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P R O C E E D I N G S

01:50:09

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

2 (Proceedings begin at 2:11.)

3 THE COURT: Please be seated.

4 COURTROOM DEPUTY: This is case number CV-10-1770, *US*

02:11:16

5 *Airways, Inc., v. Addington, et al.*, on for oral argument.

6 Counsel, please announce for the record.

7 MR. SIEGEL: Good afternoon, Your Honor. Robert
8 Siegel for US Airways.

9 THE COURT: Thank you.

02:11:31

10 MR. HARPER: Your Honor, Marty Harper for the West
11 Pilots.

12 THE COURT: And you are?

13 MS. GILLEN: Karen Gillen, US Airways.

14 THE COURT: Thank you. Marty Harper.

02:11:39

15 MS. BROWN: Katie Brown for the West Pilots.

16 MR. JACOBS: And Andrew Jacobs for the West Pilots.

17 MR. SZYMANSKI: Patrick Szymanski for USAPA.

18 MR. O'DWYER: Brian O'Dwyer for USAPA.

19 MS. MARTIN: Susan Martin for USAPA.

02:12:00

20 THE COURT: Okay. Counsel, I have given you a
21 proposed opinion and, as you know -- I have given you a
22 proposed opinion and, as you know from being in front of me
23 before, proposed means proposed.

24 As I started with the sentence, this is a hard case.

02:12:16

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1 It has been a hard case from the beginning. Hopefully, hard
2 cases don't make bad law. We'll see. I could not, even though
3 I would have liked to, to have resolved this matter to such an
4 extent that everyone was immune from liability no matter what
5 they did and particularly US Air. But in light of the Ninth
6 Circuit decision, I am constricted from doing so.

7 The only thing that is clear to me is that as the
8 Ninth Circuit has said, and as all of you know as well or
9 better than I do, is that the give and take of the collective
10 bargaining negotiation prevails. And it is -- there are so
11 many issues that are involved, having long, long ago been
12 involved in that process, I understand what it's about to some
13 extent. But it has been a long time ago.

14 There's always the risk of potential unfair labor
15 practices in that process. So the best I can do is what I've
16 given you.

17 And if, let's say, the negotiating union engaged in
18 the process of totally subverting the negotiations to the point
19 where they gave up something substantial on behalf of the East
20 Pilots in favor of the seniority agreement, well, certainly on
21 the face of it, it may sound like, may look like unfair labor
22 practice. And if US Air was somehow involved in that with the
23 requisite state of mind, that is aiding and abetting, perhaps
24 US Air could be responsible for unfair labor practice.

25 But this is a very dynamic situation. The Ninth

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1 Circuit has said that. The only difference here, and the
2 reason why I decided to reach out and attempt to resolve this,
3 is because throughout the litigation before, US Air was not
4 involved. It seems to me that they deserved at least an
5 opportunity to attempt to have some resolution such that they
6 might feel more comfortable during the contract negotiations.

7 So with all of that, tell me whether you agree with
8 me or not? Let me hear from US Air.

9 All right. Mr. Siegel?

10 MR. SIEGEL: Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 MR. SIEGEL: I'll accept your invitation to try to
13 change the Court's mind in some respects.

14 THE COURT: All right.

15 MR. SIEGEL: I recognize that earlier in the case we
16 faced a Rule 12 motion on the ripeness issue and the Court
17 distinguished this case from the Addington case that was
18 decided by the Ninth Circuit. If I might just take a moment to
19 circle back.

20 Your Honor is absolutely correct. The carrier was
21 not part of that litigation. There was not an allegation of
22 aiding and abetting and there was only a contract claim and
23 Judge Wake correctly dismissed the carrier.

24 So what we had in the Ninth Circuit was an argument
25 on the DFR principles and it was between the union and the West

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1 Pilots?

02:16:05

2 As the Court knows, the Ninth Circuit reached the
3 decision it reached on the ripeness issue. But at no point in
4 time in that argument before that Court and the briefing or in
5 the decision was the issue of the carrier's responsibility in
6 this kind of situation at all considered.

02:16:16

7 And I don't want to go on and on, because I know we
8 argued this point in the Rule 12 proceeding to Your Honor, but
9 it is a unique point. And it does distinguish what occurred
10 and Addington won from this case. Here's why. From a
11 prospective of just a disagreement with the West Pilots with
12 USAPA concerning the seniority demand, the constitutionally
13 mandated seniority demand with USAPA that says it has to be the
14 date of hire and cannot be the Nicolau award, that was assessed
15 by the Ninth Circuit on the grounds of whether or not the West
16 Pilots faced a ripe harm at that time.

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02:17:03

17 What was not discussed in that process is what was
18 eventually raised by the threat of litigation by the West
19 Pilots against the carrier after the Ninth Circuit decision was
20 decided. And this puts us square into some of the case law
21 under the Railway Labor Act which puts the carrier in the
22 middle of the DFR deputy. And as some of the cases have
23 recommended in some situations, the carrier can be responsible
24 for accepting the illegal proposal from the union if it
25 breaches the DFR. That particular circumstance, that issue

02:17:23

02:17:49

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1 involving the carrier was never discussed. It didn't come up
2 because the carrier wasn't a party.

3 So the ripeness ruling cannot be a ripeness ruling
4 that says the circumstances involving the carrier cannot be
5 ripe until after the carrier has agreed to the potentially
6 illegal collective bargaining proposal. That is the conundrum
7 that gets created here, is that the proposal is made. If you
8 read the Ninth Circuit opinion, it says, well, we can't decide
9 whether the West Pilots have been harmed by this until we have
10 a ratified contract.

11 THE COURT: Well, and, unfortunately, through the
12 negotiation process, cannot -- can't the carrier evaluate on
13 its own concerning what the law is and the involvement of the
14 carrier in the collective bargaining agreement, whether or not,
15 in fact, there is -- they have engaged?

