UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

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Don Addington, et al.,	)	
	)	No. CV 08-1633-PHX-NVW
Plaintiffs,	)	
vs.	)	
	)	Phoenix, Arizona
US Airline Pilots	)	May 4, 2009
Association, et al.,	)	3:15 p.m.
	)	
Defendants.	)	

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BEFORE: THE HONORABLE NEIL V. WAKE
UNITED STATES DISTRICT JUDGE
(*Jury Trial - Day 5*)
(*Pages 1038 - 1088*)

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P R O C E E D I N G S

THE COURT: Please be seated.

THE COURTROOM DEPUTY: CV 08-1633, Addington versus US Airline Pilots Association on for trial.

Counsel, please announce.

MR. STEVENS: Don Stevens, Andy Jacob, and Kelly Flood on behalf of plaintiffs.

MR. GRANATH: Good afternoon, Your Honor. Nick Granath, Jim Brengle, Lee Seham on behalf of defendants.

THE COURT: Good afternoon, counsel. And as you know, we're running late and I have a whole 'nother group of people who are expecting justice at 3:30. And they are going to be delayed as well. I think we are going to run probably about a half hour late on everything for the rest of the afternoon. So I appreciate the patience of those of you who are waiting. We just had a matter that went much longer than expected but it was necessary.

MR. GRANATH: Your Honor, observing the clock, I was going to offer the suggestion that defendants could make a written reply to the response that was filed today, and we could move on to the jury instructions if time is pressing. Either way.

THE COURT: Tell you what. Here's my thought. I thought we could take maybe 45 minutes. And I have a few preliminary thoughts.

First, you all have been filing paper while I have been on the bench today. So I have taken a quick look. First of all, Mr. Granath, the second Rule 50 motion, I think I may have given Mr. Brengle a wrong impression when we were at sidebar the other day. Rule 50 says you can file a motion at any time. I think what that means is in connection with the notes that at a point in time when all the evidence is in on an issue you can do it. So you don't have to wait until formally the plaintiff rests and the defendant rests. If there's a dispositive issue and all the evidence is in, you can make the motion. However, I did not contemplate sequential Rule 50 motions. So --

MR. GRANATH: I would address that, if I could, Your Honor.

THE COURT: Yes.

MR. GRANATH: Would Your Honor prefer the podium?

THE COURT: Yes, the podium has a better microphone.

Obviously, you can make a motion at the close of evidence as well.

MR. GRANATH: Your Honor, it was simply a convenience of the parties and logic. We obviously only have two motions. We didn't want to burden the Court with the discussion on the merits on a Rule 50. The ripeness is obviously a threshold issue. It's jurisdictional. We felt it was entirely appropriate to bring it at this point after plaintiffs have

rested merely bring it now so there's no misunderstanding for the Court or the plaintiffs that the second motion is coming.

THE COURT: Okay. Well, let me tell you my sense of what the practicality and fairness. I'm ready to tell you about the ripeness motion that's briefed. That's one reason I am late. I did read the plaintiffs' memorandum that came in on that.

I'm disposed to -- the second motion, which is sort of a place holding motion, doesn't make any ground arguments but says we'll make one. I understand why everybody wants to be cautious. But I'm disposed to deny that, of course, without prejudice to people filing another motion at the close of the evidence. And I will hear you as to why you think that might be unfair or in any way inappropriate. But I'm here to discuss the merits of the ripeness motion.

And as you can see from the revised instructions I sent out today, I, at least, am of the view that the *Ramey* case from the Ninth Circuit provides an analytical structure for the ripeness motion. So I hoped we could briefly touch on that.

Mr. Seham knows the case.

MR. SEHAM: The *Ramey* case.

THE COURT: Yes.

MR. GRANATH: Your Honor, if I may.

THE COURT: Yeah.

MR. GRANATH: As long as the Court -- truly, the point

was not to present argument on the second Rule 50 today or to surprise the Court or the plaintiffs. It was simply to preserve and make clear so there was no misunderstanding. And I did that in the context of reading the response. So I have no problem as long as it's clear that there's no prejudice to refiling.

THE COURT: Again, let me tell you my understanding when I spoke with, I think, Mr. Brengle at sidebar, that we agreed that the Rule 50 motion could be deferred until the jury was gone on Friday so we did not waste jury time. But I did not contemplate we would have sequential briefing coming in on Rule 50 as though it was the end of the plaintiffs' case.

So I'm not seeing that it's necessary to allow that and I don't see any prejudice to you because at this point it's your witnesses are the ones we're going to hear now. So I'm disposed to deny the new place holding motion, of course, without prejudice to making a Rule 50 motion at the close of the evidence. But I'm ready to discuss the briefed motion on the ripeness issues.

MR. GRANATH: So that I understand the Court's intent, am I hearing that you would prefer not to have a brief on the second rule motion when we do renew it?

THE COURT: I frankly think it's too late. I agreed I would hear that motion --

MR. GRANATH: That's fine, Your Honor.

THE COURT: -- at the close of evidence on Friday. And I do see a very serious practical problem with having multiple Rule 50 motions come in over time when we're all -- opposing counsel are in the midst of trying the case.

So you know, of course, the difference is technically, when -- the Rule 50 motion at the close of the case I consider all the evidence I have heard in the meantime, whereas a motion at the close of the plaintiffs' case must be decided only on the evidence that has been received up to that point in time. I doubt that's going to make a difference in this case.

MR. GRANATH: I understand, Your Honor. We're acting out of abundance of caution for the appellate record.

THE COURT: I understand. And lawyers are trained to be paranoid.

MR. GRANATH: I am, Your Honor.

THE COURT: All right. Then the new second Rule 50 motion filed today is denied.

Now --

MR. GRANATH: Denied without prejudice, correct, Your Honor?

THE COURT: Pardon?

MR. GRANATH: Denied without prejudice?

THE COURT: They are always without prejudice to renewing it at the close of all the evidence.

And now, Mr. Granath, am I saying your name right?

MR. GRANATH: That's fine, Your Honor.

THE COURT: Good. It looked like this *Ramey* case from the Second Circuit in 2004, although its own particular procedural facts are somewhat different, lays out the analytical structure for ripeness for a challenge to union action with respect to a bargaining position. And it appears to me that the facts are really undisputed, that USAPA has refused to submit and negotiate for the Nicolau Award. It has -- I don't want to use any loaded word here -- but it has not continued forward with the Transition Agreement and the incorporated ALPA Merger Policy that calls for the arbitration award to be final and binding. So there doesn't appear to be any prospect that's going to be any different. Indeed, I think you all have been clear it's never going to happen.

