

1
2 **UNITED STATES DISTRICT COURT**
3 **FOR THE DISTRICT OF ARIZONA**

4 _____
5
6 Don Addington, et al.,)
7 Plaintiffs,) No. CV 08-1633-PHX-NVW
8 vs.)
9 US Airline Pilots) Phoenix, Arizona
10 Association, et al.,) October 12, 2010
11 Defendants.) 10:05 a.m.
12 _____

13 **BEFORE: THE HONORABLE NEIL V. WAKE**
14 **UNITED STATES DISTRICT JUDGE**
15 **(Motion Hearing)**

16
17
18
19
20 Official Court Reporter:
21 Laurie A. Adams, RMR, CRR
22 Sandra Day O'Connor U.S. Courthouse, Suite 312
23 401 West Washington Street, SPC 43
24 Phoenix, Arizona 85003-2151
25 (602) 322-7256

24 Proceedings Reported by Stenographic Court Reporter
25 Transcript Prepared by Computer-Aided Transcription

1 APPEARANCES:

2
3 For the Plaintiff:

4 POLSINELLI SHUGHART PC
5 By: **Marty Harper, Esq.**
6 By: **Andrew S. Jacob, Esq.**
7 By: **Kelly J. Flood, Esq.**
8 By: **Katherine V. Brown, Esq.**
3636 N. Central Avenue
Suite 1200
Phoenix, AZ 85012

9
10 For the Defendant US Airline Pilots Association:

11 SEHAM SEHAM MELTZ & PETERSEN LLP
12 By: **Nicholas Paul Granath, Esq.**
2915 Wayzata Blvd.
Minneapolis, MN 55405

13 SEHAM SEHAM MELTZ & PETERSEN LLP
14 By: **Lucas Middlebrook, Esq.**
445 Hamilton Avenue
Suite 1204
15 White Plains, NY 10601

16
17 For the Defendant US Airways:

18 OMELVENY & MYERS
19 By: **Robert Alan Siegel, Esq.**
610 Newport Ctr Drive
Suite 1700
Newport Beach, CA 92660

20
21 US AIRWAYS INC.
22 By: **Karen Gillen, Esq.**
111 W. Rio Salado Parkway
Tempe, AZ 85281

P R O C E E D I N G S

1
2 COURTROOM DEPUTY: This is Civil Case 2008-1633, Don
3 Addington, et al., versus US Airline Pilots Association, et al.
4 This is the time set for a motion hearing.

5 Counsel, please announce for the record. 10:05:57

6 MR. HARPER: Good morning, Your Honor. Marty Harper,
7 Andy Jacob, Kelly Flood, and Katie Brown for the Addington
8 plaintiffs. And we're with the Polsinelli Shughart firm.

9 THE COURT: All right. And who will be arguing the
10 motions, Mr. Harper? 10:06:17

11 MR. HARPER: Depends which ones are up, Your Honor.

12 THE COURT: We'll argue both. I want to proceed first
13 with the Rule 60(b) motion and then the transfer motion.

14 MR. HARPER: Fine. It will be Andy on the 60(b) and I
15 will deal with the transfer, Your Honor. 10:06:34

16 THE COURT: All right.

17 MR. GRANATH: Good morning, Your Honor. Nicholas
18 Granath and Lucas Middlebrook, Seham, Seham, Meltz & Petersen
19 on behalf of USAPA. With me today are Bob Davison and Jess
20 Pauley, union officers. 10:06:53

21 THE COURT: All right. And who will be arguing the
22 motions?

23 MR. GRANATH: I will, Your Honor.

24 THE COURT: All right.

25 I'm sorry, counsel. Do you want to announce? 10:07:01

1 MR. SIEGEL: Just to say hello, Your Honor. Robert
2 Siegel for US Airways.

3 THE COURT: Oh, Mr. Siegel. I'm sorry for treating
4 you like chopped liver.

5 MR. SIEGEL: I will hide over here. 10:07:13

6 THE COURT: All right. Let's see. The 60(b) is Mr.
7 Jacob. All right.

8 MR. JACOB: Good morning, Your Honor.

9 Ripeness is a quality that's a point in time, and
10 unlike other jurisdictional rulings, it can change as events 10:07:37
11 change. And the Court should reconsider ripeness in the same
12 way that it would reconsider injunctive relief. If the
13 circumstances have changed, a claim that might not have been
14 ripe on one day could have been ripe on a later day.

15 The Supreme Court has reversed cases that held that 10:08:09
16 claims weren't ripe, not on the basis that they were ripe when
17 the case was before the District Court or the Court of Appeals
18 but that events changed and the case had finally become ripe by
19 the time it got to the Supreme Court.

20 Rule 60(b) has been used to reopen a case to 10:08:32
21 reconsider injunctive relief when the circumstances have
22 changed and the relief might not be appropriate under the new
23 circumstances.

24 THE COURT: Well, certainly been used to lift relief
25 previously granted. 10:08:56

1 MR. JACOB: That's right. Yes.

2 THE COURT: But that's not our case.

3 MR. JACOB: No. But it has been used to reopen a
4 judgment that was based on a determination of circumstances at
5 the time the judgment and action were taken. 10:09:13

6 THE COURT: Do you have any cases that involve closely
7 analogous factual and procedural circumstances, that is, that
8 the ruling of this Court now, pursuant to the mandate, is that
9 there's no ripeness and the case is dismissed? So do any of
10 your precedents involve cases where ripeness has been found 10:09:37
11 lacking, judgment entered, and then later circumstances are
12 argued to create ripeness different from the circumstances that
13 led to the original judgment finding no ripeness and
14 dismissing? I'm looking for facts, cases with that procedural
15 context. Because looking through your cases, you cite a lot of 10:10:07
16 cases. I appreciate that. But I didn't really think I found
17 any that had -- that were horses of that same color and spots.

18 MR. JACOB: You are right. And I'm not hiding the
19 ball. I didn't have any such cases.

20 THE COURT: Go ahead. 10:10:25

21 MR. JACOB: But the situation that the Court is in, we
22 believe, is that if we were to file the claim anew now, under
23 the context of the US Airways case, we have filed it as a
24 counterclaim. It is ripe. So the question --

25 THE COURT: And you filed a cross claim too? 10:10:56

1 MR. JACOB: We filed a cross claim. I'm sorry. I
2 used the wrong word.

3 THE COURT: Did you file both a cross claim and a
4 counterclaim?

5 MR. JACOB: Just a cross claim. 10:11:05

6 So the question that we have is if the same evidence
7 and issues are going to come up that were at issue in the
8 Addington case, if everything is going to be coming back, does
9 it make sense from a point of efficiency for the Court to use
10 Rule 60(b) to reopen the Addington case so that all the 10:11:35
11 evidence that's in the record in the Addington case becomes
12 available and in the record again where the Court can refer to
13 its rulings and the pleadings and just move forward from that
14 point?

15 If we don't reopen the case, there's not major 10:12:01
16 prejudice. We just have to go through the awkwardness of
17 bringing all that evidence back into a second record.

18 THE COURT: Sounds like you might be stealing Mr.
19 Harper's argument. But I want to follow that up for a minute.
20 Are you suggesting that if I do grant this motion somehow the 10:12:22
21 evidence, any evidence or rulings previously made, would have
22 any force?