16 Now, the fact that they have engaged in unfair labor
17 practice does not, as a matter of law, mean that you're an
18 aider and abettor. And I think in looking back -- I don't know
19 where you are on the Collective Bargaining Agreement, but I
20 suppose, let's say, hypothetically, if the union said, well,
21 all right, if you accept this agreement on seniority, we will
22 reduce the amount of salary we're asking for by thousands and
23 thousands of dollars. If that's unreasonable and unfair
24 perhaps the carrier would have some responsibility there. I'm
25 creating an absolutely obscure hypothetical.

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1 But that is a problem. As the Ninth Circuit has 02:19:53
2 said, I don't have those facts in front of me. All I can do is
3 almost give you an advisory opinion. And as I said, I'm glad
4 you're here. I don't know why you were dismissed before. I
5 don't know why you aren't a part of the Ninth Circuit decision. 02:20:08
6 But I've said what I've said.

7 MR. SIEGEL: Yeah. Well, there's a unique part of
8 this case which I think is why we brought the declaratory
9 judgment action in the first place. This is no ordinary
10 negotiation. This is not a give and take on the issue of the 02:20:26
11 nuances of the seniority list.

12 What has happened here, as Your Honor knows, we have
13 the arbitration decision that was conducted before Mr. Nicolau.
14 We have the constitution of USAPA that says it cannot be
15 Nicolau and it has to be date of hire. We have the two pieces 02:20:46
16 and the carrier doesn't negotiate the seniority list. It
17 accepts from the union the seniority list. It was asked
18 originally to accept the result of the arbitration award and
19 then when the new union came in, it was asked to accept the
20 date of hire, but it doesn't negotiate the seniority list in a 02:21:05
21 traditional sense. It just accepts it.

22 Number two, and this is what I raised in the Rule 12
23 hearing, the conundrum is that as we came out of the Ninth
24 Circuit ruling, we have a constitutionally mandated date of
25 hire proposal that we know. And at least one jury and one 02:21:25

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1 judge found to be illegal under the DFR principles. It was
2 later reversed but not on the merits. It was reversed on
3 ripeness ground without the carrier there to talk about its
4 circumstance and the ripeness of its circumstance in that
5 situation.

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02:21:48

6 So the reason we brought the declaratory judgment
7 action in the first place was what we called in our papers the
8 Hobson's choice, the rock and the hard place. We have a demand
9 on one hand for a date of hire seniority list that we know at
10 least one court on the merits found to be illegal. We have a
11 threat from the West Class of pilots on the other hand, saying
12 if you acquiesce to that demand, we not only will sue the
13 union, but we will sue you as an aider and abettor because you
14 know from the prior case that there was a finding.

02:22:07

15 THE COURT: as a matter of law, could a Court find
16 that where you were not bound by a decision that is not res
17 judicata that are you an aider and abettor? I mean, aren't you
18 asking, really, that question at least for that particular
19 issue? Isn't that a legal issue? We're talking about res
20 judicata. We are talking about a decision. Isn't that the
21 question?

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02:22:57

22 MR. SIEGEL: And two layers to the answer. First of
23 all, there are certainly plenty of cases where the union is
24 found to breach its duty of fair representation and the carrier
25 is -- even though it adopted the union's demand, is not found

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1 to be an aider and abettor. And there's plenty of cases where
2 that occurred and that's really the basis of our Count Three,
3 because we wanted to at least have clarification on that piece
4 of it because these facts are unique given the prior trial.

5 But the direct answer is that there's no
6 black-and-white rule here and this is why we brought the
7 declaratory judgment. The fact that there was a prior case and
8 a prior ruling but it was overturned is part of the mix. And
9 we understand what occurred; but in terms of whether or not in
10 all of the circumstances that occurred is whether the carrier
11 is now able to proceed to accept a seniority demand,
12 constitutionally mandated by the union. This is not something
13 that gets malleable in the bargaining process.

14 We know it's not going to be the Nicolau award. We
15 know that the threat to sue from the West Pilots is that it has
16 to be the Nicolau award. There's nothing that is change -- to
17 change at the bargaining table. And if I -- with all respect,
18 I think that makes this piece of it, and the discussion and the
19 negotiation that we're talking about, much different than a
20 normal course labor collective bargaining process.

21 We've got the two polars. We've got the threat on
22 each side and what we were seeking was a declaration of whether
23 or not, given those circumstances, and given the fact that the
24 proposal is not changing, it's constitutionally mandated, could
25 we have a judicial ruling on whether it violated, first of all,

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1 the DFR and if we couldn't have that, whether it violated the 02:25:01
2 carrier's obligation not to be aiding and abetting an illegal
3 proposal.

4 So that was -- so if I can say, Your Honor, I think
5 that the ruling from the Court on the original Rule 12 motion 02:25:13
6 to dismiss on ripeness correctly distinguished between what we
7 saw from the Ninth Circuit when it was simply the claim by the
8 West Pilots and what we have in this case which is a ripe claim
9 by a carrier that does, in fact, face the rock and the hard
10 place that is -- I'm using colloquial language that is 02:25:37
11 described in the case law all the way up to the U.S. Supreme
12 Court.

13 THE COURT: Let me ask you this: If the carrier had
14 been part of the original lawsuit and it had been appealed to
15 the Ninth Circuit, do you think the Ninth Circuit decision 02:25:53
16 would have been any different? And said, well, we're going to
17 remand it for this determination with respect to the carrier?

18 MR. SIEGEL: I think, Your Honor, it's --

19 THE COURT: That's the issue that I feel that I had,
20 is that does the carrier ruling make a difference here and 02:26:10
21 there's where I had to dig deep.

