
2 issue for the declaratory judgment claim as whether or not that
3 plaintiff, the declaratory judgment plaintiff, had a real and
4 reasonable apprehension of harm.

5 So, for example, in *MedImmune*, the defendant was
6 arguing that the case was not ripe because the plaintiff had
7 not yet infringed a patent. In other words, the patent
8 infringement action was not ripe.

9 The Supreme Court said that doesn't matter and held
10 that the declaratory judgment action was ripe and did so in
11 fairly dramatic language which I think it's still worth
12 repeating in open court today: The rule that a plaintiff must
13 destroy a large building, bet the farm, or, as here, risk the
14 treble damages in the loss of 80 percent of its business before
15 seeking a declaration of its actively contested legal rights
16 finds no support in Article III of the constitution. That's
17 the Supreme Court rule. It doesn't require a ripe patent
18 infringement case in order for the declaratory judgment.

19 THE COURT: All right. Mr. Siegel, let me get right
20 to it, though. Is there a difference? Can this case be
21 distinguished in the context of a collective bargaining
22 negotiation?

23 MR. SIEGEL: Your Honor, that is what USAPA argued.
24 I think that's an absolutely misguided argument. The standard
25 announced by the Supreme Court in *MedImmune*, and reaffirmed

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1 really by the Ninth Circuit in the *NBA* case, was not limited to 02:16:41
2 a patent case and was certainly not by an NBA team wants to
3 move to a different city case. It was establishing a principle
4 under Article III of the Constitution, case or controversy
5 principles. When does a declaratory judgment plaintiff have a 02:17:00
6 ripe claim? There was no limitation in any of the discussion
7 by either one of those courts as to the subject matter.

8 Now, I'll point out that the USAPA brief tries to
9 argue that we should completely ignore those cases because this
10 is a labor negotiation, and they cite you to, principally I 02:17:26
11 think, to a Southern District of New York District Court
12 decision, the *North American Airlines* case, and they say that
13 is your labor case, because there the judge denied declaratory
14 relief. Of course that case predated *MedImmune* and did not, of
15 course, disavow the standard established by the Supreme Court 02:17:45
16 at all.

17 THE COURT: Give me some cases that you would cite
18 after the *MedImmune* case in 2007 in the Ninth Circuit that has
19 embraced the breadth and depth that you would like me to adopt
20 in this case. 02:18:04

21 MR. SIEGEL: Your Honor, if I have -- if I'm going to
22 list Ninth Circuit cases postdating *MedImmune*, I would like to
23 have an opportunity to submit that to you in writing so I don't
24 get the dates wrong on the cases.

25 But what I do argue, from at least my knowledge here 02:18:19

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1 at the podium, is that I think that you can read the Ninth
2 Circuit decision that predates *MedImmune* in the *NBA* case for
3 the same proposition that the Supreme Court was talking about.

4 THE COURT: And I also -- the decision from the Ninth
5 Circuit was last summer. Are there any cases that will help
6 you, assist you in persuading me that this court in the Ninth
7 Circuit, and we do have a dissent, which certainly I'm sure you
8 would like for me to embrace, but I am bound by the Ninth
9 Circuit law and we all know that.

10 So, since that time, have there been any decisions by
11 the Ninth Circuit that you believe are persuasive that are
12 distinguishable? Give me every single case you have and the
13 distinguishing features.

14 MR. SIEGEL: All right. If I can answer that by
15 saying to you in terms of listing cases from the Ninth Circuit
16 that postdate the Supreme Court case, I would like, if I may,
17 with leave of Court, to submit in writing so I do not get the
18 dates wrong.

19 But I will tell you -- what I would like to argue to
20 the Court on this point is that we do have the legal standard.
21 So the issue -- I'm not asking Your Honor or this court to
22 deviate from the *Addington* Ninth Circuit decision, nor am I
23 asking this court to adopt the dissent because that, of course,
24 is not the argument that we've made.

25 What we have said, and I think this is absolutely

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02:18:23

02:18:37

02:19:01

02:19:20

02:19:34

02:19:55

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1 correct, is that the *Addington* case, the decision in the Ninth
2 Circuit, did not address the issues presented by this
3 complaint. It could not have. It was not a declaratory
4 judgment action and it was not a case in which the carrier, US
5 Airways, was arguing that it faced the real and reasonable
6 apprehension of harm that we now allege in this complaint.
7 Those facts didn't exist at the time. They were not alleged.
8 They were not --

9 THE COURT: What would you have argued to the Ninth
10 Circuit had you been a party? You're in front of the Ninth
11 Circuit now. What would you have argued that would change the
12 complexion of the case? It seems to me, as I've read the case
13 again and again, that the majority opinion was -- they were
14 adamant about taking the position, which is supported by the
15 case law, that they are to defer where there are collective
16 bargaining agreement negotiations. So they were just going to
17 keep away from that no matter what. No question the Court
18 embraced the issue that there was harm to the West Pilots.
19 That was clear. Nonetheless, they were not -- still, this was
20 something that could be negotiated and they felt it would be
21 negotiated and even though US Air was not present, that it
22 still could be negotiated so why is it any different?

23 MR. SIEGEL: Your Honor, the issue in that case was
24 two-fold: Whether or not there was a breach of the duty of
25 fair representation and whether or not there was a ripe claim

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1 held by the West Pilots, a harm to the West Pilots? 02:21:44

2 The issue in that case and the issue that was briefed
3 and was argued and was decided by the Ninth Circuit was whether
4 or not, for purposes of ripeness, there is an immediate harm to
5 the West Pilots. 02:22:02

6 What the Ninth Circuit said is for that question, the
7 answer is no. That is the question that the Ninth Circuit was
8 deciding.

9 THE COURT: Now, the concern of US Air is that they
10 are going to be sued by somebody. 02:22:16

11 MR. SIEGEL: We have been -- since the Ninth
12 Circuit's decision, the events that occurred were --

13 THE COURT: Yes. Now you tell me.

14 MR. SIEGEL: The Ninth Circuit decides that the West
15 Pilots did not have a ripe harm that they could sue about until 02:22:29
16 their union made a deal, and then the union would be acting at
17 its peril for a then-ripe DFR claim harm to the West Pilots.

18 What happened after that case, both sides declared
19 victory on this issue, both sides meaning the union and the
20 West Pilots. 02:22:51

21 We get two letters from my good friend Mr. Harper,
22 counsel for the West Pilots. Those letters, which I have here
23 at the podium, actually addressed to me, in June of 2010 and
24 July of 2010, directly threatened the company if it agrees on
25 remand to a non-Nicolau seniority list, because their position 02:23:14

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1 is the Nicolau list was binding and they are entitled to it. 02:23:23

2 So they make a threat that we are going to sue you as
3 aiders and abettors, colluders under the statutory DFR claim
4 that we have against the union and that we intend to reassert
5 if there is a deal made that deviates from the Nicolau award. 02:23:38
6 That is the threat -- I'm sorry, Your Honor.

7 THE COURT: You're going to aggressively represent
8 your client on that issue. How viable is that claim under the
9 law?

10 MR. SIEGEL: Your Honor, I'm quite aware of the law 02:23:55
11 in this area. There's a lead case that discusses this, a
12 District Court decision by Judge Conlon in Chicago in 1991
13 involving United Airlines. I represented United in that case.
14 I actually was able to prevail on the issue of whether the
15 carrier was or was not a colluder. 02:24:15

16 But there are cases which I don't, as a carrier
17 lawyer, don't favor but there are cases which hold that a
18 carrier can be, in certain factual circumstances, held liable
19 as facilitating, aiding, abetting, or colluding with the union
20 in the adoption and agreeing to an illegal contract term. 02:24:36

21 Now, I would like to argue and would argue in Count 3
22 of our complaint that in the facts of this case, we don't have
23 that type of collusion. But the point of the matter is that's
24 my argument. That's my Count 3 argument.