23 MR. JACOB: Yes.

24 THE COURT: How would that be?

25 MR. JACOB: Because none of those were addressed by 10:12:35

1 the Ninth Circuit. All the Ninth Circuit said was that the
2 case wasn't ripe. If the case becomes ripe, the rulings that
3 were made when the case wasn't ripe are not invalid.

4 THE COURT: Why not? How would they be valid?

5 MR. JACOB: Because ripeness is this odd thing. 10:12:59

6 It's -- if the case is ripe at the time that it's in front of
7 the Court, it's treated like it's been ripe up to that point.

8 THE COURT: So all the rulings and the jury trial
9 would be resurrected from the dead?

10 MR. JACOB: I believe that they would be. 10:13:23

11 THE COURT: Again, do you have any cases that
12 exemplify such a resurrection?

13 MR. JACOB: The rail cases from 1974 were cases that
14 were before the Supreme Court where the Court held that what it
15 looks at to determine ripeness when the case is in front of the 10:14:01
16 Court is the circumstances at that time. And I believe that's
17 the case where some administrative --

18 THE COURT: I'm sorry.

19 MR. JACOB: -- action hadn't been done when the case
20 was at the Court of Appeals but had been done by the time it 10:14:23
21 got to the Supreme Court. So the Court ruled that the case was
22 ripe and --

23 THE COURT: That was a case that was still in the
24 appellate process. Was -- the appellate process was not done
25 at the time the Supreme Court made that ruling. This is a case 10:14:42

1 in which a final judgment pursuant to mandate has been entered.
2 The appellate process is over. Well, I mean, you have your
3 cert petition pending. But for purposes of Rule 60(b) that
4 doesn't matter.

5 MR. JACOB: We have two doctrines. We have the 10:15:01
6 doctrine of ripeness being the point in time, and we have the
7 doctrine that Rule 60(b) is not inappropriate after a dismissal
8 is ordered by the Court of Appeals if it's based on an issue
9 that wasn't addressed by the Court of Appeals. And the issue
10 that was addressed by the Court of Appeals was, was this case 10:15:22
11 ripe in December 2009. The issue now is, is the case ripe
12 today.

13 And that's not a fair question to ask if the facts
14 haven't changed, but the facts have changed. The question that
15 the Ninth Circuit looked at was, was there undue hardship to 10:15:46
16 the Addington pilots if they have to wait. The question now
17 is, really, is there undue hardship to the Airline if it has to
18 wait and is there undue hardship to the Airline based on what
19 has been occurring of late if it has to wait. And this Court
20 is not bound by the Ninth Circuit ruling if it's addressing a 10:16:14
21 different question.

22 THE COURT: But despite Mr. Siegel's privileged
23 position, position as a spectator, he hasn't been in this case
24 since the first couple of months. So the Airline is not in
25 this case. So how does the arguable ripeness of the airline's 10:16:34

1 claim affect ripeness for the West Pilots' claim?

2 MR. JACOB: The way it affects it is that the facts
3 are still there. And I believe that the proper time to rule on
4 our 60(b) motion is when we get past the point of deciding if
5 US Airways has a valid claim or not, and then the Court can
6 decide if it's going to consolidate the two cases in some way.
7 Again, I'm just seeing this as a procedural means to facilitate
8 that case. And --

10:17:16

10:17:48

9 THE COURT: But then you have the new case, Airlines
10 case. All the parties are there including the airlines, which
11 didn't want to be here, and now they want to be there. That's
12 a vehicle for full litigation and determination of whatever is
13 ripe. Other than adding mass to your motion for transfer, what
14 does this Rule 60(b) motion do?

15 MR. JACOB: Again, what I believe it does, is it makes
16 the record a live record again, that the evidence is evidence
17 again, that the pleadings, the rulings of the Court, the
18 orders, are all active and in effect unless they are changed.

10:18:21

19 THE COURT: Well, that comes as a surprise to me, and
20 I'm sure it comes as a surprise to Mr. Granath. And none of
21 that is briefed. So again, it's not briefed, so I don't
22 purport to offer an answer to that question. But it strikes me
23 as awfully ambitious, and in any event, you don't have it
24 briefed.

10:18:50

25 MR. JACOB: I apologize for that.

10:19:09

1 THE COURT: Well, you don't necessarily have to
2 apologize. I'm not saying you needed to brief it now. On the
3 other hand, if you think it helps you, you should have briefed
4 it.

5 But in any event, please continue. 10:19:33

6 MR. JACOB: I don't have too much more to say. I
7 recognize that we're asking the Court to do something that I
8 couldn't find an example of a court having done before. We do
9 have a precedent that the Court can consider a 60(b) motion
10 after a case is ordered dismissed by the Court of Appeals. We 10:19:56
11 do have a precedent that the current state of affairs
12 determines that, whether a case is ripe or not, if a judgment
13 is reopened. My understanding is that you back up in time to
14 the point where the judgment was closed. The Court is free to
15 change its orders and judgment as it wants to, but the starting 10:20:23
16 point would be just backing up to that point.

17 And again, it makes the most sense to us that we don't
18 -- that the Court not make a final decision on the 60(b) motion
19 until we have a sense of where the US Airways case is going to
20 go, because I don't think we would be here asking to have the 10:20:55
21 case be reopened if they weren't making their claims and we
22 felt that our claim was a necessary part of their action.

23 THE COURT: By the way, Mr. Jacob, if I make the wrong
24 ruling on the 60(b) motion, would that be amenable to a prompt
25 review by the Court of Appeals on a mandamus? 10:21:20

1 MR. JACOB: I believe that an order on a post-judgment
2 motion is appealable.

3 THE COURT: It is appealable, but on the other hand --
4 and I have not researched this. I'm just going on my general
5 knowledge. Matters of the District Court complying with the
6 mandate are generally reviewable on mandamus, are they not? 10:21:39

7 MR. JACOB: I believe that they are, but we do have a
8 precedent in the Ninth Circuit that it's not -- that they do
9 allow or do want the District Court to address the 60(b) motion
10 in a situation such as this. 10:22:04

11 THE COURT: Well, the general rule is that, of course,
12 the District Court lacks jurisdiction to consider anything that
13 would modify the judgment on appeal while the appeal is
14 pending. But the Ninth Circuit, for practical reasons, has not
15 wanted to consider motions to revest jurisdiction in the 10:22:26
16 District Court to consider a Rule 60(b) motion unless they
17 already know the district judge is interested. So for
18 practical reasons, our circuit has said, tell us ahead of time
19 what you think you are going to do, then they will decide
20 whether it is worth their time to think about it. And that is 10:22:44
21 a very practical course of action for cases that are pending on
22 appeal.

23 This case is not pending on appeal. So I'm not at all
24 sure that that practical solution that the Court of Appeals
25 uses for cases pending on appeal even has any application here. 10:23:01

1 MR. JACOB: I believe that we cited post-appeal cases
2 after the mandate where the District Court addressed a 60(b)
3 motion. The Court of Appeals had some say, like the District
4 Court is best suited to decide if the motion is a frivolous
5 motion.