22 MR. SIEGEL: Well, Your Honor, I have an answer for
23 that. It is obviously speculation but I actually think it
24 would have been a different result. I was at the oral argument
25 in the Ninth Circuit and the issue of the carrier when the 02:26:25

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1 discussion turned to you need to have a ratified contract
2 before you have a legal ruling or a ripe problem. From a
3 carrier's perspective, that is obviously wrong. And I think if
4 the carrier had been present in that case, and we had been
5 arguing in that case, we would have had a different result.

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6 That's just my speculation but I believe that there was a
7 different unique interest that was not addressed because the
8 party wasn't there.

9 And of course we weren't there because there was not
10 a claim against us like -- the claim against us essentially got
11 created after the Ninth Circuit decision and we came back and
12 had the threats from both sides. At the time it was simply a
13 DFR dispute between the two groups.

02:26:59

14 THE COURT: Today -- well, first of all, let me ask
15 you a couple of questions. One interesting issue that you seem
16 to say there can be no negotiations on these. Which seniority
17 agreement is accepted by the carrier in combination with other
18 issues? Now, I gave you a hypothetical that was probably
19 extreme, as likely extreme, where you could negotiate with one
20 party concerning the seniority agreement to the benefit, let's
21 say, of USAPA and to the detriment of the West Pilots that was
22 extreme that may, on its face, establish that you are an aider
23 and abettor in accepting that.

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24 But you said to me that there was no way that the
25 seniority agreement negotiations stand alone and are not in any

02:28:06

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1 way relevant to other components of -- or other parts of the 02:28:11
2 collective bargaining process. Because that's what the Ninth
3 Circuit seemed to say.

4 MR. SIEGEL: Right.

5 THE COURT: They basically said, well, this may 02:28:25
6 turn -- all turn out in the end because there's all of this
7 combination of different issues.

8 MR. SIEGEL: Right. And I don't want to -- so I
9 don't want to be misinterpreted. I couldn't possibly speculate
10 on the trade-offs between subject matters in a collective 02:28:39
11 bargaining negotiation. I understand what Your Honor is
12 referring to. I have no personal knowledge about how the
13 dynamic would exist at the bargaining table regarding other
14 issues.

15 The only point I was making is that the seniority 02:28:52
16 list itself is not a subject that the carrier makes a proposal
17 and says, "We want the pilots ordered this way versus that
18 way."

19 THE COURT: Yeah. I understand that. But if the
20 union presented to you a proposal that involved other issues, 02:29:11
21 say, for example, something as simple as salary, is that
22 possible or do they have to negotiate the seniority agreement
23 independent of every other issue?

24 MR. SIEGEL: No. The -- it's under the guidance of
25 the National Mediation Board and all of the issues are 02:29:32

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1 discussed in sequence. So I'm not claiming to Your Honor that
2 there's some special separate womb for the seniority
3 negotiations. My point was what I said, which is that on that
4 issue, we have the Nicolau award and we have the USAPA
5 proposal. There's only been one and it was several years ago
6 and it was mandated by their constitution. Date of hire, it's
7 different than the Nicolau award.

02:29:35

02:29:54

8 All I was saying is, there's no company proposal.
9 It's whether you're going to accept the union proposal on that
10 subject. But I don't want to -- I don't want to overstate it
11 because there's always, in collective bargaining, issues that
12 get discussed in context with each other so I'm not trying to
13 say that to Your Honor. But it still presents us with what I
14 would characterize as an extraordinary difficult and unique
15 situation that I think the Ninth Circuit was not addressing. I
16 don't say they missed it. It's just that the issue of a
17 ripeness when a carrier brings a claim for declaratory relief
18 and has these two types of threats like we talked about at the
19 Rule 12 hearing, I think that is a totally unique situation
20 that was not addressed by the Ninth Circuit. And if we had

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02:30:53

21 been there and had made the point and the argument from the
22 carrier's perspective, I do believe we would have had a
23 different result. I don't see how we could not because to send
24 the carrier into negotiations and say, "You go, you go make an
25 agreement and then it gets ratified and then we'll decide if

02:31:15

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1 it's legal or not," when we know going in what the
2 possibilities are. It is simply Nicolau or it is the
3 constitutionally mandated date of hire?

02:31:19

4 THE COURT: But you haven't been engaged in any of
5 that process; right? So whatever you do prospectively is going
6 to affect whether or not the carrier is involved in the unfair
7 labor practice; right? They are not going to look at something
8 you did before because you're now engaged in collectively
9 bargaining. You're considering both of these. You know we
10 can't be an aider and abettor, one side or another. We have to
11 move forward and make this -- make our decision based upon the
12 complexities of collective bargaining; right?

02:31:33

02:31:56

13 MR. SIEGEL: Yes. And, actually, that's why we
14 included Count Three, Your Honor. I mean, the truth is that
15 we're raising the issue in the declaratory judgment but,
16 obviously, we don't think we're an aider and abettor at all.

02:32:18

17 THE COURT: Of course.

18 MR. SIEGEL: And we so allege and we wanted to do
19 that as part of Count Three. But the situation here is that
20 when there's a negotiation and you're being monitored by the
21 federal mediator, these items get put on the table and the
22 USAPA seniority proposal in that process pending the results of
23 this lawsuit, frankly, Your Honor, would be put on the table in
24 that mediation process.

02:32:36

25 And the question that gets put to the carrier is, do

02:32:58

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1 you accept it or do you not? And that's the point that never
2 had to be assessed by the Ninth Circuit. And what we do when
3 we have to face that question -- and I don't want to be
4 repetitive -- is we do know the history. We know what happened
5 in Judge Wake's court. We know there was a jury and a judge
6 who thought it was illegal. We didn't -- the Ninth Circuit
7 didn't comment it was the ripeness ruling without us present
8 and then we have the two threats.

9 So I think, Your Honor, those are the dynamics that
10 caused us originally to file the complaint and to make the
11 argument we did to Your Honor in the Rule 12 proceeding.