So looking at the, again, the nice structure provided in the *Ramey* case, in particular Page 279, it appears this meets the evidentiary and constitutional minimums for a real dispute for which a remedy could be provided.

MR. GRANATH: We respectfully disagree, and strongly so, Your Honor. The standard is whether there's a final product, and this is, in fact, a substantive claim. That's apparent from the pleadings, and it's very much apparent now from the relief that the plaintiffs seek.

This is about what goes into the bargaining process -- into the bargaining contract. That's what this case says.

They are seeking a dictated contract here. There's no issue that there's no final contract when they sued. There wasn't a proposal on the ground. They have stipulated in open court there is no delay to any section. And that's what we have right now in this case. It's not a process claim. We are in standard -- we are in exactly the phase where, in *O'Neil*, where the only standard should be one of reasonableness of rationality subject to good faith. Their response is to address standing. That's not an issue. Their injury argument presupposes that there's an entitlement to Nicolau. There is no entitlement to Nicolau that could be presupposed. It's either a fact question for what was ALPA's merger policy, and the jury should have that, or the Court is invading the province of a system Board of Adjustment.

The ripeness should be assessed under applicable labor law, and the Court's only -- the only earlier determination the Court has made that there was delay, that's simply not an issue anymore. It's uncontested. It's stipulated to.

This is, in fact, the substantive claim, and the pretrial is relevant. The response misreads the Rule 50. There can't be an injury now. There is no final product, and there is no entitlement to Nicolau. And all we have is exactly what we have in the *Breeger* case, which is shooting at a bargaining proposal. And even in this case, all we have is shooting at an intent to make a bargaining proposal.

THE COURT: There's no dispute about -- there is no possible uncertainty about what events have to happen and what events will happen. USAPA will not in any event negotiate for the arbitrated Seniority List, will it?

MR. GRANATH: That's correct, Your Honor. But then it just becomes a question about what goes into the contract. And we don't have a contract yet.

THE COURT: One thing is undisputed. We know it won't be the Nicolau -- the seniority arbitration award.

MR. GRANATH: That's correct. But what they're -- the claim that's been made here is whether or not there is a violation of the duty of fair representation. They are aiming at the Collective Bargaining Agreement, and that hasn't been determined that we don't have a final product yet. And what's happening here in this case is that the jury and this Court are substituting their own view of what is a proper bargaining agreement. That is what the Court is being invited to do.

THE COURT: Actually, you are jumping ahead to the merits. All we're talking about is standing. That doesn't presume whether anybody wins or loses. It's just is there enough evidence of enough of a dispute to meet the constitutional minimum to invoke the judicial process.

MR. GRANATH: Their case in controversy that they bring to the this Court is that we don't have the Seniority List that we want. The Seniority List hasn't been determined

yet, Your Honor. Negotiation is ongoing. The only basis for finding ripeness to date has been the Court's observation. I'm not sure where it came from, because it has not cited any evidence or any pleadings, that there was a process claim and that there was somehow a delay going on. Well, we know there's no delay going on now. We know there's nothing -- there's no legally sufficient evidence for the jury to grasp on. Indeed it's been stipulated away.

All we're left with is a substantive claim attacking the union's performance while performing the function of bargaining when bargaining hasn't been completed yet. When bargaining hasn't been completed yet. This is fundamental labor law. And this case is turning that precept on its head, Your Honor, and it's reversible error, frankly.

THE COURT: All right. Mr. Stevens.

MR. STEVENS: Your Honor, Mr. Jacob will present the plaintiffs' case.

THE COURT: Everybody bear in mind I intend to be done by 4:00.

MR. JACOB: I will be very brief, Your Honor.

The plaintiff gets to define their claim. The issue is whether we have an injury that is amenable to being addressed. There's a number of ways that one could define what the injury is. The bargain was that the West Pilots could insist on there being a single CBA using the Nicolau Award

negotiated and put to a vote. That didn't happen. That is the right that has been injured. The remedy that we seek does not necessarily have to only address that injury, but that's the injury that we can focus on. That's ripe. What the defendant wants to do is, again, say that we're too early, and when we would get to the point that they are saying today would be time to bring our case they will say we're too late.

The *Ramey* case says the cause of action accrues when the union starts to negotiate the Seniority List that the claim says is a breach of the duty of fair representation.

THE COURT: I could see how they could be right if there's any fluidity at all as to what the union's bargaining position is. But that seems to be set in concrete what their position is.

MR. JACOB: Yes, Your Honor. And unlike the *Breeger* case, in that case, quite frankly because of this case, it's not at all certain what's going to happen there, because even though the union has said they don't plan to ask for a seniority scheme that's sought by those plaintiffs, the whole case may change in North Carolina based on what happens here. It makes perfect sense to say that that case is not ripe. It doesn't make sense to say this one isn't.

THE COURT: All right.

MR. GRANATH: Briefly, if I may.

THE COURT: Yes.

MR. GRANATH: It's not a breach of contract claim, Your Honor. We don't know, this Court doesn't know, and the jury doesn't know, and they can't know what the final contract will look like. We have a constitution --

THE COURT: But we know it will not be -- look like the Nicolau Award. There's no room for debate on that.

MR. GRANATH: Well, we have a constitutional objective that says Date-of-Hire with conditions and restrictions unmerged. That's what we have. That's all we have. We don't even know what the company will accept right now.

THE COURT: We do know the company accepted the Nicolau Award year and a half ago.

MR. GRANATH: Not for the final contract, Your Honor. Respectfully disagree. The Nicolau Award was binding on ALPA as a proposal subject to ratification.

THE COURT: But in terms of the point of view of US Airways, they contractually -- from the evidence that was read in the depositions, they understand that they contractually bound themselves to accept an arbitrated award if it complied with the stated criteria. They have acknowledged it does, and they have acknowledged they are contractually bound to accept the Nicolau Award. That's the only evidence. Not only is there evidence of that, that's the only evidence on that point.

MR. GRANATH: The parties remain free to revisit seniority. ALPA was free to revisit seniority, including the

Nicolau Award once they exhausted a reasonable attempt. And there was impasse, and they did get to that. Again, we're left with a contract that we don't know what the end of it is. Yes, there's a present intent not to put in Nicolau. But the intent that the union is proceeding on, and the only evidence right now, is that -- to proceed to the a constitutional objective that the union has. We don't know what the union -- or excuse me -- what the company will accept or what the parties will accept yet.