10:23:31

6 THE COURT: Well, let me tell you my general
7 understanding, and this has been my understanding for decades
8 as a practicing lawyer. And that is a notice of appeal divests
9 the trial court of jurisdiction to consider a matter that would
10 change the judgment being reviewed on appeal. The mandate
11 eliminates that barrier, and therefore, there are cases -- I
12 don't know if they are federal cases, I know state cases --
13 where a 60(b) motion's filed and then a party files a notice of
14 appeal and that waits for two years until the mandate comes
15 down. Then the trial court can rule on that 60(b) motion
16 unless, of course, the Court of Appeals had revested
17 jurisdiction or followed the procedure the Ninth Circuit
18 follows.

10:23:49

10:24:08

19 So as a matter of the law, of the procedural law of
20 Rule 60, it seems to me that I'm not procedurally barred from
21 considering the motion; indeed I have to. The greater problem
22 you face is whether the motion you filed is directly contrary
23 to the mandate. And although the Court may consider the motion
24 as a matter of Rule 60 procedure, the mandate deprives this
25 Court of the authority to tell the Court of Appeals a different

10:24:25

10:24:56

1 answer from what the answer is they have given me, that in the
2 circumstances of this case, the mandate said dismiss this case
3 for lack of ripeness. And you are asking me to bring this case
4 back for ripeness. That looks like a direct confrontation with
5 the mandate. And so it's the law of the mandate rather than
6 the law of Rule 60(b) that strikes me as your greatest problem.

10:25:24

7 MR. JACOB: I agree with you, and we tend to leave off
8 a few words sometimes that really explain. The Ninth Circuit
9 said the case wasn't ripe, but what we're saying, because a
10 ripeness is a point in time, it's saying the case isn't ripe
11 now. They weren't saying this case can never be filed again.
12 They gave a situation where they thought it could be filed
13 again.

10:25:50

14 THE COURT: Well, and let me interrupt you. If, in
15 the future, and the future could be a day later, the events are
16 different, you can always file a new case and then it's a
17 matter of the law of the circuit. And if it's the same parties
18 you may also have issues of collateral estoppel on specific
19 issues actually adjudicated. But that's different than the law
20 mandate I have to file.

10:26:06

10:26:30

21 MR. JACOB: We cited the *Standard Oil* case and the
22 *Gould* case which addressed a 60(b) motion after the mandate
23 issued, and those cases said when there are changes in the
24 circumstances that make the question a different question than
25 was addressed by the Court of Appeals, it's not in violation of

10:26:50

1 the mandate for the District Court to rule on the same theme.
2 There are certain questions where the facts aren't going to
3 change. The classic case for standing, and I'm blocking on the
4 name right now, but it's the case where they said that the
5 parties had to have plans to go to the Aswan Dam to have
6 standing to contest the building of it. Well, if at some point
7 they had plans, and they were honest plans in theory, the
8 ruling that they didn't have standing doesn't apply once they
9 have made plans.

10:27:25

10 Well, in our case, the facts change, and it's not a
11 change in facts that even we cause. The facts change and the
12 Ninth Circuit hasn't ruled on this issue, and you would be
13 doing nothing that was not approved by the Ninth Circuit. In
14 the *Gould* case, if you were to say there are new facts, new
15 circumstances that change the analysis, what's most black and
16 white to us is the Ninth Circuit did not consider the hardship
17 to the Airline. Now we're seeing the hardship to the Airline.

10:27:46

10:28:13

18 THE COURT: Well, on the other hand -- well, if we go
19 back, the hardship to the Airline was there when they asked to
20 be dismissed out of this case. They, for whatever reasons,
21 rather than counterclaiming for declaratory venue, they decided
22 they didn't want to be involved. But those facts, those
23 circumstances were there and we have ample evidence in this
24 case that the Airline is and always has been greatly distressed
25 by its inability to complete its merger, and that that derives

10:28:44

10:29:07

1 apparently, certainly may not solely, but sufficiently from the
2 failure to complete the seniority lists.

3 So that was there when you litigated your case. If
4 you wanted to raise that as a grounds for ripeness for the West
5 Pilots, why could you not have done it then in this case? But 10:29:29
6 you made a decision not to ground your ripeness in that either,
7 right?

8 MR. JACOB: That's correct.

9 THE COURT: So why couldn't you have done it then? If
10 you can do it now, why could you not have done it previously in 10:29:45
11 this case? And I packed a lot into the "if you can do it now."
12 I'm not assuming you can do it now, although I'm sure there's a
13 big fight over that.

14 MR. JACOB: This comes to the issue of whether the
15 appellee waives an argument. We weren't the appellant. We 10:30:03
16 didn't have any to prove. We're not charged with having waived
17 arguments that we didn't need to make. We thought we proved
18 that the case was ripe. And it would be different if we were
19 the appellant, we had lost the appeal, and we were coming up
20 with a new argument. Then I think you should tell us that we 10:30:36
21 waived.

22 THE COURT: But all parties are charged with making
23 the factual record for the issues they want to present. And
24 you didn't elect -- well, maybe -- there may be -- there may
25 well be a factual record here just incidentally as the hardship 10:30:52

1 of alleged hardship to the Airline, but you didn't.

2 All right. Go ahead. I understand your argument.

3 MR. JACOB: You know, it's just a matter -- we agree
4 that this would have been easier if we had raised that, and if
5 we had raised it and if the Ninth Circuit had ruled on it, had
6 not accepted that argument, the circumstances would not be
7 changed and we would interpret what they ruled as saying that
8 this case is not ripe, even taking into account the hardship to
9 the Airline. But that isn't how they ruled. And just on the

10:31:14

10:31:36

10:31:58

10:32:20

10:32:39

10 issue of whether the Court would be in conflict with the

11 mandate to the extent that they didn't rule on it, they

12 wouldn't. To the extent whether we waive the opportunity to

13 make this argument, I don't believe that waiver applies to us

14 even though our lives would be easier today if perhaps we had

15 made that argument.

16 THE COURT: Let me go back to your assertion that if I

17 reopen this case it would resurrect all prior rulings and

18 evidence. It strikes me that that, I must admit, I didn't

19 think of that. But that may be your motivation or part of your

20 motivation for this motion. But it's not part of the legal

21 analysis as to whether to grant the motion, is it? And if it

22 is part of the legal analysis of whether to grant or deny the

23 motion, walk me through the legal structure as opposed to the

24 motivation.

25 MR. JACOB: I will back up to the motivation a little

1 bit more. I don't think I raised it in the motion because I
2 thought it was a side issue that would complicate things that
3 we don't need to decide what would happen if the case is
4 reopened until it gets reopened.

5 THE COURT: I think --

10:32:59

6 MR. JACOB: And I believe the Court does have a task
7 of what to do, and we didn't want to ask for something that the
8 Court might not be comfortable with. And we don't get the case
9 reopened because of that, so we're not asking the Court to rule
10 what it would mean if the case was reopened. We believe that
11 should be addressed afterwards.

10:33:13

12 THE COURT: I think that's what I was thinking, but it
13 doesn't determine whether I grant or deny the motion. And if I
14 grant -- I only have to reach it if I grant the motion.