12 THE COURT: Let me diverge for a moment. You have,
13 since we have seen each other, been involved in negotiations
14 and the world has turned to some extent. Have those facts in
15 any way altered the prospective that you have? Or perhaps I'll
16 ask the other attorneys about that.

17 MR. SIEGEL: I think our facts are we find ourselves
18 in the same position. We are sitting with a proposal from the
19 union, with a threat from the West Pilots and, frankly, there's
20 been a process, to some extent, of waiting for judicial
21 resolution.

22 THE COURT: Okay.

23 All right. Thank you.

24 MR. SIEGEL: Thank you, Your Honor.

25 THE COURT: Mr. Harper?

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1 MR. HARPER: Thank you, Your Honor. 02:34:34

2 I, too, would like to try to perhaps make an effort
3 to change your mind.

4 THE COURT: Okay.

5 MR. HARPER: And I do feel for Airways and Mr. Siegel 02:34:46
6 because this is a difficult case. It is unique. But this
7 whole situation with respect to negotiating a new seniority
8 list, the time, as Mr. Siegel was trying to tell you, I
9 believe, has passed for the Airline to be able to do that. The
10 time when the seniority provisions, and the outcome of what the 02:35:15
11 seniority provision was going to be, occurred back in 2005 when
12 the Transition Agreement was put into place.

13 And at that particular point in time, the Airline and
14 ALPA -- and you now found that USAPA is bound by the TA and is
15 a successor to ALPA. They negotiated the outcome, the process 02:35:43
16 for the outcome of the seniority list. And that is what is
17 causing the Airways to have a bad feeling here today.

18 Can I put a chart up for you that we have? I think
19 we have handouts, too.

20 You've sent them out? Okay. 02:36:06

21 Do you mind if I stand over here?

22 THE COURT: Oh, no. I can see it.

23 MR. HARPER: Back in the TA, they agreed on a
24 process, East and West would get together and they would go to
25 Nicolau and there would be an arbitration decision which would 02:36:23

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1 be the single list. Airline, ALPA, the predecessor now to
2 USAPA, presented that to the Airline in December of 2007. The
3 Airline accepted it back in 2007. Seniority was done at the
4 end of December 2007.

5 Now, you asked about aiding and abetting. If they
6 now go back and rescind this acceptance, given everything that
7 has happened in the last 49 months, and we have been at
8 litigation since September of 2008, yes, they are exposed to
9 aiding and abetting a change in this process --

10 THE COURT: As a matter of law, without any facts?

11 MR. HARPER: I think it is a matter of law. I mean,
12 I don't know what the different facts here would be.

13 THE COURT: You mean just based -- because they
14 accepted. They are aiders and abettors, as a matter of law, in
15 any Court?

16 MR. HARPER: They are participating in an unfair
17 labor practice to the extent this list is a detriment. We have
18 to prove the unfair labor practice and we would have to prove
19 the aiding and abetting. There's not too many facts that would
20 be --

21 THE COURT: What would be the aiding and abetting
22 based upon the facts that you've given?

23 MR. HARPER: Allowing them to implement a seniority
24 list that is to the substantial detriment of the best pilots
25 without a legitimate objective purpose by the union, and the

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1 union has told us and they write it in their papers --

02:37:50

2 THE COURT: And if they know -- and that is a good
3 point, Mr. Harper, that exception. If they know without
4 legitimate reason by the union, they know that. So, then, they
5 go and give them a legitimate reason, it's not -- then the
6 well-represented carrier not going to do it; right?

02:38:08

7 MR. HARPER: I would hope not. But we have
8 been going --

9 THE COURT: Well, if they do, then they are sued;
10 right?

02:38:24

11 MR. HARPER: We have been going for 49 months. I
12 agree with Mr. Siegel that when we were here a while ago, we
13 had a decision on ripeness. I think it was a ripeness issue
14 that you correctly decided because it was different than in
15 Addington and it really was a question about looking into the
16 future.

02:38:38

17 THE COURT: Right.

18 MR. HARPER: Looking into the future about what
19 happens, and I really do think that you have too narrowly
20 construed the issue at the bottom of page four because we're
21 not complaining about the proposal from USAPA. We're really
22 complaining about the implementation and that is going to be
23 into the future.

02:38:47

24 And that is what I think the Airline is entitled and
25 so are the West Pilots and USAPA, quite candidly, is entitled

02:39:06

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1 to have a ruling on. If you implement something that is 02:39:10
2 different than what you have negotiated and already agreed upon
3 without a legitimate objective purpose --

4 THE COURT: Isn't that -- but, unfortunately, I keep
5 going back to the Ninth Circuit. We all love the Ninth 02:39:24

6 Circuit. Let me get that on the record. They are always
7 right. They keep saying, just as you've said and so

8 articulately, is that it is the future and they have -- whether
9 they have experience with it our not, they believe this
10 collective bargaining process is so dynamic, is so obscure that 02:39:50
11 anything could be agreed to and so, therefore, you cannot
12 project it.

13 I will tell you, as everybody in this courtroom
14 knows, I wanted this resolved today. I didn't -- maybe the
15 exception makes the rule with the Ninth Circuit. I definitely 02:40:16
16 didn't care for that decision. But it's the only one I didn't
17 care for forever, but we're here. We're stuck with it and I've
18 tried? But go ahead. Try to talk me out of what I've done.

19 MR. HARPER: There's a world of difference between
20 you sitting here today and the Ninth Circuit back in 2010 02:40:36
21 because 24 months or more have passed since then and nothing
22 has changed from the union.

23 THE COURT: Okay. I'm sorry, Mr. Harper, but let
24 me -- I apologize for interrupting.

25 What's happening in the negotiation process? Is 02:40:55

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1 everybody just standing still on this issue or anything? I 02:40:58
2 mean, there has been so much that is a matter of public record,
3 I'm wondering. Have you not made any progress here?