And this is precisely, Your Honor -- I may be beating a dead horse, and losing my ability to make my tongue work either, but I'm frustrated, Your Honor. Because this seems to me to be exactly where a court should not go. Because it results in the inability of a union to negotiate. And indeed, negotiations are imperiled.

THE COURT: Sounds to me like you are jumping ahead of ripeness to the merits with that kind of observation.

MR. GRANATH: Well, it may seem that way, Your Honor. But there is no actual case in controversy if they are aiming at the final product. And we don't have it yet, so there can't be an injury. And you can't predetermine the claims about the Nicolau Award. That's hotly disputed.

Thank you.

THE COURT: All right. As I said, I think the *Ramey* case from the Ninth Circuit is very helpful with the structure

here. In particular, their notation on footnote 4 on Page 249 seems to fit this case very well. So I'm persuaded that the constitutional minimums for a ripe case or controversy are well met here. So the defendant's Rule 50 motion for lack of ripeness is denied.

We'll talk about jury instructions.

MR. JACOB: Hate to interrupt you, just to correct the record, that's a Second Circuit case, not the Ninth Circuit.

THE COURT: I know that.

MR. JACOB: You keep saying Ninth Circuit.

THE COURT: If I said Ninth Circuit, it proves yet again you have to listen to what I say. Because I say the wrong thing, a lot. But I knew it was a Ninth Circuit. I just didn't engage my tongue right. So thank you. You are all directed to help me whenever I make that kind of a misspeak.

MR. JACOB: That was the only reason I stood.

THE COURT: Okay.

As you can see, we have, I guess -- everybody has put a lot of labor into this, including me. And I had mentioned to Mr. Brengle at one of the sidebars that I was having some serious anxiety about the utility of arguing over certain pigeonholes of the duty of fair representation. And it might make more sense to instruct with respect to the contentions made in the case and the facts in the case. And in looking for that, again, the *Ramey* case that we found seemed to provide an

example of that. So it's shed some light for us in how to come at this.

Also, I want to -- as a preface, I do agree with the defendants that the draft instructions I had submitted earlier that dealt with principles of contract interpretation, I don't think they need to be given so far. From what we have seen so far, there is no dispute about the meaning of the Transition Agreement or the meaning of the incorporated by reference ALPA Merger Policy Article 45, or whatever it is. There just -- I haven't seen any ambiguity that would require the jury to be instructed on the principle of contract interpretation, and therefore, I have come up with an instruction that reads the way it appears to me, at least so far, to be the plain meaning of documents. That does simplify it.

And as to the other issues, I have tried to frame the issues, the instructions, the way I'm seeing the law or trying to discover it, without making any judgment, of course, yet as to whether any particular sub-issue is subject to conflicting evidence such that it needs to go to the jury. Some of them looked to me like they pretty clearly will. But others remain to be seen.

I don't know where to start. Have you all been able to look at the revised draft I sent out late this morning?

MR. SEHAM: We didn't get it until shortly before 1 p.m.

THE COURT: It was sent out about that -- a little before then.

MR. STEVENS: It's my understanding that the Court system was down for a while. We were not able to electronically file and did not get whatever the second --

THE COURT: We sent you an e-mail.

MR. STEVENS: We have that. I was just pointing out we didn't get the second USAPA Rule 50 motion. But I don't have to deal with that now.

But Your Honor, we have -- on behalf of the plaintiffs, Don Stevens.

We have reviewed the 13 proposed draft instructions and special interrogatories, and we would have no objection to the Court giving those.

THE COURT: And let me be clear. I view this as still a work in process.

MR. STEVENS: I understand, Your Honor. And we have no substantive complaints at this point. There are a couple of clarifications we would probably ask. But in the general term of a working draft, I think the Court has winnowed this down to something that reads fairly well, that the jury could understand, and that covers both sides, both claims.

So we have nothing further to add to this draft.

THE COURT: Allow me to be particularly anxious about these proposed special interrogatories. I really haven't

focused on that as much as I want to. That might be expanded or improved or changed. And interrogatories could be done with a special -- or general verdict form. My thought processes are not complete on that.

MR. STEVENS: I understand, Your Honor. And because it was a work in process and we hadn't gotten down to what the verdict actually would look like or what the jury is going to, the rest of the instructions were written as though it would be find in favor of the plaintiff or the defendant. Was not sure whether the Court viewed what -- there were any equitable claims the jury was merely advisory. I thought the Court found this was a dispositive jury.

THE COURT: Actually let me restate what my understanding's always been.

We're having the jury answer all questions that are necessary for the legal relief, the damage relief, except one that we're going to have to have a second jury for if it gets that far.

The other issues that only go to the form or appropriateness of equitable relief, that's not a jury trial issue and I will try that to the bench. We'll pick up as soon as the jury starts to deliberate. That's the way I laid it out at the outset. I don't have any objection to advisory juries. We don't have time to burden them with anything more than what they have to say.

MR. STEVENS: That's the way I understand, there would be both a verdict form in the traditional find in favor of the plaintiff or the defendant, and the special interrogatories which would perhaps guide the Court on other -- on the other phases of the trial.

THE COURT: One other thing that has occurred to me during the trial so far is even though I have tried to manage this in a way that sequences it expeditiously and as economically as possible, putting off damage determinations to a second jury, if the case gets that far, it has occurred to me some of the evidence we have been hearing so far is evidence that would have to be repeated for a second jury on issue of causation for damages. I think that's somewhat unavoidable.

MR. STEVENS: At least the fact of damage, I think, was relevant because of the issue of causation. We didn't go very far into it, just that it had, in effect, so that there was evidence in the record. And then the extent of that, I understood, would be tried.

THE COURT: Let me -- for example, a logically possible outcome is that plaintiffs could prove liability. The Court would grant some equitable relief. But when the day came, there would be failure to persuade that things would have -- the timing of the negotiation would have been such that plaintiffs would have gotten to different and better positions than they are today. That's logically possible.

So we could end up in a situation where a damage claim could fail later on entirely even though a liability claim and injunctive relief of some sort is granted here. I'm not making any judgment about it. It just occurred to me that that's a possibility.

MR. STEVENS: Yes, Your Honor. We're aware of that.

THE COURT: Let's let Mr. Seham have the microphone.

MR. GRANATH: Am I correct in assuming I have five minutes?

THE COURT: No. You have got -- you have all but two minutes, okay. That would be about half.

MR. SEHAM: I have two minutes?

THE COURT: No. I said I wanted to finish at 4:00.