15 So your surprise, I'm thinking, doesn't affect what I
16 do on this motion.

10:33:31

17 MR. JACOB: And again, just one more comment on
18 efficiency, it doesn't make sense to us that the Court rule on
19 this motion until it's established that the US Airways claim is
20 ripe, because if that claim was dismissed for lack of ripeness,
21 and this case was reopened, it would be very hard to understand
22 why that was proper in that circumstance.

10:33:56

23 THE COURT: Now you are stealing Mr. Harper's argument
24 because I can't, and I'm not, ruling on any of those other
25 things unless I transfer the case here.

10:34:17

1 MR. JACOB: But I'm saying whether you or another
2 judge rules that case is ripe, it just seems to me that we risk
3 being in a position that no one wants to be in if we're not
4 consistent. And the best way to be consistent is to rule in
5 that case first, which I think is an easier matter to rule on,
6 whichever way you go, and then if what is ruled in that case
7 makes, in essence, our 60(b) motion ripe, that that can be
8 ruled on.

10:34:37

9 THE COURT: All right.

10 MR. JACOB: Thank you.

10:34:54

11 THE COURT: Mr. Granath.

12 MR. GRANATH: Thank you, Your Honor.

13 Your Honor, I'm going to summarize our position to
14 start and then maybe walk through a few things for the record,
15 although I have a sense of where we're at.

10:35:17

16 The Court doesn't have jurisdiction. The Court noted
17 it has procedural jurisdiction. We accept that. Rule 60(b)
18 cannot be used to create jurisdiction where there isn't any.

19 THE COURT: And you're -- you know, jurisdiction is a
20 fuzzy word. Are you picking up the discussion I had, the
21 distinction between the mandate and Rule 60(b)?

10:35:37

22 MR. GRANATH: Yes, sir.

23 THE COURT: All right. Go ahead.

24 MR. GRANATH: Granting their motion would flout the
25 mandate. The argument that they have made today that we've

10:35:48

1 heard, and the argument they have made in papers is a
2 reargument of what we had on appeal. That's improper. There
3 is no resurrection of the rulings in the previous case. That
4 case is now a legal nullity, rendered so by the appellate
5 decision.

10:36:11

6 What they are really asking the Court to do here is to
7 vacate the Ninth Circuit's ruling, not the District Court's,
8 because the same ruling obtains in both directions. There is
9 no jurisdiction. I'm going to quote from *Rufo v. Inmates* 502
10 US 367, 384. Quote, "Rule 60(b) may not be used to challenge
11 the legal conclusions on which a prior judgment or order
12 rests," end quote.

10:36:32

13 Here, in this case, the District Court merely complied
14 with the order finding no jurisdiction. Rule 60 is
15 inapplicable. It's not a device to manufacture jurisdiction.
16 That's why there is no case law that they have what Your Honor
17 just verified.

10:36:54

18 What the Ninth Circuit has indicated is that this
19 action prolongs unwarranted judicial intervention into
20 collective bargaining. And this is what this looks like.
21 That's in the *Addington* decision on Page 4.

10:37:14

22 The District Court is not free to deviate from Ninth
23 Circuit's ruling under the mandate rule, as I think you said,
24 the law of the mandate. And in the future in the law of the
25 case, the *Addington* ruling was clear. It was direct. It was

10:37:33

1 limited. It was not conditional or unqualified. And we know
2 that the Court, the panel, went on not to just rule it void but
3 to indicate when there would be a final product when ripeness
4 would obtain.

5 Now, there's a good discussion in the case I found, 10:37:55
6 unfortunately after our briefing papers, Your Honor, and that's
7 in a decision called *Orient Mineral versus Bank of China*. It's
8 a Utah case, February 19, 2010. I'm going to have my
9 colleague, with your permission, hand that out to the Court and
10 to counsel. 10:38:15

11 That's an exhaustive and very recent analysis by one
12 of your fellows, Your Honor, on 60(b) in very similar contexts
13 and specifically under the grounds that apparently you are
14 moving under. And if that is 55(b), it illustrates that that
15 requires prospective application, which we don't have in this 10:38:40
16 situation.

17 THE COURT: Well, if it's 27 pages it cannot be clear.

18 MR. GRANATH: Well, Your Honor, I will leave that to
19 you to judge.

20 THE COURT: Just kidding. I will read it. 10:38:53

21 MR. GRANATH: Thank you.

22 So really, to do this, you would need permission from
23 the appellate court. The Ninth Circuit has already said no
24 district court could fashion a remedy to alleviate the alleged
25 harm. 10:39:11

1 THE COURT: Mr. Granath, I apologize for interrupting
2 you, but there's a fine line which I think I see. It may be
3 illusory, but I think I see it, between complying with the
4 mandate, which is a direct obligation without judgment or
5 discretion on the one hand, and on the other hand, analyzing 10:39:33
6 the precedential force of the decision on the Court of Appeals.
7 Obviously, whoever decides the new case is going to have to
8 figure out the precedential force of this decision that's now
9 circuit law.

10 But I see that as different from the issue of 10:39:58
11 complying with the mandate. If the mandate requires me to do
12 it then my decision is not ground in nor is it an
13 interpretation of the precedential force of the opinion.

14 I'm just doing my job if, in fact, you are right about
15 that, to comply with the mandate. 10:40:17

16 MR. GRANATH: I agree, Your Honor.

17 Now, the motion is procedurally defective because it
18 fails to specify what subcategory of Rule 60(b) that we're in,
19 1, 2, 3, 4, or 5, and we didn't hear today that clarification.

20 But that's relevant to the legal analysis because 10:40:37
21 those categories are, under the case law rule, mutually
22 exclusive and, frankly, prejudices us in responding. If it's
23 under 60(b)(5), no longer equitable exceptions, or if it's
24 under 60(b)(6) for other reasons, the standard is even doubly
25 higher to open. I'm sure the Court is aware it requires 10:41:01

1 exceptional circumstances or substantial change, and the case
2 law warns -- the juris prudence of 60(b) warns that this is not
3 an invitation to redo appeals. It's not a substitute for
4 appeals.

5 The motion that also occurred to me after our briefing 10:41:22
6 might sound under 60(b)(4) void, because they say on Page 10 of
7 their brief, quote, "Judgment of dismissal is invalid in light
8 of current circumstances, but it can't be void based on nothing
9 but a litigant's assertion rather than a court ruling or rather
10 than evidence of a final product of collective bargaining." 10:41:45

11 There's assertion made on their side that Rule 60(b)
12 is proper after a mandate is issued and sure is a generic
13 prospect, but not when the issue was dealt with on appeal. And
14 that's a problem here, is that this is all about what was dealt
15 with on appeal. 10:42:07

16 Now, there's assertion that's been made -- well, and I
17 should say that both ripeness and harm to the parties,
18 including the company, were dealt with and were on appeal.
19 You, I think, also addressed whether they should have been, and
20 that's another issue or another -- 10:42:26

21 THE COURT: You know, I made no -- I didn't ground my
22 ruling on ripeness on the Airline and I didn't think the Court
23 of Appeals did.