25 Mr. Harper and his clients have raised the issue, and 02:24:55

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1 here's the point that causes us some pause, Your Honor. 02:24:59

2 Unlike the *Rakestraw* case, as we get this threat,
3 we're fully aware that the DFR argument that Mr. Harper's
4 clients want to make was presented in a nine-day trial to a
5 jury and to Judge Wake. We're fully aware that the facts that 02:25:16
6 were presented caused a jury to find that the proposal made by
7 the union breaches its duty of fair representation.

8 On remand, we have that proposal on our negotiating
9 table knowing full well that a jury has already found that in
10 the jury's view, and per Judge Wake's follow-up remedial order, 02:25:39
11 violated the DFR.

12 We're now being asked by the union, being demanded to
13 accept a non-Nicolau seniority list. We need to know whether
14 that's legal or not. We are at a bargaining table today and it
15 is mediated by the National Mediation Board that has the legal 02:25:59
16 authority under the Railway Labor Act to call off the
17 negotiations and grant the union a right to initiate a strike
18 if an impasse is deemed to exist by the NMB. None of those
19 circumstances existed at the time that the *Addington* case was
20 filed. 02:26:18

21 But now we are in this true rock-and-a-hard-place
22 Hobson's choice that arose after the *Addington* case. And it's
23 because, from the union's perspective, they claim after
24 *Addington* was decided, they are now free to demand a
25 non-Nicolau seniority list that's on the table. 02:26:35

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1 Mr. Harper's clients, on the other hand, have 02:26:41
2 vigorously written letters saying, "You can't accept that
3 because you will be colluding." And there are cases that say
4 there's a theory. And you know that it's an illegal proposal
5 because the jury already said so. The nullification was on 02:26:53
6 ripeness but not on merits. We are in a rock and a hard place
7 on that, Your Honor. We were not at the time the *Addington*
8 case was filed. We didn't file a declaratory judgment action
9 in their case because we expected this legal fight between
10 these two groups of pilots would be resolved. We hoped it 02:27:12
11 would be.

12 We actually do not have a dog in the hunt on this
13 seniority list. We are neutral. We accepted the Nicolau list
14 when the predecessor union presented it to us because we had
15 promised we would in the transition collective bargaining 02:27:27
16 agreement. A new union comes in. They want to amend the
17 transition agreement. They want us to accept a non-Nicolau
18 list, but we have a conundrum. We have this true Hobson's
19 choice.

20 THE COURT: So that's a question I asked and let me 02:27:42
21 go back and make sure I understand, Mr. Siegel.

22 You were involved in a lawsuit before Judge Wake but
23 you didn't think it was appropriate at that time to file a
24 declaratory judgment action?

25 MR. SIEGEL: We did not -- 02:27:55

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1 THE COURT: You didn't think you should get a dog in 02:27:57
2 the fight. Now, essentially, it's your position that you have
3 one. I'm not following that very well.

4 MR. SIEGEL: There's a straightforward explanation.
5 When the lawsuit was filed -- first of all, the two claims 02:28:13
6 against the company were contractual. They were not colluding
7 under the statute that we are now threatened with, and Judge
8 Wake correctly ruled that he did not have jurisdiction over the
9 contractual claim. So we properly raised the subject matter
10 jurisdiction issue and those two breach-of-contract claims in 02:28:31
11 that complaint were for an arbitration board under well-settled
12 law, and Judge Wake so ruled.

13 Those claims against us in that case is not the claim
14 that is now being threatened against us, which is a statutory
15 claim for collusion in the union's breach of duty. At that 02:28:49
16 point in time, all that was being alleged against us was
17 challenge to furloughs allegedly in breach of a collective
18 bargaining agreement and a challenge to the way we were
19 negotiating for an integrated collective bargaining agreement.
20 Again, an alleged violation of the collective bargaining 02:29:07
21 agreement.

22 THE COURT: You mentioned that you thought this would
23 be resolved. In the context of this case, why did you ever
24 think there would be an agreement?

25 MR. SIEGEL: We thought the legal issue would be 02:29:19

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1 resolved, Your Honor, which, up until the Ninth Circuit's
2 ripeness ruling, it was resolved.

3 What we wanted to know is -- and, frankly, again, I
4 say this with great vigor, the company is neutral on this
5 issue.

6 THE COURT: I know that.

7 MR. SIEGEL: And what -- I'm sorry.

8 THE COURT: I'm trying to figure out, just as a
9 matter more than anything else of curiosity, but maybe it
10 really is a legal issue. Why did you decide a declaratory
11 judgment wasn't appropriate then but then it is now? Weren't
12 you in negotiations then or had they commenced so that there
13 was at least a threat to you of some sort?

14 MR. SIEGEL: The day the *Addington* case was filed,
15 the seniority demand from USAPA had not even been presented to
16 us yet. That occurred sometime during the trial. We were not
17 in federally mediated negotiations. The NMB had not yet
18 assumed jurisdiction over the discussions, which is the
19 predicate step to being exposed to a work stoppage, Your Honor.

20 And then, finally, Your Honor, just from an
21 employer's standpoint, our first choice was not to do what
22 we've had to do here, which is sue our union and sue our class
23 of West Pilots. We were not in the business of trying to sue
24 anybody and we didn't -- as a first choice, we didn't wish to.

25 We understood this to be a legal fight raised as a

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1 DFR claim by the West Pilots against their union over whether
2 or not a seniority demand other than Nicolau would be lawful.

02:30:48

3 We presumed that that issue would be the subject of
4 litigation between the two real parties-in-interest and there
5 would be a ruling that would then give us guidance on whether
6 the proposal was legal or not. Judge Wake gave such a ruling.
7 But then with the ripeness decision, a new circumstance existed
8 for us which led to what we now describe to you, Your Honor, as
9 the Hobson's choice. Because at that point in time, we don't
10 have resolution on whether or not their demand is legal. And
11 we have an assertion from each of the litigants, after the
12 Ninth Circuit opinion, telling us what they are going to do to
13 us if we don't pick their side. And thus we come to this
14 court, as you see with this complaint, asking for at least some
15 clarification on our rights and obligations with regard to this
16 proposal.

02:31:04

02:31:26

02:31:47

17 THE COURT: I gotcha.

18 Now, let me ask you the other question, that is,
19 what's happening in the collective bargaining negotiations and
20 why do you think that it's not possible that this will get
21 resolved? I know what the issues were before the Ninth Circuit
22 and certainly I know the Ninth Circuit was troubled with it. I
23 know the dissent was troubled with this case because it seemed
24 like it perhaps wouldn't be resolved, although the majority
25 decided that even though maybe this case is unique in the sense

02:32:01

02:32:24

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1 that this is a litigation between components of the union or
2 two unions as opposed to the company and the union.
3 Nonetheless, they decided that it could be resolved in
4 negotiations. Why isn't that still the case?

5 MR. SIEGEL: Your Honor, the union and US Airways are
6 in the negotiations supervised by the National Mediation Board.

7 The union has stated, and its constitution states, it
8 will not propose or accept the Nicolau arbitration seniority
9 list in this negotiation, which is the list that we previously
10 accepted pursuant to the transition agreement requirements and
11 the requests of the prior union.

12 That position by USAPA is, as we allege in the
13 complaint, intractable. They have told us that. I'm sure they
14 will say that today. They are not going to propose or accept
15 that list.

16 THE COURT: Even though as I am familiar with -- in a
17 variety of different contexts, there's always give and take.
18 So, in other words, if the company decided we're going to give
19 you -- let you retire, all of you retire with full pay, then
20 are you going to, as a consequence of that, give this up? I
21 mean, is it going to have to be that bad? Are they really
22 digging their heels in and standing stiff-legged in front of
23 you and saying, "There is no way. You can't give us anything
24 where we would alter our position on this"?