4 MR. HARPER: And I asked Mr. Siegel ahead of time and
5 I appreciate his difficulty because he's under some 02:41:15
6 restrictions on talking about how the world has turned. I
7 don't think I am under the same restrictions. So I can address
8 those issues for you.

9 But if I can just go back to my first point before I
10 bring you to the current if you don't mind, Judge. 02:41:31

11 THE COURT: All right.

12 MR. HARPER: Since we came back from the Ninth
13 Circuit in June of 2010, there has been no change in position
14 by the union with respect to what they are going to insist on
15 by way of a seniority list, date of hire. 02:41:48

16 As recently as last month, I mean in September of
17 2012, the union adopted a new operating manual for the union.
18 Union operating manual -- union operating manual. OUM.
19 Paragraph 51 of that or Section 51 of that operating manual
20 says, just within the past month, the Negotiating Committee, if 02:42:16
21 they sit down at the table, is duty-bound. They can't deviate
22 from the union-mandated constitutional provision of date of
23 hire with some defenses and restrictions.

24 So as we walk into the room today, there is no
25 change. Mr. Siegel is right. They are not going to change. 02:42:38

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1 They are not changed and that is what they are going to insist 02:42:41
2 upon.

3 You have 24 more months of facts than the Ninth
4 Circuit did. I think you can take that into consideration and
5 say, yes, the Ninth Circuit said they might change. But the 02:42:52
6 passage of time confirms that they won't.

7 So let's talk about the implementation of something
8 other than the Nicolau and it would be an unfair labor practice
9 for them to do it because as recently as last month, they have
10 failed and can't come up with an objective -- objectively 02:43:09
11 legitimate reason to deviate from it. They can't do it. If
12 they could, they would have written about it. But they are
13 sitting here middle pages of their opening brief chastising the
14 West Pilots for a windfall and lamenting the fact that the East
15 Pilots -- like business expectations or expectations were all 02:43:30
16 daft so they have to direct that and the only way they can
17 correct it now, even seven years after the Transition
18 Agreement, five years after the Nicolau, is to insist upon date
19 of hire.

20 So that's where we are today in the negotiations 02:43:51
21 between USAPA and the union.

22 THE COURT: Are you saying that the negotiations are
23 completely stymied because of that?

24 MR. HARPER: Do you guys mind?

25 Things have changed. You read it in the paper, most 02:44:07

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1 likely. The potential merger between American Airlines and US
2 Airways and the activity that has occurred mostly since April
3 and before that Airways, as we understand it, based upon what
4 we are being told by our representatives and what we're picking
5 up, is that US Airways and the union representing the American
6 pilots entered into a term sheet about what a future collective
7 bargaining agreement might look like, at least some of the
8 issues, and they entered into that in April of 2012.

9 Then June or July of this year, discussions between
10 USAPA and the Airways went forward to try to arrange some sort
11 of memorandum of understanding between USAPA and Airways of
12 what certain conditions and issues, wages, and stuff like that
13 would look like if the merger goes through the merged airline,
14 the knew American Airlines sits down and negotiates a joint
15 collective bargaining agreement between USAPA and the union
16 that represents the American pilots.

17 So now we have two agreements that address collective
18 bargaining agreements. If the merger goes through in a joint
19 collective bargaining agreement, the term sheet with the
20 American Pilots Union has been signed. The memorandum of
21 understanding between Airways and USAPA is not signed yet, but
22 I think most of the negotiations have taken place.

23 I have a slide here that I think will help you
24 understand that even if that goes through and the merger occurs
25 and there is a joint collective bargaining agreement, both the

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1 term sheet and the memorandum agreement set seniority
2 integration aside and behind a new joint collective bargaining
3 agreement that covers everything except the integration of the
4 seniority list.

5 And my point here is, this is important to us, the
6 West Pilots, but it's perhaps even more important as we move
7 into seniority integration if there is a merger because the
8 next dilemma that perhaps this Court is going to have is USAPA
9 going to come to the table with the Nicolau, because they are

10 now bound by the Transition Agreement and the successor, and
11 put the Nicolau on the table along with the APA, the American
12 Pilots list, if they go to arbitration to have a federal
13 arbitrator decide? Or are they going to insist that it's
14 either date of hire, their list only or do we get to squeak
15 under and provide the Nicolau list there as a legitimate list?
16 And that is why it's important not only for today's train for
17 you to decide this issue but in the near future for the airline
18 and for all of the pilots on both East and West because what
19 you decide today may make a world of difference in what happens
20 if there's a merger.

21 THE COURT: Am I to understand what you're saying is
22 that the merger is on seniority, the agreement that the merger
23 with American Airlines is not going to be decided on the basis
24 of renegotiating a seniority agreement for all the pilots that
25 would be fair and impartial to all the pilots.

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1 MR. HARPER: That's what this box, the single, lists. 02:48:16

2 THE COURT: Okay. So they will -- but they will take
3 into consideration history and determining what that final
4 agreement is or are you saying that that is totally
5 speculative, that they are stuck in the middle of the road. 02:48:30
6 They can't until this is resolved?

7 MR. HARPER: I don't know exactly what the arbitrator
8 would -- in a federal arbitration would deem to be relevant.

9 What we are most concerned about is what list -- how
10 this table is dressed or how it's set up when you get to the 02:48:47
11 negotiations. Is it going to be the East, West, Nicolau
12 flowing on through to McCaskill bond, which the successor union
13 should be obligated to do that if they have to follow the
14 Transition Agreement and what happened here, or are they going
15 to continue to insist on date of hire and, West Pilots, you 02:49:11
16 just do the best darn thing that you can to try to get your
17 voice at this table. That's what's in the future.