MR. SEHAM: Okay.

THE COURT: And I might cheat a little bit. I have a whole bunch of lawyers who are out there. For those of you who came in late, I'm just running late today. And so if I can impose upon your patience.

Go ahead Mr. Seham.

MR. SEHAM: We have a whole laundry list of objections to these. But I think what I could do, there are a whole category in which we despair of changing the Court's view. There are others where I think, perhaps, if we make comments now, the Court --

THE COURT: Let me throw out an idea how to proceed,

because as I told you, I was -- I booked all day today. I had this one hour and I thought I could fit you in for an hour. And as you saw, we lost half that time, more than half of it. Maybe if we could address the most important issues and then look for some time later in the trial to address them in more detail. And -- does that sound good?

MR. SEHAM: I think I could get -- again, this is not the situation where if I don't lodge the objection I waive it, correct?

THE COURT: No.

MR. SEHAM: So I would like to focus --

THE COURT: Let me be clear. No one is waiving any objections to jury instructions. This is the exploratory process, as I said earlier, before we settle instructions. Everyone will get the chance to make their record, but this is not the time. You are neither making your record nor forfeiting any issues.

MR. SEHAM: With the permission of the Court, what I would like to do is make six comments as an overview and then go instruction by instruction and make very concrete suggestions --

THE COURT: Good.

MR. SEHAM: -- or requests.

The general observations are, to the extent there are any instructions on -- or pre-determinations incorporated here

concerning interpretation of the Transition Agreement, it would be our position that encroaches on the jurisdiction of the System Board. Maybe more in terms of --

THE COURT: But that's an important issue. And I thought about that way back to November, as you recall. And I remained of the view that the System Board doesn't have anything to do with DFR. And to the extent that there is a background issue of agreements of the party, including the Transition Agreement, the Court -- I don't see how the Court is ousted of its jurisdiction to provide a remedy to a complaining employee against the union and the Board isn't charged with granting that relief in the first place.

Now, the reality is this lawsuit arises out of the background of the Transition Agreement which I see as a Collective Bargaining Agreement. It arises out of that. It's background. But -- so that's something I have looked and haven't found, and you could help me if you could supply some authority where the System Board is hearing duty of fair representation claims because they are right out of a matrix of a DFR -- or CBA.

MR. SEHAM: I don't want to spend too many seconds of the 10 minutes on that because I'm pretty certain where the Court is headed. So I'm going to be philosophical about that. I just want to make that point briefly. And also the point that the Transition Agreement, that there are -- we agree with

the Court that this is a Collective Bargaining Agreement or at least a collectively bargained agreement, that the only two parties are the company and the airline, that individual employees do not have a right to access the System Board or to submit disputes and that those two parties, the airline and the company, have the exclusive right to modify or even terminate the Transition Agreement altogether. And I will pass on. I don't mean to engage in debate now.

With respect to any interpretation of ALPA Merger Policy, and again, these instructions appear to reflect interpretations of ALPA Merger Policy, that is a fact issue from our perspective. There is an abundance of evidence, in fact, evidence that generally conforms in terms of how the executive council, the president, the West MEC chairman and East MEC chairman interpret that agreement. And certainly to the extent that evidence is either overwhelming or evinces no dispute, that is a fact issue.

And consistent with that, to give a concrete suggestion with respect to instruction Number 4 -- let me say this. With respect to Instruction 1, 2, 3, in the couple of hours we have had this before us, no objections strike us with respect to Instructions 1, 2, and 3. We would like to reserve in the terms of constructive advice right now.

When we get to 4, the only comment we would make, and consistent with the comment I just made, is in that second

paragraph at the close of the first sentence that unions have a right to interpret their own constitutions that it be introduced the two words "and policies." Because to the extent there is very concrete evidence in terms of resolutions and presidential letters, that the Court and the jury should, well really, the jury should evaluate that and make their determinations as to what policy means based on those factual documents.

If I could return to the quick overview before I go to the specific instructions. There is -- the jury instructions reflect a fairly steady habit of comparing Nicolau to the USAPA proposal. We submit that the only appropriate comparison would be the two separate lists under separate operations with USAPA's proposal because under ALPA Merger Policy, that was the situation, indefinite separate operations. And that to pre-suppose.

THE COURT: I'm sorry. Explain that.

MR. SEHAM: The evidence in the record to date, just from the plaintiffs' witnesses, indicate that there was an impasse of indefinite duration during which time there would be two separate lists, and all furloughs and all scheduling would be based on those separate lists, and that the president, John Prater, said, this impasse and separate operations are indefinite insofar as he said there is no timetable.

So therefore, what USAPA came to on April 18th was a

situation where the East Pilots -- we're not attributing the actions or the supposed collective guild of these pilots to USAPA, that was a factual political situation under ALPA. And therefore --

THE COURT: I understood the evidence to be that ALPA has a process that it wasn't done with its process, that at the time it was removed it was pursuing a patient process of trying to bring the, perhaps, irreconcilable interests together but it still had other processes including trusteeship and other things, that it had simply not gotten to the point of saying, we're going to do it or not. They were only at an impasse in the sense that the people were at loggerheads now, but the remedies and course of action open to ALPA were by no means ended or exhausted.

MR. SEHAM: That is a factual dispute, and, in fact, I'm glad the Court raised the issue of trusteeship. There is evidence both from the president of ALPA and vice-president of ALPA saying that trusteeship, that vehicle would never be used to shorten that timetable or to cram -- they use the expression -- to cram down the Nicolau List. We will not resort to that. And that is evidence that we will be presenting.

And therefore, to the extent these jury instructions force the jury to look at what we consider a false comparison in which the overwhelming evidence will demonstrate is a false

comparison between Nicolau and the USAPA proposal, we're put at a great, great disadvantage; that they have a right to determine as a jury, as a fact finder, that under ALPA Merger Policy, that separate operations was going to continue indefinitely. And that was the choice --

THE COURT: What's the point of that, though?

MR. SEHAM: Well, the point of that is to show that in addressing the interests of the entire bargaining unit and the particular interests of the West Pilots, USAPA took action that put the West Pilots in a considerably better position than that which existed under ALPA Merger Policy.

THE COURT: Go ahead.

MR. SEHAM: And maybe these are related. I will pass over this quickly. There seem to be instructions that, again, seem to be focusing on the allegedly culpable conduct of the East Pilots. And I think I can --

THE COURT: Where is that?