24 MR. GRANATH: No. I'm sorry, Your Honor.

25 THE COURT: Go ahead. I didn't mean to interrupt. 10:42:37

1 MR. GRANATH: That's fine. I was merely going to
2 point out, though, Your Honor, on your Findings of Fact and
3 Conclusions of Law, which we specifically brought up on appeal,
4 Docket 593, Page 37, and I'm going by the internal pagination,
5 not the docket, Lines 11 through 16, the Court expressly did
6 consider it, expressly did consider harm to the company. So
7 that's part of what was brought up on appeal.

10:42:55

8 THE COURT: Did the Court -- I don't know what's in
9 your briefs, but did the Court of Appeals address that?

10 MR. GRANATH: I would argue that the Court of Appeals
11 did address that in their discussion of the effect of the
12 injunction as part of the ripeness analysis and then
13 impliedly -- I mean, this was a case that went up, after all,
14 amidst of collective bargaining where many of our facts were
15 not disputed. Certainly there was no dispute about who was who
16 and where we were at in the process.

10:43:14

10:43:32

17 So also, Your Honor, the motion here is premature. I
18 won't belabor that. But before I surrender it, I would submit
19 the reply brief now makes that an admission that asks the Court
20 treat the motion as if it was timely. But --

10:43:54

21 THE COURT: Well, let me tell you, on that, I have
22 told you earlier what has always been my understanding about
23 Rule 60(b). And I have always thought, that is,
24 it's technically -- it might be -- a motion may be
25 substantively premature in that the events they rely on hadn't

10:44:14

1 happened yet. Procedurally it's possible for a Rule 60(b)
2 motion to be premature. You just can't rule on it. You don't
3 have jurisdiction. When the mandate returns, the trial court
4 has jurisdiction and you can rule on it.

5 So maybe I'm not understanding your argument of 10:44:31
6 prematurity. The fact that they filed it a couple days before
7 the mandate doesn't strike me as mattering unless, of course,
8 not mattering procedurally, like I said, it might matter
9 factually if the facts haven't happened yet that are the basis
10 for the relief sought. 10:44:55

11 MR. GRANATH: And I won't quarrel with the Court to
12 the extent it's jurisdictionally that matters. I will move on.
13 But just for the record we have a disagreement on the way we
14 read the *Hargrave* decision, which is cited in our briefs. And
15 the other side said that they did not consider the merits, but 10:45:10
16 if I refer you to Page 724, they say there that, quote, "Will
17 dismiss the Rule 60 motion as premature without consideration
18 of its substantive merits in full accordance with the Court of
19 Appeals mandate." So maybe it goes more to the rule of the
20 mandate. 10:45:29

21 THE COURT: I'm sorry. I didn't understand that.

22 MR. GRANATH: I was merely making for the record, Your
23 Honor, I was pointing out that counsel and I disagree on the
24 read of *Hargrave*, and I would refer to the Court to Page 724
25 there that in that situation the Court said that, look, we're 10:45:43

1 not -- we have to dismiss this as premature because we've got a
2 mandate. Now, I put that in the same context of the Court's
3 comments, which I don't quarrel with. I will say one other
4 case and I will move on.

5 It wasn't in our brief but *McMillan*, at 4F3.d, 365,
6 that's a Fifth Circuit case, and on Page 366 there's a
7 statement, "A Rule 60(b) motion cannot be filed until after
8 final judgment has been entered."

10:45:58

9 THE COURT: You know, I think it doesn't change my
10 thought. You have to be economical with language, and
11 technically, you can say it cannot be filed, but that what that
12 really means is you can't rule on it.

10:46:20

13 MR. GRANATH: I will move on, Your Honor.

14 THE COURT: There's no difference.

15 MR. GRANATH: I will move on.

10:46:32

16 Another point that's made by the other side is the
17 District Court can vacate now if it's ripe because of a change
18 in circumstances argument. Generically, that's true. There's
19 no circumstances that are even alleged here that would show
20 ripeness. That hasn't happened yet. The argument really boils
21 down to that later events change the ripeness analysis. And
22 I'm lifting that -- I'm sorry I don't have the page number of
23 their brief. That's the words they used. Counsel used similar
24 words that reargued the position argued on appeal. The only
25 significant later events are completed negotiations and a

10:46:52

10:47:15

1 ratified contract.

2 THE COURT: Before you sit down, I --

3 MR. GRANATH: Is that a hint, Your Honor?

4 THE COURT: Oh. No. No. I gave plenty of time to

5 Mr. Jacob. You can take the time you want. But I have a 10:47:28
6 question that is really meant for both of you, so Mr. Jacob can
7 answer it, too, when he gets back up there. And that is, under
8 Rule 60(b)(6), there's got to be extraordinary circumstances.
9 And one would think that prejudice is a key issue there.

10 But there's another lawsuit. All this stuff is 10:47:52
11 pleaded in the other lawsuit, so it's hard to see what the
12 prejudice is to anybody that would require reopening this case
13 as opposed to taking the procedural vehicle that now exists in
14 Judge Silver's court unless -- and this is coming back to Mr.
15 Jacob's argument -- unless he gets some alchemy that turns dead 10:48:16
16 rulings into live rulings by the granting of this motion. I'm
17 just trying to think through what the prejudice is to him.
18 Maybe, you know, again, you and I are both unprepared for that
19 because it's a surprise to both of us.

20 MR. GRANATH: What I would have to say from our 10:48:41
21 perspective, Your Honor, is that that case is now a legal
22 nullity. There is no resurrection. We certainly briefed that,
23 but I can't imagine under any circumstances that would
24 obtain -- I mean, we can have discussions about collateral
25 estoppel and claim preclusion until the end of the day, but the 10:48:59

1 notion that the earlier case is going to jump up and pick up
2 where it left off is just dead wrong, legally. And it
3 shouldn't bear any part of the analysis here.

4 THE COURT: All right. Go ahead.

5 MR. GRANATH: And I'm wrapping up here. 10:49:14

6 The -- pointing to the vacation or the dissolving of
7 the judgment and the injunction and the response thereof by
8 USAPA, as the other side has done, those are of no legal
9 significance under 60(b). And there's been nothing that's been
10 explained or any case law that makes that relevant. 10:49:43

11 As the Court pointed out, there's a problem with the
12 argument that if the company's case is ripe then theirs is
13 ripe. I submit there's a couple more problems as well.

14 THE COURT: I'm not sure there's a problem. It's an
15 obvious question. 10:50:00

16 MR. GRANATH: I'm not implying the Court has rendered
17 a finding on that. I just made a comment on that. At any rate
18 I will address your comments on that. But that's -- the
19 company's case is pending. Obviously there's a jurisdictional
20 attack. It's been moved to dismiss. Her Honor hasn't ruled on 10:50:19

21 that yet. And it doesn't -- we don't have to go too far into
22 that, and I won't go very far into that at all to say, look,
23 under the declaratory judgment statute, even if Her Honor gets
24 to the end of the line of the jurisdictional analysis and all
25 of the nuances that are a certainty to provide a great deal of 10:50:42

1 attorney time, she still has the option to say no under the
2 statute on prudential grounds. So my point is there's no type
3 entitlement that the company's got to proceed. There's a big
4 question mark there.

5 In any event, there's three counts in that case. They 10:51:02
6 each have to be analyzed. And Count 3 is independent of both.
7 And the significance of that is you don't even need to decide
8 the seniority issue. It could go straight to immunity. It's a
9 possibility. Who knows.