18 I think to the extent that you started off what I
19 thought was correct on the original ripeness, looking into the
20 future, what is going to happen. I think Mr. Siegel 02:49:36
21 desperately wants that to happen not only for the reasons he
22 articulated, because he knows that that might be happening,
23 too, and we're four years right now and this may take us
24 another three if this isn't resolved at this particular point
25 in time and that is not fair to anybody: East Pilots, West 02:49:52

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1 Pilots, or the carrier. 02:49:55

2 A couple of other just points here. For the most

3 part, I like the wording. I just don't like the conclusion in

4 the opinion. But I take you to page four if you don't mind,

5 Your Honor. To the extent that you have any doubt as to 02:50:12

6 whether or not the date of hire puts the West Pilots at the

7 bottom, I have a chart here that we used in the Nicolau that

8 would just take me a moment to demonstrate that to you.

9 THE COURT: Sure.

10 MR. HARPER: Because it does make our point. And I'm 02:50:35

11 talking mostly about furlough here, the difference between date

12 of hire and --

13 THE COURT: I understand that issue.

14 MR. SZYMANSKI: Your Honor, do you mind if I come up

15 here so I can see it? 02:51:01

16 THE COURT: Sure.

17 MR. HARPER: Here is, Your Honor, the Nicolau.

18 THE COURT: All right.

19 MR. HARPER: And you can see how well put together it

20 is. It's got the various integration of the pilots, the way 02:51:10

21 Mr. Nicolau thought it would be fair. We've got some of our

22 plaintiffs', class action plaintiffs' names up here and then

23 the bottom is the CEL pilots that -- and if you recall, pilots

24 from the East side down in the black.

25 And if this is followed, then there is not a 02:51:38

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1 substantial negative impact. The Nicolau is on the West Pilots 02:51:41
2 if there is a subsequent furlough later on. And you can see
3 how important, in looking at that chart over there, it is to
4 have something like this on the table versus this and this is
5 date of hire. It has all of the East Pilots at the top with a 02:51:59
6 few West Pilots in there interspersed in there in the blue but
7 most of the West Pilots at the bottom. And if we don't go to
8 the merger and we just stay with Airways, if there's a
9 furlough, it's all the West Pilots that go away and that is the
10 real unfairness to the West Pilots that occurs in the date of 02:52:19
11 hire. There are other unfairnesses as you go along.

12 THE COURT: Sure. I understand that and I understand
13 why Nicolau did what it did whether anybody, one side or the
14 other, agrees with it. Isn't that part of the negotiating now
15 in the new negotiations as part -- I mean, this argument that 02:52:44
16 you've made may be persuasive in the negotiations that are for
17 collective bargaining now with a new merger.

18 MR. HARPER: No. I hope not. Because if I
19 understand -- just because of four years of experience, what
20 the East wants to do is to take the date of hire -- 02:53:09

21 THE COURT: Right.

22 MR. HARPER: -- to be the only list there.

23 THE COURT: Right. But your argument in favor of the
24 West Pilots and the Nicolau agreement is an argument that you
25 can make now; right? 02:53:24

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1 MR. HARPER: Make now where? 02:53:26

2 THE COURT: In the new negotiations for --

3 MR. HARPER: That's not going to occur for some time,
4 Your Honor.

5 THE COURT: I see. So it won't occur for some time 02:53:34
6 but it will occur.

7 MR. HARPER: If there's a merger that has to be --
8 the Airline has to come out of bankruptcy. When will that
9 happen, I don't know.

10 THE COURT: So what if I made the decision now and 02:53:46
11 there was a merger? What does it do for the future? Do they
12 have to accept my decision?

13 MR. HARPER: No. The federal mediator, I would think
14 so. I mean, you're telling USAPA that they are bound by the
15 Nicolau. So when they belly up to this table over here, they 02:54:00
16 ought to be bringing the Nicolau to the table. A federal
17 district judge in Phoenix, Arizona, telling the union that they
18 have to use the Nicolau, I think would be fairly persuasive
19 evidence on a federal claim.

20 THE COURT: Only because it's me. 02:54:16

21 MR. HARPER: Only because it's you and not the Ninth
22 Circuit, just you, Your Honor, yes.

23 But I think that that is really significant. If we
24 walk up to this table and say, well, she couldn't make up her
25 mind, then it's going to be more iffy. 02:54:27

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1 So you asked the question about where has the world 02:54:33
2 turned.

3 THE COURT: It's not that I couldn't make up my mind.
4 It's because I can't do it. That's my problem.

5 Anyway, well, anything else, Mr. Harper? 02:54:43

6 MR. HARPER: Yes. I just brought that to your
7 attention and just a word of -- let me see if I can't -- if you
8 go to page seven, lines 13, 14, the sentence, "Accordingly, if
9 USAPA wishes to abandon the Nicolau award, it is free to do
10 so." The other nine lines around that makes sure that it 02:55:05
11 leaves the context that it is at their own risk. But knowing
12 the way things play out here and for the last four years, I
13 would strongly recommend that you would add after the word "do
14 so," comma, "but at its own risk" so that somebody doesn't take
15 that short sentence and say, "See, we can walk away from the 02:55:30
16 Nicolau without any risk."

17 So that's just -- if I was editing it, I would ask
18 you to put those words in there.

19 THE COURT: I certainly will consider it.

20 MR. HARPER: I appreciate that, Your Honor. 02:55:45

21 THE COURT: Thank you.

22 All right. Mr. Szymanski?

23 MR. SZYMANSKI: Your Honor, at the dinner table, my
24 father, who was a judge, used to say to his sons when they had
25 won the argument that, "Are you sure you want to open your 02:56:06

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1 mouth? Because the only thing that can happen is that I can 02:56:10
2 change my mind."

3 THE COURT: And I just changed my mind because you
4 opened your mouth.

5 MR. SZYMANSKI: I don't know that you have, Your 02:56:19
6 Honor. As you said, this is a proposed decision and you're
7 going to go back and consider it and so forth.