25 MR. SIEGEL: Well, what I can say, and I'm sure

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1 Mr. Seham is going to speak to the union's position; but I know 02:34:22
2 from the carrier's perspective, we have been told that pursuant
3 to their constitution for -- the reason that USAPA was formed,
4 they have an absolute constitutional mandate to not accept the
5 Nicolau seniority list. Everything they filed with this Court 02:34:41
6 confirms that point, that the argument isn't whether they are
7 going to change that position. They are, they have said, not
8 going to accept the Nicolau list. They have told us that is
9 intractable. That is a constitutional mandate and that is a
10 benchmark of their forming the union and decertifying ALPA. So 02:35:04
11 that is what we're faced with.

12 As to negotiations, this is not a subject that we
13 bargained about, Your Honor. To give the reality of the labor
14 negotiations, the carrier in a post-merger situation, waits for
15 the union to give it an integrated seniority list. And so long 02:35:22
16 as certain conditions are met, which are actually laid out in
17 the transition agreement so that we're not required to do
18 something called flush the system or otherwise incur a lot of
19 extra training costs, we accept their list.

20 THE COURT: But you know how you could avoid being 02:35:40
21 sued by the West Pilots; and if you negotiated with the union
22 such that they decided to give up something in order that you
23 avoid a suit by the West Pilots, isn't that essentially what
24 negotiations are all about?

25 MR. SIEGEL: Your Honor, with all respect, on this 02:36:00

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1 subject, it's yes or no. We're not sitting here bargaining a 02:36:03
2 pay rate or a pension plan.

3 THE COURT: Or a lifetime tenure.

4 MR. SIEGEL: Or lifetime tenure. What we are
5 bargaining is Nicolau list or something else, and what we have 02:36:12
6 been told by the union is it has to be something else. They
7 refer to it as a date hire list with conditions. But that is
8 what they say, it has to be something else.

9 The letters, the West Pilots write letters that say
10 it has to be Nicolau because it was final and binding and 02:36:32
11 everybody, East and West, agreed to final and binding. We have
12 a zero sum gain. We're caught in the middle. We have nothing
13 to negotiate about. We either have to say yes or no to the
14 union's demand and we are at the bargaining table and that is
15 what we are faced with. 02:36:53

16 The reason we filed for declaratory relief is because
17 we have no guidance as to what is legal or not. But we know it
18 is either Nicolau or non-Nicolau and we have to -- we are
19 trying to get legal clarification of our rights and
20 obligations. 02:37:11

21 THE COURT: All right. Mr. Siegel, if I didn't grant
22 declaratory judgment, tell me, project for me what would happen
23 for US Air this point forward in the negotiations.

24 MR. SIEGEL: This will require a crystal ball but we
25 are faced with making a decision at a bargaining table as to 02:37:34

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1 whether or not we accept or reject the non-Nicolau seniority 02:37:38
2 demand from the union. We have been waiting to do that. We
3 have not -- we haven't rejected or accepted, waiting for
4 judicial --

5 THE COURT: Okay. Is that all that remains, though? 02:37:51

6 MR. SIEGEL: No. The bargaining -- I'm not
7 personally at the bargaining table, but I know for a fact that
8 there are many other issues that the parties are also
9 negotiating including compensation issues and many others. But
10 what we are faced with in that process is while we bargain in a 02:38:10
11 normal manner, as Your Honor indicated, compromise, movement
12 back and forth on the issues such as compensation and so forth,
13 we have this one intractable issue. We don't have -- we don't
14 have our own proposal. We only have to know whether or not it
15 is legal or not legal to accept the union demand that we change 02:38:38
16 what we did previously with regard to the Nicolau seniority
17 list. On that issue, it's a yes or no.

18 THE COURT: So in order to complete the negotiations,
19 what would you have to do? In other words, you're going to
20 complete those negotiations tomorrow. You're going to get a 02:38:59
21 collective bargaining agreement. So, then, what are you going
22 to have to do to end all of this, assuming I don't grant a
23 declaratory judgment?

24 MR. SIEGEL: First of all, on the non-seniority
25 issues, the parties are in negotiations supervised by the NMB. 02:39:16

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1 They have to continue to negotiate regarding those issues. 02:39:21
2 Hopefully, on the non-seniority issues, they can resolve those.
3 There is a procedure under the Railway Labor Act if you don't
4 reach agreement, and it's not pretty, but it involves
5 releasing -- the NMB releasing parties to self-help and the 02:39:34
6 like. No one wants that.

7 So the negotiations have to be completed and each
8 side has to make proposals and counter proposals. That is on
9 the non-seniority side.

10 On the seniority issue, the company has to tell the 02:39:44
11 union whether or not it will or will not amend the transition
12 agreement and acquiesce to a non-Nicolau seniority list. We
13 have to answer that question and we don't know -- Your Honor,
14 the only thought I want to emphasize is the reason we filed is
15 because we don't know whether that proposal is legal or not. 02:40:06
16 We're concerned because we are aware of a jury verdict that
17 found it to be illegal. We have a ripeness ruling from the
18 Ninth Circuit, and we have a demand from the union that we
19 accept it, the non-Nicolau list.

20 THE COURT: Let me ask you, if I grant the 02:40:23
21 declaratory judgment to decide this issue, do we start over?
22 That means do we have to have a jury trial? Essentially, we
23 don't have a judgment in this case that I can enforce? So we
24 have to start all over again, is that it?

25 MR. SIEGEL: Your Honor, I think that -- 02:40:40

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1 THE COURT: That's assuming that I have the parties 02:40:42
2 here that you have joined, that you have sued.

3 MR. SIEGEL: That's right, Your Honor. I think
4 certainly that Mr. Harper and Mr. Seham are going to have views
5 on how a hearing on the merits, on the DFR issue, would be 02:41:00
6 addressed.

7 From the company's viewpoint, we would support a
8 procedure that can address this as quickly and as expeditiously
9 as possible. We do not want delay. We would support --

10 THE COURT: Have you talked to the parties about that 02:41:19
11 at all?

12 MR. SIEGEL: I have not had a chance to talk to the
13 parties but, obviously, one possibility that seems logical to
14 us is that there would be some type of ability to transfer the
15 record from Judge Wake's courtroom to this courtroom so that if 02:41:33
16 there needs to be any resolution or material issues of fact or
17 supplemental evidence, that can be done very quickly. But
18 rather than reinvent the wheel, assuming that that is something
19 that the two pilot groups would want, we would certainly
20 support moving on that as quickly as possible without delay. 02:41:54

21 THE COURT: Okay. Thank you.

22 MR. SIEGEL: Thank you, Your Honor.

23 THE COURT: Mr. Seham?

24 MR. SEHAM: Your Honor, I also had some prepared
25 comments. But I think if I proceed with your questions, it may 02:42:20

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1 not be as eloquent but it may be a lot shorter, so I'll do
2 that.

02:42:24

3 With respect to the question what events have
4 occurred after the Ninth Circuit's decision that show judicial
5 intervention now is appropriate, our view is that nothing has
6 happened. In fact, the primary issue raised by the cross-claim
7 in order to bootstrap a ripe action is that there is a
8 declaratory judgment. And that fact, the existence of a
9 declaratory judgment, is the primary basis on which the
10 Addington group now asserts a ripe claim.

02:42:37

02:42:56

11 The company knew all along that it was the position
12 of the Addington group that if they did not aggressively
13 negotiate for implementation of the Nicolau award, that the
14 company would be subject to suit. In fact, it was subject to
15 suit back in 2008.

02:43:14

16 In terms of the question of what is the status of the
17 negotiations --

18 THE COURT: Well, let me stop you. Mr. Siegel has
19 mentioned these letters and why doesn't that really cause a --
20 wouldn't it cause a significant concern by the Airline that
21 they may well be sued so that they are aggrieved now in a way
22 that they hadn't been before? They have now been threatened
23 with suit.