10 So there isn't much that can be said right now about 10:51:19
11 that that impacts this. There's a statement made by the other
12 side along that USAPA's coercive action would be ripe because
13 US Airways cannot acquiesce to its proposal. It's on Page 8 of
14 their brief. We submit that's just flat wrong under the law of
15 the case and under the precedent that we have had discussions 10:51:42
16 with Your Honor in the previous case.

17 THE COURT: Well, if the Airline did become of accord
18 with a common plan with the union to jettison the Nicolau
19 Award, then the Airline would be squarely back in the hybrid
20 action that I dismissed for lack of facts, right? 10:52:08

21 MR. GRANATH: I don't think so, Your Honor. I'm going
22 to respectfully disagree with you on that. That's the
23 collusion argument. And the argument that's being made there,
24 again, I don't want to jump over and argue the other case right
25 now. But the argument is that merely by signing on the line, 10:52:22

1 that's collusion. And I don't think that's -- that doesn't
2 square with the case law. And the company -- I will let Mr.
3 Siegel speak for the company. Of course, my understanding is
4 they don't agree with that interpretation either.

5 THE COURT: Well, I didn't have to say exactly where 10:52:38
6 the line draws because I didn't find any evidence at all that
7 the Airline was colluding with the union. But again, it's the
8 obvious question. And it could take us back to two years to
9 exactly where the West Pilots were when they filed the lawsuit.

10 MR. GRANATH: And I remember the Court's ruling on 10:52:58
11 that as well. And I would argue that if we go back to Docket
12 593 on Page 42, that this has been considered as well.

13 At any rate, USAPA's potential coercive claim hasn't
14 arisen. The company hasn't refused. We have -- are in the
15 midst of bargaining, and we're waiting for a response, and they 10:53:25
16 have done what they have done and they have said what they have
17 said. It couldn't, at any rate, be addressed outside the law
18 of the case at this point in time.

19 There's also an argument made about preclusive effects
20 and under 60(b)(5), if that's what they are moving under, that 10:53:44
21 requires perspective application. We don't have that. But any
22 preclusive effect that's speculative, I would argue and submit
23 that that's part of the reason why Count 1 can't survive in the
24 company's case. And it relies really on the assertion that
25 actually they have to decide Count 1 and Count 2, in other 10:54:10

1 words, they have to decide the Nicolau dispute, and that's not
2 the case. That's not the way the case was pled. Count 3, the
3 immunity count, can be separated and pled in the alternative.

4 THE COURT: Tell me why we're talking about this right
5 now. 10:54:25

6 MR. GRANATH: You know, I'm going to stop right now
7 while we're talking about this. I was trying to address
8 overall and to make a record here.

9 THE COURT: I meant that good-naturedly.

10 MR. GRANATH: No. I hear you. 10:54:32

11 But I'm just attempting to respond to what I have seen
12 in their briefing. I'm not 100 percent sure where the Court's
13 going to go after this.

14 THE COURT: Where we're going is the motion for
15 transfer. 10:54:47

16 MR. GRANATH: I know that. I know that. I'm ready
17 for that one, too.

18 In sum, Your Honor, this is not a substitute for the
19 appeal. It's not a device to get around the rule of the
20 mandate, and it can't create jurisdiction. I will step down. 10:55:00

21 THE COURT: All right. Mr. Jacob.

22 MR. JACOB: I just need to respond to your question on
23 hardship, Your Honor. There's -- the hardship could be, and
24 I'm not saying that it is, that we're foreclosed from making a
25 claim if you don't reopen, that we're foreclosed if the case is 10:55:24

1 not reopened or the hardship could be that we have to repeat
2 substantial effort that was already done.

3 THE COURT: Well, the first point strikes me as having
4 no basis at all.

5 MR. JACOB: Right. And I don't believe it's the first 10:55:42
6 one. The first one is sort of a black and white hardship. The
7 second one is hardship that can be overcome with dollars and
8 time. And it's an issue of, to us, is that it's more efficient
9 and sensible to not relitigate class certification and a number
10 of other issues. And we're hoping that we would not have to 10:56:11
11 relitigate them if the judgment was reopened. But the hardship
12 is a matter of the cost and time to do those things again.

13 THE COURT: Well, it's going back to the issue that
14 you have not briefed.

15 So what I am hearing is that it's not so much that you 10:56:35
16 have a hardship of having to file your pleadings and litigate
17 in the new case that the Airline has brought, it's that you
18 believe there is a legally legitimate consequence of reopening
19 here that resurrection of all manner of rulings this Court
20 previously made, which strikes me as being plainly null after 10:57:05
21 the dismissal for lack of jurisdiction.

22 All right. I understand your argument.

23 MR. JACOB: Thank you.

24 THE COURT: All right. Let's argue the next motion.

25 MR. HARPER: I will try to salvage what might be left 10:57:31

1 for me to argue, although, you know, the Court identified that
2 some judge, either yourself or Judge Silver, is going to have
3 to determine the precedential force of the Ninth Circuit
4 opinion. And I think Mr. Granath just made the point that it
5 ought to be you and not Judge Silver.

10:57:54

6 THE COURT: I think he agreed with me that under the
7 argument of mandate, the mandate controls. And if I agree with
8 his view on it, the ruling doesn't have -- my ruling enforcing
9 the mandate doesn't have any effect of an -- as an
10 interpretation or precedential value. But I'm not sure.

10:58:15

11 I apologize for interrupting you. Tell me you are
12 saying how maybe --

13 MR. HARPER: Because the two prongs that we look at in
14 a motion to transfer is promote judicial efficiency and avoid
15 the necessity of a new judge learning a complex factual
16 scenario.

10:58:35

17 THE COURT: Well, there's a lot here no other judge
18 would want to learn.

19 MR. HARPER: Well, but you have learned it. And I
20 think that indeed, because you have learned it, the questions
21 that necessarily come up in the context of the Airway's dec
22 action can be most efficiently and, perhaps, easily because of
23 the learning curve, be decided here and not in front of Judge
24 Silver.

10:58:47

25 And I'm not saying that she can't do it, but to the

10:59:13

1 extent that efficiency is one of the prongs that we look at, I
2 don't think anyone in this room would disagree with the point
3 that the efficiency point can be made best here in this
4 courtroom.

5 The -- in their response to our motion to transfer, 10:59:33
6 the only substantive point that USAPA makes is that you can't
7 transfer to a closed case. And we addressed that at Page 3 of
8 our reply because, indeed, it has happened in this very
9 courthouse in a matter that was before Judge Silver where a
10 case that she had was closed for about two weeks, and then she 11:00:01
11 granted a motion to transfer a new case into her courtroom.

12 THE COURT: Well, that case is dear to my heart, and I
13 have checked my memory and looked at the record, and here's
14 what actually happened there.