MR. SEHAM: Well, for example, Instruction 5. If you would review the last sentence that says, "You may still consider the circumstances before USAPA was certified and USAPA's actions before then in determining whether USAPA violated its duty of fair representations on or after April 18, 2008."

Now, that is, at least, unclear. And very clearly the defendants --

THE COURT: Let me tell you exactly what I was worried about in drafting that, is that the earlier draft, that was simple, might literally be read to mean that the jury can't even consider the campaigning and whether there was a promise to not consider the interests of the West Pilots. That would be clearly wrong. That would predate the union certification.

But it's highly relevant to whether the union would have violated its duty of fair representation after it became the collective bargaining representative. So I thought some kind of language like that is necessary to preclude an argument that says, you can't even think about the fact that maybe some of our people said that they weren't even going to consider our interest. They were going to go with straight seniority.

MR. SEHAM: Right. To that end, we suggested in our previous submission language to the effect that those events could be looked to as evidence, as potentially evidence, of USAPA's motivation.

But as written, what we're concerned about, and this dovetails what we have seen as defendant's -- as plaintiffs' strategy, is this attempt to collectivize guilt and to blame and find culpable the East Pilots for exercising their political rights under the ALPA Merger Policy.

THE COURT: That's not what I had in mind.

MR. SEHAM: I'm sure it wasn't.

THE COURT: And as with everything, the way you

articulated it now did sound pretty good. So we'll go through that process.

MR. SEHAM: Wonderful.

And again, maybe two more sort of umbrella considerations, and I could probably jump to Instruction 6, is that we're very concerned there's no bad faith -- there's no definition of bad faith.

THE COURT: All right.

MR. SEHAM: And that was in the prior drafts that were issued by the Court. Those definitions of bad faith seemed to be generally accurate, and the total absence of any definition of bad faith is a source of great concern for us.

THE COURT: What I was trying to do and what I may not have succeeded is to chisel it down, to drill down to the particular contentions here that if they were true they would be bad faith and if they are not true they are not. But maybe that doesn't work, so I'm certainly open to that.

MR. SEHAM: Doesn't work for us, certainly.

And that there is, again, this is another one where maybe it's quasi stating it for the record, but we have cited case law, including *Associated Transport*, 185 NLRB 631, and that's cited in *Barton Brands,* but that concept that unions are entitled to revisit final and binding arbitrations that determine seniority. They just have to do it on a principle basis.

But I think --

THE COURT: I have tried to draft this, and again, it can always be improved. I tried to draft that with that in mind. I think I have stated your general principle, but I'm getting to what I believe is the plaintiffs' contentions that this wasn't done for any legitimate union, a purpose, that it really was done just to favor the East Pilots over the West Pilots, a matter the jury would have to determine.

Go ahead.

MR. SEHAM: And this may be another -- just more objection for the record, so that's why I won't spend much time on it. But our contention is that we are not bound by a predecessor union policy. In fact, the impracticality of that is overwhelming, the part about the merger policy that we would have to continue to submit disputes within a union system that no longer has collective bargaining rights on the property.

But again, I state that almost in passing because I -- my sense is the Court -- the ship has sailed with respect to that.

With respect to Section 6, again, our input would be here we have reflections of arbitrary discriminatory and bad faith. The plaintiffs have, on record, waived the first two prongs and have stated that they are proceeding exclusively under bad faith. So it seems to be trickling our potential liability --

THE COURT: Actually, which section?

MR. SEHAM: Instruction Number 6.

THE COURT: Yes. I was recalling your concern about that.

I am open on this, but this is a standard federal instruction. And I view this as simply kind of the introductory instruction that the specific details are given in the following instructions. You kind of have to start within a beginning before you can get into details. And I'm certainly open to tweaking it. But my thought was that I didn't -- this, by the way, was exactly in the order I filed in November which, by the way, West Publishing Company picked it up on their own and published it in Federal Supplement. I didn't send it to them. But this is the language I used drawing on the defendant's own instructions.

But I'm open to a way to improve that. I didn't think, Mr. Seham, that was opening a door in an unfair way. But we can explore that.

MR. SEHAM: Our point is made. I will keep moving. Instruction 7, the first paragraph we're concerned about the reference to equally general speaking, the DFR case law says a union can pick winners and losers --

THE COURT: I was worried about that, too, but I thought I took care of it in the next paragraph where I gave it particular meaning. Maybe we can improve that language too.

MR. SEHAM: And that there seems to be very much throughout this a damning with faint praise of the concept of Date-of-Hire seniority, whether you look at the *Laturner* case or the *Truck Drivers* case, 379 F2d 137, that those cases -- and the *Rakestraw* case -- those cases all talk about Date-of-Hire not only being appropriate, but *Truck Drivers*, for example, says it is the standard by which all others are judged.

THE COURT: I don't see this case as being grounded in that. I see this case as being grounded in admittedly irreconcilable differences, that both interests came together and they understood their common need to make progress for economic betterment against their employer. And they understood the prospect of paralysis, and therefore, they agreed to a neutral resolution process not knowing how it was going to turn out.

So what I am seeing or wondering about here, Mr. Seham, is what's the legitimate union purpose when the represented interests have entered into an explicitly binding, final and binding resolution to turn around and saying, well, we don't like who won. We don't like who lost. We want to change it. What's the union purpose in abandoning that neutral dispute resolution process? It's kind of a mutual non-suicide pact by which both pilot groups know that they may not like what happens but they have bigger fish to fry with the employer so they are going to get on to that and put this behind them.

MR. SEHAM: I'm going to try to resist a long rhetorical speech here and try to briefly make two points.

THE COURT: My focused question is, what is the legitimate union objective in saying we know, we knew from day one, that somebody, if not everybody, was going to be profoundly unhappy with the outcome. So what's the legitimate union objective of saying we're just going to pick a different winner after everybody, who their representatives have agreed to a process who they agreed would be binding and final.

MR. SEHAM: Two points. One very briefly, because it's going to delay me getting to the one you addressed. The first point is we challenged the factual premise. No one agreed to this. It was imposed by ALPA, and there was no vote on the ALPA constitution, no vote on the ALPA Merger Policy, no vote on the Transition Agreement. None of these pilots voted on this.

Now, putting that factual dispute to one side, the other issue is this, that Date-of-Hire is in the interest of the labor movement. It may not appear to be in your interests today. It may be counter to your transient interest today. But ultimately, that concept of waiting on line when you get to the back of a line, you don't feel it's in your interest not to cut. But as time goes by, and people form in the cue behind you, it becomes more and more in your interest.