02:43:37

24 It seems to me that that is the very issue that was
25 in *MedImmune* and that's the very issue that the Court focused

02:43:57

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1 on.

02:44:02

2 And as I mentioned to Mr. Siegel, I certainly can see
3 on the facts a distinguishing feature between a patent case and
4 a collective bargaining agreement case. But that is a
5 difference, isn't it? We've now got letters that were sent by
6 the West Pilots, the Addington group.

02:44:17

7 MR. SEHAM: There's a multifaceted answer to that but
8 let me try to do it slowly and methodically.

9 First of all, it is not a change in circumstances
10 because if you go back to 2008, and I would say with respect to
11 *MedImmune* and gauging whether there is a real and reasonable
12 apprehension of harm, perhaps one of the best factors to look
13 at is how the party itself has gauged the previous existence of
14 this alleged harm.

02:44:33

15 So if you go back to the Addington litigation which
16 commenced in 2008, the company, under Count 2 of that claim,
17 was alleged to have not engaged in good-faith efforts to
18 implement the Nicolau award.

02:44:50

19 And the company's response at that moment, far from
20 seeking a declaratory judgment, saying either that it should be
21 declared whether or not we have that obligation or to protest
22 no, that we are proceeding in that fashion, their primary
23 response was this case is not ripe. The issue as to whether we
24 have some good-faith obligation under the transition agreement
25 to implement the Nicolau award is not a ripe issue because we

02:45:10

02:45:28

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1 haven't actually done anything yet.

02:45:33

2 That was the company's position back in 2008.

3 Their second position --

4 THE COURT: But that wasn't decided by Judge Wake.

5 MR. SEHAM: No, that was not decided. But Judge Wake
6 recalled that in the context of his Rule 60(b) decision when
7 the Addington group said now there is alleged harm by the
8 company in the form of their declaratory judgment action and,
9 therefore, you should revivify our DFR claim and say that it's
10 ripe.

02:45:44

02:46:06

11 Judge Wake's response was the company should have --
12 if the company feared that it was subject to a real
13 apprehension of litigation and harm, they should have brought a
14 declaratory judgment back then. They can't sit on their hands
15 for two and a half years and now say -- and now say that this
16 DFR claim is ripened.

02:46:22

17 THE COURT: Well, certainly as far as Judge Wake was
18 concerned, and that may not have been advisable as part of the
19 company was concerned, but, you know, I have combed the record
20 before the Ninth Circuit to look for anything that would
21 indicate that the Ninth Circuit considered the position of the
22 company in determining whether or not there was grievous harm
23 such that the Court should, in fact, take jurisdiction. I
24 don't know --

02:46:44

25 MR. SEHAM: May I allude to something?

02:47:03

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1 THE COURT: Just a moment. I want to make sure that
2 you understand. I don't know that anyone argued that before
3 the Ninth Circuit. That's what I'm looking for.

4 MR. SEHAM: Those were specifically Judge Wake's
5 finding of facts, that part of the reason why the case was
6 ripe, in Judge Wake's view, was because of the harm to the
7 Airline. And in his dissent, Judge Bybee quoted Judge Wake
8 saying, "This case is ripe in part because," and I'm quoting,
9 "denying judicial review would work a substantial hardship on
10 the Airline by leaving the Airline to decide between a lack of
11 a single CBA and an unlawful CBA."

12 What the US Airways is asking this Court to do is to
13 adopt the dissenting opinion.

14 THE COURT: Yes, I understand, in a way, that is the
15 what the Court is saying. But is that something that was
16 considered by the majority? Did they reject that? Did they
17 reject the very issues that we have here so it was in front of
18 them? I mean, I don't see that in the majority opinion.

19 MR. SEHAM: The least that can be said is that was
20 the decision of the majority because they rejected the decision
21 of the dissent. They said we cannot base a ripeness
22 determination on this alleged harm to the Airline. And in
23 terms of saying what must happen next, the company -- the
24 majority did say this, that the dispute over the seniority
25 issue would not be ripe until, quote, the Airline responds to

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1 the proposal, the parties complete negotiations, and the
2 membership ratifies the collective bargaining agreement.

02:48:46

3 If it were to be in any other way, then there would
4 be -- the United States Supreme Court precedent in *ALPA v.*
5 *O'Neill*, the Ninth Circuit precedent in the *Addington*
6 litigation really has no force or effect anymore. If in any
7 negotiation-related DFR case all the company has to do is to
8 say there is some plausibility that we might be pulled in in a
9 future collusion case, then there is no ripeness precedent
10 anymore.

02:49:05

02:49:28

11 THE COURT: I did focus on that language of the
12 majority opinion, too, and I think you could read that two ways
13 because I was trying to extract everything that would indicate
14 to me that the Court had considered the airline's position.
15 But I see that language that not until the Airline responds to
16 the proposal. Well, since then we've had a response from the
17 Airline because they received these letters and so it seems to
18 me that the response that they were talking about was in the
19 abstract and now we have facts.

02:49:46

20 MR. SEHAM: Your Honor, the first time we learned
21 that the company had this angst and worry, this supposed real
22 apprehension of litigation, was after the complaint had been
23 filed. The first time I heard any of this argumentation --

02:50:18

24 THE COURT: The complaint here?

25 MR. SEHAM: The complaint in the declaratory judgment

02:50:38

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1 action.

02:50:39

2 THE COURT: Here?

3 MR. SEHAM: Yes. Correct, Your Honor.

4 The first time we saw the articulation of this
5 argument were in papers submitted to this court.

02:50:46

6 THE COURT: But isn't that the very point they are
7 making is that -- I asked them why didn't they. But they
8 didn't. You may be right that they should have. It would be
9 helpful for me. I wouldn't have this case in front of me right
10 now. Maybe they should have, maybe they could have, maybe
11 Judge Wake at least implicitly ruled that they should have or
12 that they didn't have a basis to do so. But the Ninth Circuit
13 is the opinion I'm looking at, and the Ninth Circuit didn't
14 consider that.

02:51:06

15 So we have -- so, okay. We have Johnny-come-lately
16 here and so they are now before me and they are now asking for
17 a declaratory judgment. And I'm looking to see whether or not
18 the Supreme Court of the United States decision gives me that
19 discretion in a private-party situation as opposed to a
20 government situation. And I'm trying to drag out of the
21 Supreme Court decision that they are saying that this case is
22 not different, that all of the issues that were raised in the
23 Ninth Circuit decision on behalf of the company to establish
24 that they were harmed are the same ones that are being brought
25 to me now. It doesn't seem to make any difference to me that

02:51:22

02:51:39

02:52:10

United States District Court

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1 they are bringing it to me now. 02:52:14

2 MR. SEHAM: But these issues, and maybe this goes to
3 the *MedImmune* issue. These issues arise because of the
4 collective bargaining process. But the only means of resolving
5 them ultimately is the collective bargaining process as well. 02:52:29

6 THE COURT: And that's how you distinguish *MedImmune*,
7 is that it is entirely different. Patents are different than
8 collective bargaining?

9 MR. SEHAM: Correct. Just to take the example that
10 Mr. Siegel brought up, the *Rakestraw* case, which, as your Honor 02:52:41
11 may know, it was really a consolidation of two fairly distinct
12 cases, one involving the TWA pilots and Ozark pilots, and one
13 involving the United strike-breakers or, as we prefer to call
14 them, scabs, who were, pursuant to an agreement insisted upon
15 by the company, were given seniority higher than trainees who 02:53:01
16 honored the picket line. And the company -- the company in
17 this case was fully -- in this case is fully aware but was not
18 full aware in that case.

19 The company in that case made a commitment to those
20 scabs, to those strike-breakers, and forced upon ALPA an 02:53:23
21 agreement that they would never re-open that seniority
22 arrangement ever, the solemn commitment.