8 THE COURT: And I appreciate it. By the way, the
9 only reason I can pronounce your name is I have family member
10 named Szymanski. 02:56:32

11 MR. SZYMANSKI: It's a more common name than you
12 would think.

13 THE COURT: Obviously.

14 MR. SZYMANSKI: But at any rate, in this situation,
15 the other parties have raised arguments and I feel that I need 02:56:44
16 to respond to them. I want, first of all, to talk about the
17 facts and the fact about negotiations is as Mr. Siegel has said
18 before, there was a proposal made by the union in 2008 and
19 since that time in negotiations there has been no discussion of
20 that proposal. The federal mediator who is in charge of the 02:57:08
21 bargaining and the mediation has not seen fit to call the
22 parties together and put on the agenda for discussion that
23 proposal or any counterproposals by either party. So it is as
24 it was back in 2008.

25 We've said in our brief, and we talked about this 02:57:34

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1 when we were here in December at the scheduling -- the case 02:57:36
2 management conferences, that we're prepared to talk and we want
3 to talk and we want genuine engagement from the West Pilots
4 about the seniority proposal and we are prepared to make
5 changes. There are four points that they raised in their 02:57:54
6 brief. They are addressed in our brief. We think that those
7 points, including the issue about furloughs, is something that
8 can be legitimately addressed.

9 THE COURT: And this is the first time that they have
10 heard this? 02:58:10

11 MR. SZYMANSKI: This is not the first time.
12 Hopefully, in this situation, with the judge's decision, they
13 will, at this point, instead of sitting adamantly on the
14 Nicolau award, realize that there is -- should be movement in
15 this situation. And we, as a result, can discuss that and 02:58:27
16 we're extremely interested in doing that.

17 We take very seriously, the union does, its duty of
18 fair representation to the entire pilot class and not to
19 exclude any particular group from that. But for the reasons
20 we've expressed, we think that a different proposal is 02:58:47
21 appropriate.

22 THE COURT: Has there been progress more than when
23 everybody was last here? Is everybody now at this stage more
24 likely to negotiate or is everybody sitting silently waiting
25 for this decision? 02:59:11

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1 MR. SZYMANSKI: On this particular issue, I would 02:59:13
2 have to say everybody has been waiting for the decision.

3 But I think that on the other issues before the
4 union, which are extremely important facing the potential of a
5 merger with American Airlines and a merger with a larger pilot 02:59:27
6 group, a pilot group that is at least twice as large as our
7 pilot group, that the members of the board of pilot
8 representatives, including the three representatives from the
9 Phoenix domicile, have coalesced and worked together on things
10 in a way that, frankly, in my history with the union, which is 02:59:48
11 only about a year plus, is unprecedented and admirable to
12 behold and I would hope that that would carry over to trying to
13 deal with this issue.

14 THE COURT: Has the prospect of a merger with
15 American Airlines, that is -- so that changed the landscape, to 03:00:11
16 some extent, because we have a number of pilots that were not
17 part of this lawsuit before for negotiating purposes?

18 MR. SZYMANSKI: It's having some effect, Your Honor,
19 but it would be complete speculation to talk about this because
20 as much as you and everyone else in this room has read about a 03:00:33
21 merger between US Airways and American and the press. There is
22 no merger yet. There are discussions going on. We don't know
23 what the results or the direction of those discussions are.
24 There's not even been an announcement unless I --

25 THE COURT: I know. But has there been -- everybody 03:00:54

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1 knows what the seniority agreement is for American Airlines; 03:00:55
2 right? That exists.

3 MR. SZYMANSKI: We know what their list is. We know
4 what their list looks like and we've begun to look at what's
5 happened; but to talk about things like what Mr. Harper is 03:01:09
6 talking about in terms of what lists are going to be presented,
7 how it's going to happen, who is going to be at the table and
8 so on and so forth, those things have not been decided and it
9 would be complete speculation to start talking about them.

10 It is clear that if we get to that situation, it will 03:01:27
11 be the decision of the neutral arbitrator or a panel of three
12 arbitrators based on a fair and equitable standard taking into
13 account all of the circumstances.

14 But beyond that, there's really not a lot that we can
15 say about that. 03:01:43

16 I will say that the provision of the USAPA
17 constitution is in the record in our statement of facts and it
18 doesn't provide for strict date of hire. It talks of
19 date-of-hire principles with appropriate conditions and
20 restrictions in order to preserve the expectations that the 03:01:59
21 pilots were involved. So it's just -- it's not a flat
22 date-of-hire requirement that is in the constitution. And to
23 the extent that there was something in the union operating
24 manual, the UOM, that simply required adherence to the
25 constitution, that's really not new. It by no means was 03:02:21

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1 intended to add to the constitution but simply to implement it. 03:02:26

2 So we're still prepared to talk about this. I would
3 disagree with Mr. Siegel. I think your decision does give
4 direction with respect to this, to the extent that we can,
5 obviously, at risk of being sued by, you know, a duty of fair 03:02:47
6 representation case at some point down the line which was
7 always a possibility. We are free to propose something
8 different than the Nicolau list and I think that's a
9 substantial direction to US Airways, so I disagree with that.

10 And finally, the Court's statement about collusion 03:03:07
11 being the necessary element of holding the carrier liable in
12 the event of a duty of fair representation claim against the
13 union is absolutely correct. I can provide cases but I would
14 assume, based on the Court's comments, that the Court is
15 familiar with those cases at any rate. So that's unnecessary. 03:03:33

16 I would say -- I would offer a slightly different and
17 more historically appropriate collusion kind of situation. I
18 would say supposing an employer came to the union and said,
19 "Let's put all of the black pilots at the bottom of the list,"
20 that would be collusion. It would be illegal and the Supreme 03:03:55
21 Court has case after case which says that that kind of racial
22 discrimination is discrimination by both the union and the
23 employer and it would be appropriate.