And that's the concept that *Rakestraw* deliberately --

very specifically addresses. They may say, listen, these scabs -- and I'm a union attorney so permit me to use a term actually been addressed at USAPA members.

THE COURT: My father was a union man, and it's not a polite word.

MR. SEHAM: It's not. It's the lowest form of life. So when someone says that to you, it's very provocative. However, when someone crosses a picket line it's just a truthful way of referring to the man or woman.

In any case, in the *Rakestraw* case the scabs benefitted from a permanent agreement, that ALPA entered into a permanent agreement. And a few years later, after they actually lived with it for years and years, that was flipped. And yet there you have the Seventh Circuit, the same Seventh circuit as *Barton Brands* in Wisconsin, saying it was in the scabs' interest to be put down at the bottom of the list because a cohesive labor union that honored the Date-of-Hire and strengthened the union movement through the Date-of-Hire ultimately benefitted everybody.

THE COURT: You are just saying that the agreement of the two MECs to accept an unknown future neutral resolution is an illusion, that however it turns out, it can be rejected in favor of a different substantive outcome. That's what I'm hearing you say.

MR. SEHAM: No more or less than the permanent

agreement in *Rakestraw* was an illusion. And a union always has the right to revisit in a way that satisfies a legitimate union objective.

THE COURT: Is it possible under the Railway Labor Act for two hopelessly reconciled labor groups to enter into a binding neutral process to resolve their mutual disagreement so they can go forward on their areas of neutral interest? Is that possible?

MR. SEHAM: The answer to that is yes, it is impossible. Because the rule of law is you can revisit so long as it's not solely for the illegitimate purpose and it advances union interest in a certain form.

And what I'm trying to -- I'm not trying to make final argument here. What I'm trying to say is throughout the jury instructions, in effect, the jury is prohibited from making a finding of fact that Date-of-Hire -- there is an interest, that these West Pilots down the line might be very hurt. In fact, they are being hurt today because the non-implementation of that Date-of-Hire concept. And we are, in effect, being -- that is a legitimate factual conclusion. In fact, I would say that it's the rule of law throughout the United States of America and the federal courts. But at a minimum, the jury should be allowed --

THE COURT: The jury should be allowed to decide, we just think that Arbitrator Nicolau made a poor decision.

That's what you are telling me, they should be allowed to do that.

MR. SEHAM: Those are two concepts. Yes, they should be allowed, but again, there maybe I think the ship has sailed in a sense because we haven't been allowed to submit that evidence.

THE COURT: Actually, most of the evidence we have heard on both sides does dual duty. I have allowed it in to describe the nature of the dispute, how it arose, the context and the interest at stake. But it's pretty much, everything we have seen so far is evidence you would also put in if you wanted to have a jury second guess.

MR. SEHAM: Certainly nowhere near the encyclopedic evidence we were planning to present. There was a motion in limine, and we lost it. We were not able to pursue what we think the Seventh Circuit has recognized as legitimate means of proceeding.

THE COURT: 10 more minutes, all right? Because I feel awful that I brought you all down here and we don't have the time to have the discussion I wanted to have. I was looking forward to doing it outside of our regular trial day. And we'll have to add it on to our regular trial days.

MR. SEHAM: Again, to avoid too much legal argument and focus on where -- if I'm not being too irreverential to suggest where constructive criticism might actually have an

impact, I will finish up that last point by stating that the jury should be allowed to consider not just a blind choice between the benefits of getting a better Collective Bargaining Agreement and the comparative disadvantage of USAPA versus Nicolau, which, first of all, we think is a false comparison because of the reality of indefinite separate operations but that the jury should be allowed --

THE COURT: But there could only be indefinite separate operations if there is a valid ability of a self-interested Eastern pilot majority to prevent an integrated Seniority List from ever being adopted.

MR. SEHAM: How is that unlawful? That is something that was --

THE COURT: I'm just asking.

MR. SEHAM: The pilots collectively are not a union. They are exercising their rights as defined under ALPA Merger Policy. And it's always been our position -- the plaintiffs present this as a rule versus tyranny of majority conflict, and what we say is the rules provide for democracy, albeit at the tail end of an otherwise oppressive bureaucratic process they do at the tail end allow these pilots, who are supposed to be served by their union, allow them the say-so. And the president of the association, in so many words, said you can exercise this to protect your seniority interest and your job security.

THE COURT: But, you know -- well, this comes back to a fundamental issue of if the parties were proceeding in good faith and made an agreement through their authorized representatives, their MECs, for a binding neutral resolution that, clearly, there's a majority and minority that turns out probably the majority is more unhappy with it than the minority is. But what's -- how is it that if there is a duty of fair representation to honor that agreement, then how could there ever be an impasse?

I mean, an impasse would simply mean -- and -- and, the documents clearly explicitly provide that the two interested pilot groups do not have the right to ratify or reject the arbitration award. That is as clear as day. And if that's the premise, if that's the background, how could it be in good faith for a majority to use their backup power to ratify an entire CBA as a way to indirectly defeat their duty to the minority to honor the agreed resolution of the Seniority List?

MR. SEHAM: A majority does not have a DFR obligation. A majority of pilots within ALPA have the right to exercise their political rights.

THE COURT: But if they exercised their right, if they were presented with a contract, a CBA, that had, in fact, been negotiated by the union, standing by the Nicolau Award and getting all the other economic betterments that were possible,

and then if the majority said we are sufficiently unhappy with the arbitrated seniority award that we will forego the economic betterments to say no to it, if that happened, at least the majority and the minority, they are voting on a package where they decide, do I accept the economic betterments? Do I reject them? And the notion that there is an impasse just because the unhappy majority, if they had a standalone ability to reject it would, seems to not fit the reality of the situation and the very democracy that the union is supposed to fall back on. If the union has to vote everyone's self-interest, part of that self-interest is we can't get a new deal with a different Seniority List. All we're doing is turning away whether it's 125 million or whatever the number was, million dollars a year, because we're upset about it.

How could they improve their position by rejecting the CBA if the next one is still going to be bound by a duty of fair representation to stand by the arbitrated Seniority List?

MR. SEHAM: If I may respond, it's not a majority versus minority issue. Under the ALPA structure, you had two autonomous groups. The majority within either group had the ability to hold the deal up. So it's not majority versus minority under the ALPA structure. It's two independent, autonomous groups saying either one of us can hold up this deal until there's a compromise that's acceptable.