15 MR. HARPER: It's unfair if you are involved in the 11:00:22
16 record. We just have to read the record.

17 THE COURT: Actually, I wasn't involved in the second
18 case. I was here when the second case was filed.

19 But the first case was -- it's very complicated, but a
20 short way of saying it as a practical matter, the first case 11:00:39
21 was settled although there was an appeal. And later the appeal
22 got settled, and when that mandate came down from the appeal,
23 right after that, the second case was filed with respect to the
24 2004 elections. That case was assigned to Judge Murguia and I
25 think the Arizona Minority Coalition filed a motion with Judge 11:00:58

1 Silver to transfer it to her.

2 In the hearing before Judge Murguia, she asked whether
3 anyone objected to the transfer, and everyone agreed to it. So
4 it strikes me that that case is a matter of a stipulation, not
5 a precedent. 11:01:18

6 MR. HARPER: Well, obviously we didn't know that, Your
7 Honor. But from the record it appeared like it was at least a
8 closed case.

9 THE COURT: It was a closed case.

10 MR. HARPER: Where a matter had been transferred. 11:01:30

11 THE COURT: You are right. It was a closed case. But
12 the motion to transfer that went to Judge Silver in that case,
13 in the previous hearing before Judge Murguia, who was the
14 transferor judge, it's clear in the record that everybody -- no
15 one objected, i.e., everyone agreed to the transfer. So with 11:01:49
16 everyone agreeing to the transfer, Judge Silver granted it
17 without opposition. So that just does not strike me as having
18 any precedential value at all.

19 MR. HARPER: I assume if I ask USAPA if the they agree
20 to it, they will say no. 11:02:09

21 THE COURT: We already know that.

22 MR. HARPER: But I go back to the two prongs. The
23 questions and the points that Mr. Granath was trying to make
24 about Mr. Siegel's new case and the relationships and the
25 timing and the issues that need to be evaluated to determine 11:02:22

1 if, indeed, his dec action is ripe, and if his dec action is
2 ripe what does that mean for our cross claim in the context of
3 whatever is ripe in the three-prong dec action, I think this
4 practically can be best decided here, not in front of Judge
5 Silver.

11:02:48

6 THE COURT: Well, if one looks at the rule, it's a
7 very broad rule that it seems obvious that parts of the rule
8 that -- listing factors that would favor a transfer do apply
9 here. It's the same transaction or occurrence. It's the same
10 contract. It's the same arbitration award. It's the same --
11 well, it's the same transaction of occurrence. There will be
12 much in the new case that we did not address here, issues of
13 ripeness for the Airline, issues of Railway Labor Act law that
14 pertain to the employer and not just workers. There will be
15 plenty that's new and there will be plenty that's old. That
16 seems obvious.

11:03:06

11:03:30

17 But the threshold question I have for you is our Local
18 Rule 41.2 requires that there be a pending action. And I have
19 already told you that my examination leaves me unpersuaded that
20 the Arizona Minority Coalition case is a pending -- it is a
21 precedential case because everyone agreed to it.

11:03:56

22 So if the rule, and this motion is under Rule 41.2,
23 requires a pending action, the *Addington* case is not pending
24 now. And it seems to be a pretty literal language and test.
25 Maybe that's why Mr. Jacob wants me to resurrect this case so

11:04:26

1 that it is pending again.

2 But putting aside the question of whether I should
3 grant the 60(b) motion, I put it to you how that word "pending"
4 can apply to a closed case.

5 MR. HARPER: Well, it is in the rule. There's no 11:04:52
6 doubt about it. The cases that interpret the rules provide
7 wide discretion to the Court to make a determination on where a
8 case ought to be litigated. And it seems to me here that we're
9 balancing the efficiencies of having a case that is clearly
10 related, and all of the other points that you have made, 11:05:21
11 handled in this courthouse in front of the judge who can most
12 efficiently tend to that matter and get it decided in the best
13 interests of all of the parties who are going to be litigating
14 in front of you.

15 THE COURT: As I said, it appears to me obvious 11:05:39
16 there's judicial efficiency in not shifting this to a new judge
17 in the new case. But this authority under Rule 41.2 is a very
18 powerful authority of the transferee judge to take a case from
19 another judge. And in general, judges, the random assignment
20 of judges and the following of rules in transferring a case is 11:06:02
21 of very important value because we don't -- judges don't get to
22 pick what cases they want. And I can tell you all that having
23 been on this court for six and-a-half years, that the judges of
24 our court do not use Rule 41.2 to get rid of unpleasant cases
25 or take cases. This rule is applied the way it is supposed to 11:06:28

1 be applied, and that is, it has to apply. And we look at these
2 factors that are listed and, we rule on these motions on those
3 grounds. And it's mainly concerned with economy, judicial
4 economy and party economy. That's how we do it. But we don't
5 have a rule that allows one judge just to grab another case if
6 the threshold of this rule does not apply. 11:06:53

7 MR. HARPER: I don't think I have ever filed a motion
8 to transfer in this courthouse. And this was, to my
9 recollection, the first one. And it really was driven by the
10 efficiencies, I mean, when you just stop and think about it, 11:07:11
11 common sense is this is the right place for this litigation to
12 proceed.

13 So we would ask you to grant our motion to transfer,
14 and I don't know if anybody else beside USAPA wants to comment
15 on that. 11:07:30

16 THE COURT: All right. Mr. Granath.

17 MR. GRANATH: Your Honor, the Court has discretion on
18 this, obviously. The issue here is not closed or opened, it's
19 that there is no jurisdiction here to transfer into. And it's
20 fairness and due process and the appearance thereof. 11:07:52

21 The sameness isn't enough. There's a pending case
22 requirement. Costs and convenience can never outweigh fairness
23 or due process or prejudice. And it isn't true in this case,
24 Your Honor, that that would necessarily result in efficiency
25 anyway because, quite frankly, we would be in a position where 11:08:14

1 we would be taking another trip to the Ninth.

2 We did do the research --

3 THE COURT: However I rule on this, a lot of people
4 are going to be unhappy. And one nice thing about it is that,
5 I mean, the Court of Appeals is the sole judge of its own
6 jurisdiction. But it looks like this is close enough to issues
7 of mandate that it may be reviewable by mandamus which goes
8 fast, and that's good for everybody. And Mr. Jacob is right.
9 A ruling would be appealable, too. Post-judgment ruling is
10 appealable. It would also be reviewable by mandamus. What's
11 the big deal if somebody has to run back to the Court of
12 Appeals and get a definitive answer?

11:08:32

11:08:51

13 MR. GRANATH: The currently pending requirement, Your
14 Honor, is there's no authority provided to indicate that that
15 means anything other than what it says.

11:09:08

16 We did do the research on the *Navajo* and the *Minority*
17 cases. And for the record, I'm going to ask that we can put in
18 a couple of pieces of paper that we obtained from that docket.

19 THE COURT: You can, but I suspect I already have it.
20 I'd be happy to have it.

11:09:23

21 MR. GRANATH: Thank you, Your Honor. But that is not
22 a similar case. As the Court pointed out, it was settled.
23 There was stipulation. There was no objection. That was pure
24 convenience.

25 In this situation, Your Honor, there's absolutely no

11:09:37

1 prejudice to any party by allowing the case to be heard by the
2 judge that it was randomly assigned to. And there would be a
3 harm to USAPA if it was transferred. This case would not have
4 the appearance of fairness and for other reasons we stated in
5 our brief.