23 But ALPA felt strongly about the issue and said, "We
24 detest and loathe these scabs," and that was the finding of the
25 Seventh Circuit. That was part of their motivation, that they 02:53:43

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1 detested those scabs. And United was aware of that and yet
2 acquiesced and accepted the seniority rearrangement because
3 ALPA wanted it that much.

4 The other -- to say this is a factually
5 distinguishable situation where the company had made a
6 commitment to those strike-breakers and solemnly committed to
7 never reopen it and then acquiesced, that confirmed that what
8 the company argues in its brief and in Count 3 of its action,
9 that there really is not case law that supports the contention
10 that the company is neutral, as it protests it is, and as the
11 Addington group has always conceded that they are. There is no
12 exposure.

13 What we're facing instead is the potential under
14 Count 1, that the Addington group wins on behalf of -- as
15 purported class representatives, gain some kind of victory --
16 let me put that in quotes -- some victory by imposing on USAPA
17 the Nicolau award as USAPA's bargaining position when the Ninth
18 Circuit has already concluded that that proposal can
19 undoubtedly never be ratified. That nonratifiability was
20 actually a product of ALPA merger policy which gave legitimate
21 democratic veto power both to East and West MEC and to East and
22 West Pilot groups. And both of them have that veto power. And
23 certainly if Nicolau had come out with a strict date of hire,
24 we would be here with the West MEC and the West Pilot group
25 having vetoed that as well.

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1 So there is no answer to this solution. If that
2 unratifiable proposal is imposed through Count 1, that doesn't
3 resolve the company's concern that there's going to be some
4 work stoppage. That either guarantees a work stoppage or it
5 guarantees no contract ever.

6 THE COURT: How do we resolve this then? If I don't
7 resolve it, the Ninth Circuit has said how is it going to get
8 resolved? It seems to me that Mr. Siegel has said both sides
9 are intransigent. The union that he's negotiating with or the
10 company is negotiating with says, "This is nonnegotiable.
11 We're not going to give in on this."

12 So their position is that we're not going to get
13 anywhere. They are going to be sued. How are you going to end
14 up -- how is this going to resolve itself?

15 MR. SEHAM: Well, the same way that the *Rakestraw*,
16 the other half of the *Rakestraw*, the TWA/Ozark situation was
17 resolved and the same way that the Southwest/Morris Air
18 situation was resolved, by negotiation and a ratification
19 process.

20 THE COURT: Well, I know that. That is theoretical.
21 But give me the facts. Where are we going to end up here so
22 that this goes away at the end of the negotiations? You've got
23 an agreement; there's no lawsuits. What is the union going to
24 give up to give the company what it wants? We end up and that
25 everyone is happy. No lawsuit. Or is this going to go on for

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1 the next five years? That's the problem. We have to have an
2 end to this -- if I'm persuaded that everybody -- we're going
3 to walk out of this courtroom and we have a mediation here and
4 this is the end of it.

5 MR. SEHAM: If I may put this in some factual context
6 about how a compromise has been pursued to date.

7 THE COURT: Okay. That will help. That's what I
8 want to hear. And you've pursued it but have you gotten
9 anywhere with it?

10 MR. SEHAM: Well, we haven't gotten anywhere with it
11 because the company refers to the existence of litigation,
12 first the *Addington* litigation and now this litigation, as a
13 reason not to negotiate.

14 THE COURT: Well, that sounds like you're not getting
15 along. So tell me how you're getting along.

16 MR. SEHAM: Okay. Let me make a note so I come back
17 to the issue I was about to speak to.

18 The negotiations are proceeding. Progress is being
19 made slowly, and let me underscore slowly. That since the
20 papers were filed, another two of 30 sections have been closed.
21 There has been progress on other sections with respect to
22 noneconomic issues. There has been, I would dare to say -- and
23 I'm not the negotiation counsel, but I would dare to say have
24 little to no progress on the economic issues, part of which is
25 due to the fact that there has been no agreement on how to cost

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1 out these economic issues. 02:58:17

2 The representation that we are before the National
3 Mediation Board and, therefore, the next step is release and a
4 work stoppage is -- I don't think I can even charitably say
5 specious. The fact of the matter is that all of the federal 02:58:34
6 courts have described the railway labor negotiating process as
7 virtually interminable.

8 And the fact that the National Mediation Board has
9 you confirms that they can have you forever; that there are
10 airlines and unions that have been retained in collective 02:58:51
11 bargaining procedures for three and four years in mediation.
12 We haven't even really touched on the economic issues. The
13 likelihood is if there is going to be a strike, it's going to
14 be as much because of the failure to reach an agreement on the
15 economic issues as anything else, that resolving this seniority 02:59:09
16 issue isn't going to necessarily in any way, shape, or form
17 prevent some work stoppage issue.

18 THE COURT: Are you saying this is a small grain of
19 sand on a beach, this issue?

20 MR. SEHAM: No, it's not a small grain of sand. 02:59:27

21 THE COURT: I mean, isn't it really a significant
22 part of this negotiations? And if you're going to tell me it's
23 minor, we're going to get through this, that is different. But
24 that is the whole point that the company is making.

25 And you're not suggesting, I think, that they are 02:59:42

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1 here in bad faith. They are certainly here trying to get this
2 resolved because they believe it's a real issue. Tell me why
3 it's not. You're going to get through these negotiations and
4 everybody is going to end up if not happy, they are going to
5 walk away because they know that that is the end of it.

02:59:44

02:59:59

6 MR. SEHAM: Well, with all due respect, we do think
7 they are here in bad faith; because if they cared about this
8 issue, they would not have been arguing ripeness to Judge Wake
9 in 2008 and they would have been pursuing this case in front of
10 the System Board.

03:00:15

11 THE COURT: What are they here for, then? What are
12 they hear for?

13 MR. SEHAM: They are here to provide further excuses
14 for themselves for not proceeding with the negotiations with
15 respect to the seniority issue.

03:00:23

16 THE COURT: So you have a separate lawsuit against
17 them now for not engaging in good-faith negotiations?

18 MR. SEHAM: Not as of this moment. We were hopeful
19 that this would be dismissed so that all of these issues that
20 Mr. Siegel is protesting about to you he might address to us
21 for the first time at the negotiating table.

03:00:38

22 THE COURT: I see. They haven't been, as far as
23 you're concerned?

24 MR. SEHAM: No. There has not been one day, one
25 hour, one minute of discussions at the table about this issue.

03:00:52

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1 And these issues are, as the Ninth Circuit said,
2 these are all thorny issues. It was a thorny issue with
3 respect to the United strike-breakers --

03:00:58

4 THE COURT: Is the union willing to give on this?

5 MR. SEHAM: Well, this is where I wanted to go in
6 terms of a little bit of factual background.

03:01:12

7 THE COURT: That will help.

8 MR. SEHAM: Okay. Because there have been a lot of
9 misrepresentations concerning what USAPA is trying to
10 accomplish in terms of its constitutional objective, and that's
11 how it's expressed.

03:01:23

12 The factual background is this, that the Addington
13 group -- I will not say the West Pilots because, frankly, I
14 don't believe these individuals are representing the best
15 interests of the West Pilots. We are -- this union is
16 certified to represent East and West Pilots, and it is doing
17 its darndest to do that.

03:01:39

18 But going back to the ALPA situation, which is the
19 genesis of what we are confronting today, is that those who
20 represented the West MEC at that point and the West Merger
21 representatives felt that they were entitled to have pilots
22 with two months' seniority go above pilots with 16 years of
23 seniority and pilots with five months' seniority go above
24 pilots with 18 years' seniority.

03:01:55

25 As the Ninth Circuit determined, that was never going

03:02:12

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1 to ratify. The East MEC, the East ALPA MEC representatives
2 were saying, "We want a pure date of hire so that East Pilots
3 will have the ability to bid into West operations and take the
4 captaincies as they become vacated."