Now, with respect to -- there is no factual issue

about what the majority of the East autonomous body wanted. We have stipulated to that. The East majority, exercising their rights under the ALPA Merger Policy, said we will not accept this Collective Bargaining Agreement in --

THE COURT: I guess, Mr. Seham, I do not see any arguable language in the documents or the ALPA Merger Policy that empowers the East Pilots or the West Pilots to have any right to say we reject that arbitration award. That's what I'm struggling with.

MR. SEHAM: Well, I think you have to -- you start with the Prater letter, Exhibit 1122, in which he states, in effect -- well, not in effect, he states each side has the right to exercise their ability to look after their interest by holding up this agreement, and there is no timetable. Even John McIlvenna, the chairman of the MEC, said --

THE COURT: Remind me, how do they do that under the text of Part 45 or Article 45. They have no right to vote on it. The only right they had is after the Seniority List got integrated in an entire CBA, they can reject the entire CBA. Am I missing something?

MR. SEHAM: No, you are not. And that is completely consistent with the concept that to union membership has a right to vote on any individual section. The final and binding, and this is stipulated in the stipulated facts as well, the ground rules under the Nicolau process were that,

stated explicitly, that the parties who are in this action are the merger representatives. So they are done with the process. They can't argue it anymore. It's going to go into a tentative Collective Bargaining Agreement, and then the members get to vote on it.

But I would say in terms of the factual record, you have John McIlvenna, the West MEC chairman, saying ALPA National passed the list. The East side has ever ability to stop implementation of this list by exercising their voting rights either as an East MEC or East pilot group.

All I'm saying, Your Honor, is there is overwhelming factual evidence that this is how ALPA interpreted its own policy.

THE COURT: Well, you are right. The evidence isn't over. We need to see -- I suppose, though, when I'm telling you this so you all can benefit from what is concerning me, that it does appear, and I need to see more, that at least if the pilots had to vote on a combined CBA they would be making a balanced judgment of individual self-interest, do I want to throw away the economic betterments to have a chance of a new negotiation to get a new Seniority List? But I have got to make -- I have got to balance. When the union comes in and says, we're going to spare you from making that choice. We're not going to make you choose a balanced package in which you are going to have to consider things that benefit you, benefit

the other pilot crew, and whatever, we're simply going to step in and give you the veto the documents clearly do not give you and prohibit you from having by just taking away the arbitration award and do it for you. That sounds like -- that looks like a bad faith by the union that exceeds private self-interest by pilots.

MR. SEHAM: Your Honor, we have relied very heavily on the stipulated facts in this case in terms of preparing what we were going to present at trial. And we think those stipulated facts address the reality. The parties have stipulated that the East MEC made its determination that the East Pilots would not ratify, and that the East Pilots --

THE COURT: But help me out.

MR. SEHAM: Yeah.

THE COURT: The East Pilots had no -- I may be having it wrong, in which event you have to help me.

MR. SEHAM: The evidence is overwhelming that ALPA interpreted its own policy as giving the pilots, even if motivated by the desire to prevent indefinitely --

THE COURT: The pilots all together, or in each MEC?

MR. SEHAM: East Pilots acting on their own, because there are two autonomous bodies and each has a democratic check they with wield.

THE COURT: Then that changed when USAPA became the single collective bargaining representative for the entire

community, didn't it?

MR. SEHAM: Yes, it did.

THE COURT: It became moot.

MR. SEHAM: Yes, it did. The MECs, as soon as ALPA is decertified -- it was never certified, frankly, on the East side. It was voluntary recognition. But as soon as ALPA lost representational status, the East MEC and West MEC didn't exist anymore. The structure, the dual ratification, the dual MEC approval process, as consistent with the facts we have stipulated to and the evidence presented in this trial so far, guaranteed indefinite impasse, and that that indefinite impasse was not a violation of ALPA Merger Policy as confirmed by the president.

THE COURT: Once the new union came in, there was a unitary approval process of the new CBA.

MR. SEHAM: That would suggest that what was a unachievable under ALPA Merger Policy suddenly has to be -- under ALPA, suddenly must be accepted by the new union. The new union saw the impasse and said, this is not separate operations hurts the East Pilots, it also hurts the West Pilots. This is a way to approach to overcome this impasse, and we will not do it in a winner takes the spoils fashion. We will not pursue Date-of-Hire in the way the flight attendants and the IEM and TW dispatchers have. What we will do is constrain ourselves and compel ourselves under constitutional

obligation to consider their interest and make sure their unmerged interests are not compromised.

THE COURT: I understand. I have gone off too long in this, and I appreciate you wandering through my thoughts on this. Do you want to give me more --

MR. SEHAM: Constructive --

THE COURT -- specifics? Doesn't have to be constructive. And I'm going to ask you all to figure out how we should go forward with this process. I got, and read, all of your submissions on Friday. This is a result of some rethinking on our part and, of course, we're still in the process and in particular, Mr. Seham, it will be easier if I can get your points like you did the last time in writing. Those are helpful presented that way, and of course, the plaintiffs as well.

Give me your other significant points and then I need to take a short recess.

MR. SEHAM: One made perhaps relatively picayune, we consider the word "coverup" to be maybe an unnecessarily pejorative term.

THE COURT: Where was that?

MR. SEHAM: Top of Page 5.

THE COURT: We can work on that.

MR. SEHAM: I think I have mentioned the sort of damning a faint praise that Date-of-Hire is often consistent

with the union's DFR obligation that we should be free to argue to the jury that a Date-of-Hire approach ultimately benefits the entire unit, just as the *Rakestraw* court found.

With respect to the special interrogatories, again, those are based on what we consider a false premise and a premise which is factually driven as to whether there was really a choice between Nicolau and USAPA. We think, factually speaking, that the appropriate comparison is separate operations versus USAPA and at least that the jury should be able to address whether ALPA Merger Policy produced that situation.

THE COURT: All right.

MR. SEHAM: And then "substantially less favorable," there's a lot of use of the term "substantially less favorable."

THE COURT: I'm not wedded to that. What do you suggest instead?

MR. SEHAM: Again, the formulation, whether it's *Alvey* or *Rakestraw*, is that so long as it's rationally related to a legitimate union objective and not solely for the purpose of political expediency, then the result is acceptable.

THE COURT: This is where *Ramey* helps me. I thought that was a very helpful case where they talk in terms of pretext. They left it to the jury. Juries deal with that in employment discrimination, a lot of cases.

MR. SEHAM: Out of false pride, when you asked me whether I was familiar with the *Ramey* case --

THE COURT: Of course you are.