24 That is just one example. But it's got to be
25 something that is actual collusion that is provable in order to 03:04:10

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1 bring the employer into the situation for some liability
2 purpose, not for the purpose of reordering the list which you
3 could bring the employer in and say that the employer is a
4 party because the employer's party to a Collective Bargaining
5 Agreement that includes a list and as a result, we need the
6 employer in this lawsuit in order to effectuate the remedy.

03:04:14

03:04:30

7 But liability requires collusion and there is no
8 evidence in this case of collusion. I think that's obvious and
9 I don't expect that that is going to be changed. But if it
10 were to change, there would be a claim and that is why I think
11 the Court's decision with respect to Count Three is correct.

03:04:53

12 Your Honor, thank you very much.

13 THE COURT: Thank you.

14 Mr. Siegel, I have give you last word. You didn't
15 have to raise your hand.

03:05:08

16 MR. SIEGEL: Your Honor, thank you very much. I want
17 to -- because there's a whole lot of discussion about the
18 merger subject, I think it's important not to have anything
19 speculative or incorrect in the record before the Court or the
20 argument.

03:05:26

21 There's no decision or agreement to merge.

22 THE COURT: Right.

23 MR. SIEGEL: The AMR and the US Airways put out a
24 press release on August 31 that instructed everyone that there
25 were no assurances that there would be a transaction, and all

03:05:40

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1 that was reported and has occurred is that they have signed
2 what's called an NDA, a nondisclosure agreement, providing for
3 exchange of confidential information, an evaluation is what
4 it's called. I can represent there's no agreement, there's no
5 decision to merge and it's a mistake for people to be supposing
6 anything on that subject until or unless there's further
7 announcements from the two carriers. Let me put that one
8 aside.

03:05:45

03:06:01

9 THE COURT: Are negotiations really at a standstill
10 between US Air and USAPA until this decision is made?

03:06:20

11 MR. SIEGEL: Mr. Szymanski and I actually agree on
12 that subject. The federal mediators have told us that. They
13 have not scheduled recent negotiations and they have reported
14 to us, because they are quite aware of the legal battle over
15 the seniority proposal and they understand you can't reach
16 agreement on a Collective Bargaining Agreement without a
17 seniority proposal and they are aware of this proceeding in
18 this court. So that is exactly what has occurred since we were
19 last here.

03:06:46

20 THE COURT: And are you waiting until there is
21 something affirmative about whether or not there's going to be
22 a merger? I mean, do the negotiations go ahead without it or
23 are they determining the merger in order to not waste a
24 needless consumption of time?

03:07:02

25 MR. SIEGEL: We are still governed by what's called

03:07:26

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1 Section 6 of the Railway Labor Act. We have a government
2 obligation with USAPA. It's under the jurisdiction of the
3 National Mediation Board and the Board sets the date for the
4 mediation. I know that USAPA a while ago asked the Board to
5 set dates and as I've said to the Court, the Board has told us
6 that it is, in fact, aware of the legal issue on the seniority
7 proposal.

03:07:28

03:07:41

8 THE COURT: Okay. Thank you.

9 MR. SIEGEL: All right. Thank you.

10 THE COURT: All right.

03:07:55

11 Mr. Harper?

12 MR. HARPER: Just --

13 THE COURT: You've got your hand up. Go ahead.

14 MR. HARPER: Mr. Siegel puts his hand up, I'll put my
15 hand up.

03:08:03

16 I just want to make sure that you understand, when
17 you ask these questions about negotiations, that you have a
18 clear picture. The negotiations and the context of a
19 Collective Bargaining Agreement between -- as I understand it,
20 between Airways and USAPA without the merger are not going
21 forward. They are stopped.

03:08:21

22 THE COURT: Right.

23 MR. HARPER: Mr. Szymanski said that the Board of
24 pilot representatives has been really easy or more willing to
25 negotiate terms and conditions with the company. That is in

03:08:36

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1 the context of the MOU, memorandum of understanding, associated
2 with the merger. So if you take it up to that level, that's
3 where the substantive discussions about terms and conditions
4 have gone forward.

5 THE COURT: That was what I thought was inconsistent
6 here, too.

7 So, in other words --

8 MR. HARPER: Level A and level B. And the reason
9 level B is going forward is because they have agreed here to
10 put the seniority issue off until they get a joint collective
11 bargaining agreement.

12 So that has been pushed off under the MOU until some
13 sometime into the future, so that's the only reason that there
14 is progress here, is because they didn't put, neither union put
15 seniority on the table either with the term sheet or the MOU.
16 It's still on the table, as I understand it, if they went back
17 and negotiated at the level A, between Airways and USAPA, just
18 for a new Collective Bargaining Agreement under the 2005
19 merger.

20 So I just want to make sure you have a clear
21 understanding here of what is either being told to you or not
22 being told to you and that makes a difference. That's why I
23 think is this document -- they have moved forward. If the
24 merger goes forward, and I am not assuming that it is going,
25 they have the outline of a Collective Bargaining Agreement

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1 already. So there's no impediment in negotiations for you to
2 say they are bound by the Nicolau now. It won't affect this.
3 That's why I think you can go ahead and do it in light of what
4 has changed in the past 24 months, actually in the past six
5 months.

03:10:10

03:10:27

6 THE COURT: Thank you.

7 All right. Thank you, Counsel. This matter is under
8 advisement.

9 COURTROOM DEPUTY: All rise.

10 (Whereupon, these proceedings recessed at 3:10 p.m.)

03:10:41

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United States District Court

C E R T I F I C A T E

03:10:41

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.

03:10:41

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.

03:10:41

DATED at Phoenix, Arizona, this 3rd day of October,
2012.

03:10:41

s/Elaine M. Cropper

03:10:41

Elaine M. Cropper, RDR, CRR, CCP