03:02:14

5 And USAPA has said, "We're not going to pursue either
6 of those options. We are going to state as a constitutional
7 objective date of hire, seniority integration principles
8 accompanied by conditions and restrictions which restrict the
9 exercise of that seniority in a manner that will conform to
10 each pilot's pre-merger expectations." That is -- compromise
11 is a constitutional mandate for us.

03:02:30

03:02:50

12 THE COURT: So what you're saying -- your answer is
13 no, this is nonnegotiable. This is -- so whether or not the
14 company has said to you that, okay, this is the issue now.
15 Let's resolve this. You're going to say, "We're not giving in
16 one bit," which is your right to do so and it's based upon the
17 constitution to the *Addington* claims?

03:03:10

18 MR. SEHAM: That's not what I said and I'm trying to
19 understand how you might have taken away that conclusion.

20 The East MEC, ALPA East MEC wanted date of hire. The
21 West MEC wanted the Nicolau award and there was no movement
22 toward the middle. USAPA has a very malleable standard that
23 can be moved to a substantial degree.

03:03:29

24 THE COURT: Have you negotiated that with the
25 Addington group? Are they willing to give on that the way you

03:03:58

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1 are suggesting it, your proposal now? I mean -- and I'm not --
2 please, don't misunderstand me. I am not derogating your
3 proposal. I'm just trying to understand have you attempted to
4 resolve this with them or is this black and white on both
5 sides?

03:04:01

03:04:19

6 MR. SEHAM: We have, within our union, invited West
7 Pilot representatives onto the Merger Committee and onto the
8 Negotiating Committee in order to participate in resolving this
9 internally.

10 And, unfortunately, there has been a boycott of these
11 committees, to some extent, induced by threats of violence and
12 economic boycotts within the West group so that we have not
13 been able to obtain the participation of West Pilots.

03:04:32

14 THE COURT: All right. That being the case, and then
15 it doesn't change, how is -- how are the negotiations going to
16 change this so that this issue goes away?

03:04:52

17 MR. SEHAM: The same way it was resolved in the
18 *Rakestraw* and *Gullickson* cases. If you bear with me, I'll lay
19 out how that goes. Again, imagine Count 1 is granted.
20 Notwithstanding that, in our view, anything, any claim based on
21 Section 2 first which is, in turn, based on the transition
22 agreement, is surely within the jurisdiction of the System
23 Board. But assuming that is granted, we just have what the
24 Ninth Circuit has agreed and that we maintain is an
25 unratifiable agreement.

03:05:14

03:05:35

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1 That hurts not just East Pilots, not just West Pilots
2 but it hurts 5,000 US Airways pilots that this union represents
3 because this group is at the bottom of the barrel in terms of
4 major airlines. The mediator for the NMB has conceded that you
5 rank with the major airlines; that our goal is to obtain what
6 Delta pilots received and what United pilots received and
7 anything that contributes to a delay in these negotiations is
8 hurting 5,000 East and West Pilots because they are not getting
9 the better wages and better benefits.

03:05:36

03:05:54

10 It is not for this court, frankly, to decide that the
11 West Pilots are going to be better off with a lottery ticket
12 they can not cash in because it's unratifiable and thereby
13 defer indefinitely a package of wages and benefits and
14 conditions and restrictions that may be palatable to them.

03:06:14

15 Let me give you that hypothetical. And here I am, in
16 effect, negotiating with the federal judiciary; but I think
17 it's important that you understand what we're trying to
18 accomplish in terms of compromise.

03:06:34

19 Every other employee group on the property has gone
20 pure date of hire: The flight attendants, the mechanics, the
21 baggage handlers, the stores keepers, the dispatchers. And
22 it's only USAPA that has decided we insist on protecting the
23 West counterparts. So although there will be a date-of-hire
24 seniority list, no one in the East can use their seniority to
25 bid into a West position until a West pilot first bids into an

03:06:50

03:07:12

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1 East position. It's very much a live-and-let live scenario. 03:07:18

2 What you brought to the operations, you keep; what we
3 brought to the operations, we keep, except you can exercise
4 your seniority into our operations now so that you're going to
5 have scores of their senior pilots moving into West body seats 03:07:32
6 they could have never had before.

7 Now, maybe that is not the lottery ticket that they
8 had under Nicolau, but the Ninth Circuit has essentially found,
9 in terms of finding no injury, that that was a lottery ticket
10 they never could have cashed in. 03:07:49

11 And this is our approach to the West Pilots.

12 THE COURT: Well, I'm not so sure I would go so far
13 as to say that. I don't think that the Ninth Circuit reached
14 that.

15 MR. SEHAM: Well, they said Nicolau would undoubtedly 03:08:02
16 never be ratified by the USAPA's members. That is the language
17 of the Ninth Circuit.

18 So here's what we're trying to accomplish. And it's
19 in the mode of *Gullickson* and *Rakestraw* but in a much more
20 favorable way, which is we don't think the federal court or 03:08:17
21 purported class representatives have the right to take away
22 from the West Pilots the secret ballot.

23 Those 1800 pilots who are all based in Phoenix in a
24 single domicile have the right to decide whether USAPA has
25 delivered a mix of seniority; job security through conditions 03:08:38

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1 and restrictions; better pay, which we know we can get them;
2 better benefits, which we know are there to be had; better work
3 rules, which we know are there to be had.

4 And that if a majority of West Pilots in the
5 ratification process approve that package, say we would rather
6 not have this uncashable lottery ticket, we would rather take
7 more money now, more benefits now, better work rules now and
8 protections that we wouldn't even have under the Nicolau award
9 because we're going to be protected by East Pilots who live in
10 California who are left-overs from the PSA days who would come
11 in and take vacated West captaincies.

12 This is the complication of our proposal which, in
13 many respects, would leave them better off than the Nicolau
14 award. Are they not entitled to vote on that? And if they do,
15 and they vote by majority, then we have the *Rakestraw* situation
16 where the Ozark pilots ultimately voted for -- there is no DFR
17 claim if the minority, by a majority, accept the arrangement.
18 And we're not going to get there and that is why this is
19 different from a patent case, because this is a political
20 process. It's a negotiating process both through the company
21 and both with our members, and they are our members, although
22 they are only six of our members.

23 There are up to 1800 Phoenix members and we represent
24 them, and we're trying to get something that they will find
25 acceptable. It's not just about appealing to the East majority

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1 because we've already been sued by East Pilots who say we
2 should be doing what AFA did and what the IAM did and what the
3 TWU did and we said we're not going to do that. We're not
4 going to apply this seniority retroactively.

03:10:16

5 And that case was dismissed on ripeness. And we have
6 been threatened by other East Pilots who said, "You stand for
7 date of hired and I'm not going to be able to use my seniority
8 in West operations? How dare you?"

03:10:33

9 We're not going to solve anything today. We're just
10 going to have different lawsuits.

03:10:45

11 One of the lawsuits we're going to have if this court
12 imposes the Nicolau award is the *Naugler* case that we've
13 referenced in our papers. ALPA is accused of having
14 deliberately committed a falsified seniority list because part
15 of Nicolau's decision was to say pilots on furlough back in
16 2005, even with 16 years of seniority, get zero. It became all
17 important who was actually on furlough and who was not.

03:11:02

18 There were hundreds of pilots working in the
19 Mid-Atlantic Division of US Airways who were US Airways pilots.
20 So Nicolau got it wrong, as far as we're concerned, but he
21 couldn't even get it wrong right because his whole logic based
22 on furloughs was misapplied. And it was misapplied allegedly
23 according to a lawsuit pending in the Eastern District of New
24 York. It was misapplied because ALPA lied.