MR. SEHAM: Mostly as a witness, Your Honor. I didn't ultimately handle the litigation. But what I do know about that case is that was a pure bad faith retaliation because a group of employees chose an independent union and they were stapled because of their choice of an independent union. And the facts are really as laser tight as that.

THE COURT: I know the facts are different, but the structure seemed to be helpful in terms of getting to what's the true motivation. Juries deal with stuff like that. Was it really just because you got a whole bunch of East Pilots who want their self-interest promoted and notwithstanding the agreed arbitration award, or was it something else? Seems to me that's exactly what juries are capable of deciding.

MR. SEHAM: Also maybe a couple other -- there's a reference in Instruction 7 to the interests of all members, and again, that suggests that everybody's got to end up happy. It is the proper standard, we would submit, is the interest of the bargaining unit as a whole.

With respect to Instruction 8 in the third paragraph, their reference to "already resolved by contract" and clearly, I'm not going to repeat the arguments. Clearly that's, from our view, a factual dispute, whether --

THE COURT: I'm sorry. Which is that again?

MR. SEHAM: Instruction Number 8, third paragraph. That refers to issues being already resolved. And that is very much --

THE COURT: This is not prejudging that. That's to be proved by the plaintiff.

MR. SEHAM: Well, then I think your average juror might read this and say that's what the judge is telling me and that there ought to be some counter balance to say, you know, if you find or that's part of what you might be inquiring as to whether there was a final resolution of this matter that was going to be implemented at any time in the future.

THE COURT: Give me your bullet points.

MR. SEHAM: I've jumped around so much.

THE COURT: While you are thinking, let me give you my global on the drafting. The challenge with drafting this for me, and maybe you all observed it, is you can't say everything every time you say something. You have got to start out with something general and get specific. And the examples you are giving, Mr. Seham, are good examples. I actually thought and worried about some of those very words you noted and I moved on thinking, well, I'm being more specific in the next paragraph or the next instruction. And we tell the jury that they have to take all the instructions as a whole.

So I invite you to give me better ways to draft to

avoid implied suggestions that are contrary to what we know the law to be. But I was trying to develop it from the beginning to end.

Go ahead, Mr. Seham.

MR. SEHAM: Well, there are some expressions about -- I'm trying to make sure I don't --

THE COURT: Well --

MR. SEHAM: -- repeat myself here. We're very anxious there be no indication of the collective guild of East Pilots in the pre-certification period. All they are doing is exercising their rights under ALPA Merger Policy.

THE COURT: Let me put it to you this way, since I have imposed on everybody else in the courtroom. When can you get me these points concisely in writing?

MR. GRANATH: We can do that very quickly. Whatever the Court -- I was going to ask the Court -- Nick Granath for defendants here.

Was the format that we submitted, the strike and underline, helpful?

THE COURT: That was very helpful.

MR. GRANATH: That was my intent. I'd be happy to do that again, Your Honor.

THE COURT: And with your comments behind them as well.

MR. GRANATH: Yes, sir. I will do that.

THE COURT: All right.

MR. GRANATH: Do you have a date and time, sir?

THE COURT: I don't want to be too dictatorial. The sooner the better.

MR. GRANATH: Whatever you want, Your Honor.

THE COURT: The reality is I'm in trial with you guys from before 9 in the morning until after 5. So there's not any point in getting it to me before tomorrow night. The reality is I'm so tired, I'm getting up early in the morning. That's the time I'm getting whatever quality work I get done.

So the reality is, if you had it to me by Wednesday morning, I'm happy with that. That would be very early so I can look at it very early in the morning.

MR. GRANATH: We'll make it so.

THE COURT: And you have 90 seconds, Mr. Stevens.

MR. SEHAM: I have run out of spit, so I think I will stop talking.

MR. STEVENS: Briefly, Your Honor, Don Stevens for the plaintiffs.

There are a couple of evidentiary matters we obviously won't address today, but I would ask, since we're in the last week of trial --

THE COURT: Are we? I hope so.

MR. STEVENS: I'm not sure. My request is that the Court ask the defendants to tell us who is going to be called

on what days. They have already made arrangements, I assume, for out-of-town witnesses. I think it's fair for the plaintiffs to know who is going to be called be able to understand that in the context of the end of the case, instructions, and final argument.

THE COURT: Let me tell you, my rule -- I forgot to tell you -- is I want everybody to know who the witnesses are 48 hours ahead. That's two trial days ahead so the opposing lawyer can plan. But I was also hoping we would have the evidence done by the end of this week. Seems to me that's doable. What do you think, Mr. Brengle?

MR. BRENGLE: I agree, Your Honor. We probably missed 48-hour deadline. I have been trying to talk with counsel for plaintiff with an ever-moving target of witnesses. And we're still working on that. But I think they have got a pretty decent idea, and I will continue to work with counsel on that.

THE COURT: If we can finish the evidence by Friday, we can deal then with these issues that we'll be resuming and have the jury ready to be instructed Tuesday morning.

MR. SEHAM: One of the things we're trying to do to actually make sure we finish by Friday, in which we proposed to Mr. Stevens, and I think we raised with the Court on Friday, was to try to stipulate to enough documents so that we could eliminate a witness or two. And I think we're on the verge of that. If I could ask for Mr. Stevens cooperation on that and

then proposing that if we could start at 8:45 on Tuesday. And what I envisioned is just what we did to eliminate the necessity of bringing Randy Mowrey up, if there could just be a series of court decisions on admissibility, and we'll take our lumps and keep moving.

THE COURT: I will start with you early any morning that anybody wants. So we'll resume at 8:45 tomorrow morning.

MR. STEVENS: Your Honor, I am not satisfied, with all due respect, with the moving target of the witnesses. There was some effort to cut it back, and then I don't know whether or not I'm looking at five witnesses or 15 witnesses or two witnesses and it affects -- I don't want to have a summary end in which we have less than two hours to do closing argument.

THE COURT: Counsel, I'm going to have to ask you to have that dialogue. Again, I apologize to everyone who is waiting. I am now an hour late on three other case management conferences which we will take care of.

So here's what I'm going to do. We'll do take a 10-minute recess because the court reporter needs a little rest and then we'll come out and we'll give everybody the time we need and we won't leave until the three case management conferences are done.

We'll be in recess for 10 minutes.

(Proceeding recessed at 4:25 p.m.)

C E R T I F I C A T E

I, LAURIE A. ADAMS, 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.

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.

DATED at Phoenix, Arizona, this 5th day of May, 2009.

s/Laurie A. Adams

Laurie A. Adams, RMR, CRR