03:11:22

25 ALPA's argument in that litigation is, Your Honor,

03:11:42

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1 this case is not ripe because Nicolau may not be implemented;
2 but if Nicolau is implemented, then the company is just in
3 another lawsuit about whether the Nicolau award was corrupted
4 by ALPA's forged seniority list.

03:11:44

5 THE COURT: So you're going to have once -- assuming
6 it ever occurs -- the collective bargaining agreement is
7 entered into, then you are projecting lawsuits?

03:12:01

8 MR. SEHAM: We've already been threatened with
9 lawsuits. One that was declared unripe in the -- in Charlotte,
10 North Carolina, in a Federal District Court, that USAPA would
11 be sued for not more aggressively applying the concept of date
12 of hire. And we've also received e-mails saying that the
13 conditions and restrictions are too onerous with respect to the
14 restriction on East Pilots' exercise of seniority.

03:12:29

15 THE COURT: So no matter how much you do for them and
16 how, from your perspective, you engage in good faith through
17 these negotiations, you expect to still be sued by the
18 Addington group?

03:12:50

19 MR. SEHAM: I think, frankly, if the Addington -- if
20 you're referring to the Addington group, that we have a
21 situation where we put together a package -- and this is our
22 goal, to live and let live. What you brought to the operation
23 is yours. What we brought to the operation -- because that was
24 the problem with Nicolau was that it was going to give pilots
25 with five months' seniority the ability to bid over someone

03:13:13

03:13:31

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1 with 18 years who had never been on furlough. And these
2 individuals tended to be 20 years younger, so that man was
3 tamped down by many, many hundreds of West Pilots who have 15,
4 20 years younger might never become captain. And that was even
5 aggravated by the fact that these gentlemen had lost -- the
6 East Pilots had lost their defined benefit plan. They have
7 lost their pension, so these guys have to work. They have to
8 work until they are 65. They have no choice.

9 That is why it's nonratifiable to say that you're
10 going to lose what you've been waiting 20 years on this
11 seniority list to get in East operations. And all I'm saying
12 is this --

13 THE COURT: Let me circle back and ask you, are you
14 saying -- it seems like when you started to answer my question
15 that you're in the process of negotiating something with the
16 Addington group so that there is no lawsuit whatsoever?

17 MR. SEHAM: No. We don't -- we haven't been
18 negotiating with Addington because it's not a certified class.
19 We are -- we have repeatedly had road trips out to Phoenix,
20 which is the single domicile of West Pilots, to ascertain their
21 concerns. We've combed through declarations from West Pilots
22 to try to ascertain their concerns and entertain modifications
23 to our proposal.

24 Our goal, because ultimately on economics, we might
25 have to shut this company down and strike them. And we don't

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1 want a pool of 1800 disgruntled pilots who are going to want to 03:15:05
2 cross the picket line.

3 THE COURT: On this issue you're going to have --
4 (Laughter in the gallery).

5 MR. SEHAM: We don't -- we want . . . 03:15:18

6 We want 5,000 pilots united in a compromise which is
7 live and let live, neither the extreme of date of hire proposed
8 by the East ALPA MEC, neither the unratifiable lottery ticket
9 that the Nicolau award represents.

10 So by soliciting the opinions from the Phoenix 03:15:33
11 pilots, asking them to join our committees and work within our
12 union, not with litigants who are no longer certified to
13 represent a class, but with the actual pilots and trying to
14 determine what is a package that can be ratified by majority of
15 East Pilots and a majority of West Pilots but, most 03:15:52
16 importantly, by a majority of all of the pilots.

17 THE COURT: Let me hypothetically only -- if I were
18 to accept jurisdiction of this matter, declaratory judgment
19 matter, what would be the status -- I asked Mr. Siegel this.
20 What would be the status of what had occurred previously before 03:16:17
21 Judge Wake? Would we start all over again?

22 MR. SEHAM: We would have to start all over again
23 because 90 percent of our case could not be presented. When we
24 appealed, we didn't appeal on ripeness and we weren't looking
25 to win on ripeness, frankly. We were looking to win on other 03:16:35

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1 items that would be dispositive.

03:16:40

2 THE COURT: And it was never -- was that never
3 raised? Did the court raise it on its own before the Ninth
4 Circuit?

5 MR. SEHAM: No. No, we didn't.

03:16:47

6 THE COURT: But you expected you're going to win on
7 the merits?

8 MR. SEHAM: We expected to win on the merits because
9 the Ninth Circuit and the DC circuit and the Seventh Circuit
10 have all said that preservation of date-of-hire seniority
11 advances the interest of the entire bargaining unit. And what
12 Judge Wake said was we were not allowed to present that
13 evidence to the jury. We were also not allowed to present
14 the --

03:16:57

15 THE COURT: So we would -- in your view, we would
16 have to have another jury trial?

03:17:12

17 MR. SEHAM: We would have to have another jury trial
18 and we would have to be able to present, for the first time,
19 our case because we've referenced them in bullet-point fashion,
20 but we were not allowed to present the evidence in our case.

03:17:24

21 THE COURT: All right. Thank you very much. That
22 has been very helpful.

23 Over here? Okay.

24 Mr. Harper?

25 You heard me speak and you've heard your counsel,

03:17:44

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1 opposing counsel, speak and I'm sure you're going to have to 03:17:48
2 have much to tell me.

3 MR. HARPER: Well, I don't know how much you want me
4 to go into trying to respond to what Mr. Seham just presented
5 to you. 03:18:01

6 THE COURT: I have some questions that I proposed and
7 so you can start there and then let's see where we go, the
8 written questions.

9 MR. HARPER: Oh. I have those right here, Your
10 Honor. 03:18:11

11 The general questions about what is different, at
12 least from the *Addington* perspective, is that what is different
13 is that we now have a new issue on the table that was not
14 presented in the underlying litigation, the harm to the carrier
15 which is different. 03:18:31

16 THE COURT: Yes. And you, I presume, embrace the
17 same arguments that were made by Mr. Siegel, is that you have
18 made it clear now, by the letters that you have sent to the
19 company, that this is an issue, you're going to sue, all of
20 that? And that has occurred after the opinion? 03:18:52

21 MR. HARPER: June 10 and July 17 -- July 14 I wrote
22 two letters and I was attempting to put them on notice that if
23 they changed their position, which was the earlier position
24 that they agreed to go through a final and binding arbitration
25 and they agreed to accept the results of that, and if they 03:19:17

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1 changed their mind now after hearing what the jury did, then,
2 yes, we would sue. And we would sue -- and I think
3 notwithstanding what Mr. Seham says, the opportunity for us to
4 be successful is fairly good because of the point that Mr.
5 Siegel makes.

03:19:21

03:19:44

6 They now know that a jury decided that what USAPA did
7 was a breach of the duty of fair representation. And if they
8 change their mind now, after what they previously promised and
9 agreed to and did, in light of what the jury found, I think
10 that is collusion. I fully expected that as a result of those
11 two letters, I was hoping that the company would stand up and
12 say, "We can do nothing else but accept the Nicolau." That is
13 what they should do.

03:19:59

14 They have chosen to do it a little differently. The
15 basketball analogy is here because of the Clippers case but,
16 really, what is happening here in this courtroom right now, if
17 you declare that their action is ripe, they are throwing the
18 jump ball up here and they want the two sides to play to see
19 who is going to win. And that is what we have to do if you
20 allow them to throw the jump ball up, because if we don't go
21 forward and try to replicate what we proved the first time, our
22 pilots are going to lose because a non-Nicolau will be
23 implemented as part of the CBA.

03:20:18

03:20:35

24 THE COURT: Do you also agree with Mr. Seham that we
25 would start over again?

03:20:52

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1 MR. HARPER: No, absolutely not. 03:20:55
2 THE COURT: Why not?
3 MR. HARPER: Because we have a whole record here that
4 has been developed --
5 THE COURT: But we don't have a judgment. It's not a 03:21:00
6 res judicata.
7 MR. HARPER: I understand.
8 THE COURT: We have a jury and the jury has to make
9 findings of fact so why wouldn't we start over?
10 MR. HARPER: Because at least twice during the course 03:21:13
11 of the case in front of Judge Wake, he opined that if he had
12 known that the facts were going to come in the way that they
13 came in, that he would have gone the summary judgment route
14 rather than making us go to trial because we got to a point in
15 January of -- 03:21:33
16 THE COURT: Why wouldn't there be a genuine issue of
17 material fact? Are you saying that I would decide it as a
18 matter of law and why?
19 MR. HARPER: Based upon the record as it now stands,
20 I think you would decide that there are no material issues in 03:21:43
21 dispute with respect to the DFR issues and would decide the
22 case again in our way.
23 Now, notwithstanding the fact that Mr. Seham wants to
24 go out and add a few other things to the record, I think you
25 may make rulings on that that would be consistent with what 03:21:59

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1 Judge Wake did the first time or perhaps allow them to do a 03:22:03
2 little bit more.

3 But what other unions have currently done in the
4 workplace --

5 THE COURT: I'm sorry to interrupt, but are you 03:22:11
6 saying that Judge Wake said he gave the wrong instructions so
7 as a matter of law --

8 MR. HARPER: No.

9 THE COURT: -- he would have ruled, as a matter of
10 law, that there was bad faith? 03:22:24

11 MR. HARPER: No. Let me go back.

12 In January of 2009, after the lawsuit had been filed
13 in late or September or August of 2008, we were at a point in
14 the case management where -- and we had asked for permission to
15 file summary judgment motions and he decided at that particular 03:22:45
16 point in time not to go that route. But because he thought
17 that this needed to be decided quickly, it would take too long
18 to do the summary judgment, so he took us directly to getting
19 ready for trial that started in May.

20 THE COURT: So what would you argue to me now that 03:23:02
21 would indicate that this is to be decided as a matter of law as
22 opposed to go to the jury because there are genuine issues of
23 material fact as to whether or not the union breached its
24 fiduciary duty?

25 MR. HARPER: All of the facts that were admitted by 03:23:17

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1 Judge Wake had two sides to the story, but the clear story with
2 respect to why USAPA was founded, what they intended to do, why
3 they embodied the constitutional mandate in their constitution
4 all for the purpose of putting in a date of hire which was to
5 the detriment of the West Pilots. That's uncontroverted in the
6 record below.

7 THE COURT: I'm sure that Mr. Seham is not going to
8 say -- he's not going to say that those are undisputed facts.
9 Are you saying that the judge found, as a matter of law, that
10 was undisputed?

11 MR. HARPER: He did not find it. The point I was
12 trying to make, Your Honor, is that twice during the course of
13 the trial Judge Wake mentioned at sidebar that if he had
14 understood that the facts associated with the DFR issue were
15 going to be as solid as they were, then he would have
16 considered more seriously going the summary judgment route
17 rather than taking us to trial. That was his point of view
18 during the course of the trial which was based upon the
19 evidence that had come in before him and him sitting there
20 judging the evidence and not necessarily the credibility.

21 So I think that the record, if he would have
22 permitted, would at least allow us to get substantially -- to
23 be imported to get substantially close to being able -- for us
24 to be able again to file a summary judgment motion.

25 Now, along the way, there are going to be motions to

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1 allow further evidence to be developed and further evidence to
2 be submitted.

03:25:03

3 Now, at that point in time you're going to have to
4 make up your mind whether you're going to permit that by
5 rulings; and if you do, then it may change it going out into
6 the future whether summary judgment is inappropriate. But
7 there's absolutely no reason in the world for us to abandon \$4
8 million worth of effort to develop the record that is sitting
9 over in front of Judge Wake right now. Allow us to import it,
10 allow us to use it, which is the most economical way, and the
11 Airline would be in favor of that, and then make some judgments
12 as case management issues as to whether you're going to permit
13 more to be added or not. And let's see where we are. But for
14 darn sake, we don't have to go back and redo two dozen
15 depositions, thousands of documents that we have already
16 admitted are relevant and should be part of the record. That
17 record is a solid record, Your Honor.

03:25:19

03:25:35

03:25:54

18 It's just a shame -- shameful waste for us not to be
19 able to look at that and try to use it in this case if you
20 decide that the issue is ripe and we think you should.

03:26:15

21 THE COURT: Okay. Thank you.

22 I really don't think there's anything else for us to
23 discuss. I see some of you trying to get out of your chair.

24 Mr. Siegel?

25 MR. SIEGEL: Your Honor, I'm sorry. If I could just

03:26:27

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1 have 40 seconds to correct a factual issue. 03:26:28

2 THE COURT: As long as it's only to correct and
3 you're not going to restate something and not argue something
4 that you've already told me.

5 MR. SIEGEL: Your Honor. I will not. In fact, if 03:26:40
6 I'll just sit at the table --

7 THE COURT: I saw you shaking your head so I'm sure
8 this has something to do with Judge Wake's opinion.

9 MR. SIEGEL: Mr. Seham referred to the Rule 60
10 argument before Judge Wake. I would just like to make sure 03:26:54
11 that the Court understands that there is a transcript of that
12 argument at docket 67-1 in the record before Your Honor. It's
13 attached to the second granted declaration.

14 In that transcript, Judge Wake said expressly in
15 answer to something Mr. Seham's partner said, Mr. Granath, "You 03:27:16
16 know, I made no -- I didn't ground my ruling on ripeness on the
17 Airline and I didn't think the Court of Appeals did."

18 So this argument about what happened before was
19 raised in the Rule 60 hearing by Mr. Granath and Judge Wake
20 said no, it did not -- I did not. And, obviously, it's because 03:27:37
21 we were not parties.

22 I just wanted to make sure that the whole transcript
23 is noted as in the record before you, Your Honor.

24 THE COURT: Mr. Seham?

25 MR. SEHAM: Ten seconds. It's in the dissent of 03:27:49

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1 Judge Bybee, the quotation is directly from Judge Wake's
2 findings of fact. So perhaps Judge Wake misremembered. But
3 for what it's worth, it's right in the dissent of the Ninth
4 Circuit.

5 And with respect to the issue of Judge Wake's
6 importing, if it's a question of reusing depositions, that's
7 one thing. But Judge Wake himself said, in the context of the
8 60(b) discussion, that he understood that all his rulings would
9 be a legal nullity.

10 If we could send to the Court our briefing to the
11 Ninth Circuit on all of the other issues, all of the evidence
12 that was excluded, we were never allowed to present our case to
13 that jury.

14 THE COURT: Okay. All right.

15 Thank you.

16 This is under advisement and you will have a decision
17 as quickly as I can get it to you.

18 MR. SIEGEL: Thank you, Your Honor.

19 MR. HOLLINGER: Thank you, Your Honor.

20 COURTROOM DEPUTY: All rise.

21 (Whereupon, these proceedings recessed at 3:28 p.m.)

22 * * * * *

03:27:52

03:28:04

03:28:29

03:28:39

03:28:48

C E R T I F I C A T E

03:28:50

I, ELAINE M. CROPPER, do hereby certify that I am
duly appointed and qualified to act as Official Court Reporter
for the United States District Court for the District of
Arizona.

03:28:50

I FURTHER CERTIFY that the foregoing pages constitute
a full, true, and accurate transcript of all of that portion of
the proceedings contained herein, had in the above-entitled
cause on the date specified therein, and that said transcript
was prepared under my direction and control, and to the best of
my ability.

03:28:50

DATED at Phoenix, Arizona, this 14th day of February,
2011.

03:28:50

s/Elaine M. Cropper

03:28:50

Elaine M. Cropper, RDR, CRR, CCP