11:10:04

6 THE COURT: Well, let us discuss that. Of course,
7 it's not a pleasant subject, but your briefs have stated I am
8 unbiased and unfair. So let's discuss the basis for that.

9 MR. GRANATH: Your Honor, I won't go beyond what we
10 said in our brief. My only point is to note that was an
11 argument that was made on appeal. We felt we had grounds.

11:10:18

12 But my point today, though, is that you already did
13 this case. And your rulings were strong and they were
14 extensive, and --

15 THE COURT: That's what judges do, Mr. Granath.
16 That's a judge's responsibility. How does that result in bias
17 or prejudice?

11:10:37

18 MR. GRANATH: I think the appearance, Your Honor, of
19 having Judge Silver who hasn't gone through this case, who
20 hasn't been asked to decide those issues and who hasn't
21 rendered rulings --

11:10:54

22 THE COURT: So your argument is that if there is a
23 reversal and a remand and the judge has already expressed views
24 on points of law and the persuasiveness of evidence as
25 presented, that that judge cannot fairly address matters that

11:11:12

1 require repetition in a retrial? Is that your argument?

2 MR. GRANATH: No, Your Honor.

3 THE COURT: Well, it's hard for me to see how that's
4 not your argument, because trial judges routinely retry cases
5 that they have tried before and there's error found, and they
6 do it all over again. So what is your argument? 11:11:31

7 MR. GRANATH: My point is only that the system
8 randomly assigns judges, and all parties can now go through the
9 process with Judge Silver knowing that they have a fresh judge,
10 and that appearance has value. And that's a factor that should
11 outweigh any gains in efficiency or any losses in efficiency. 11:11:49

12 THE COURT: Is there any dispute that as burdensome as
13 it is, there is great efficiency in having the same judge
14 address the litigation involving the exact same transaction and
15 the same parties, although it will now involve another party as
16 well? 11:12:11

17 MR. GRANATH: That's correct, Your Honor. And I think
18 the simple answer is of course there's going to be some
19 efficiency gains but there's always going to be new issues that
20 are addressed in the case, and there already are new issues
21 pending. So I don't know that there's a net gain. Obviously
22 there's some gain. 11:12:25

23 THE COURT: You know, Mr. Granath, of course it is the
24 duty of every judge at all times, in every case, to consider
25 whether the judge has a bias or prejudice. And if the judge 11:12:41

1 has a bias or prejudice, it is the duty of the judge to recuse
2 then regardless of the consequences.

3 So I have examined this with that in mind. And I have
4 gone back through this case, and your argument, apparently what
5 you argued in the Court of Appeals, too, is that I made 11:13:01
6 numerous rulings against your client and expressed them
7 strongly and therefore, it would be, although you on the one
8 hand say I'm not biased and prejudiced, it would have the
9 appearance of bias and prejudice and I should not transfer.

10 That's how I read what you said. And having gone back, I made 11:13:17
11 a lot of rulings for both sides in this case, did I not?

12 MR. GRANATH: You did, Your Honor.

13 THE COURT: So for example, I granted your motion to
14 consolidate the two cases. I granted your motion dismissing
15 the plaintiff's removed state court case as entirely pre-empted 11:13:35
16 by federal law, threw the whole case out at your request. I
17 did grant the airline's motion to dismiss for lack of
18 jurisdiction. That was their motion, but it had collateral
19 benefits to your client in the litigation as well.

20 We hotly litigated the question of whether you had a 11:13:54
21 right to jury trial. It was a close question and I ruled in
22 your favor on that.

23 MR. GRANATH: That's correct.

24 THE COURT: Not because I was ruling for you but
25 because I thought, as in everything, that was the strongest 11:14:04

1 weight of authority.

2 And I also granted your motion for judgment as a
3 matter on the pleadings on the claim for restitution of union
4 dues and fees, eliminating that entirely. On the motions in
5 limine, there were many -- by the way, there were too many 11:14:25
6 motions in limine -- and those were a mixed bag. You won some;
7 you lost some. I denied the West Pilots' motion for additional
8 discovery. I struck their supplemental reply. And it came to
9 what probably is one of the most important aspects of the
10 entire litigation, and that is, settling what jury instruction 11:14:45
11 to give on DFR in these circumstances. I rejected entirely
12 West Pilots' proposal. And the instruction I gave, although it
13 wasn't exactly what you proposed, it was a lot closer to your
14 instruction with one change than theirs.

15 So if adverse rulings are enough to give rise to an 11:15:09
16 appearance of impartiality and unfairness, I haven't been very
17 efficient at being biased, have I?

18 MR. GRANATH: I take your point, Your Honor.

19 THE COURT: Now, what about the point that the
20 fundamental principle of disqualifications that neither 11:15:29
21 disqualification or bias and prejudice can be shown from
22 adverse rulings? What about that point of law, Mr. Granath.

23 MR. GRANATH: I understand. I'm familiar with the
24 juris prudence, Your Honor. I think our argument was a little
25 different in the Ninth Circuit. I may have to respectfully -- 11:15:51

1 THE COURT: I haven't read your briefs in the Ninth
2 Circuit, so is it different from what you argued here?

3 MR. GRANATH: I think so, Your Honor. But I really
4 don't have anything to add to that. My only point directed to
5 the motion that's on the table is all doubts should be resolved 11:16:05
6 in favor of the full appearance of justice. We have a randomly
7 assigned judge. There's no quarrel there.

8 THE COURT: That's not the standard on transfer. The
9 standard on transfer is what is stated in Rule 41.2.

10 Now, of course, as I said, in any case, if the judge 11:16:22
11 is actually biased and prejudiced it is the judge's duty to
12 examine that and to recuse.

13 Go ahead. I want to hear whatever you have to say in
14 support of that argument.

15 MR. GRANATH: It's true that that's the standard, Your 11:16:39
16 Honor, but also it's true that all parties are entitled to due
17 process and fairness under the constitution. My point is that
18 we have a judge that it was randomly assigned to and there's no
19 issue on that side with that judge. As Mr. -- as counsel has
20 said, Judge Silver can do it. And it seems to me if there's 11:16:59
21 any -- I understand the Court disagrees with our position. I
22 respect that.

23 THE COURT: It's not a matter of subjectivity. We
24 have court rules, and the court rules here lay out the criteria
25 to be followed, the factors to be considered, and that's what 11:17:14

1 matters. Now, it comes back to the question of whether I'm
2 biased or prejudiced or whether there is an appearance of bias
3 and prejudice. I'm asking you, the fact that I have engaged
4 this case thoroughly, I viewed this case from the point of view
5 of everyone's interest as one of utmost importance --

11:17:38

6 MR. GRANATH: Yes, sir.

7 THE COURT: And I invested great effort in processing
8 it expeditiously and fairly, and I labored through the numerous
9 issues that were presented and I reached decisions. And as we
10 have just summarized, the other -- this is a battle in which
11 both sides had a lot of ships sunk.

11:17:57

12 How is it that the Court's engagement of counsel with
13 vigorous dialogue and reaching conclusions, sometimes with a
14 strong point of view, even gets close to bias or prejudice that
15 would preclude what is otherwise an appropriate transfer? I'm
16 not saying that the pending requirement is met. But if it
17 were, how is it that that would preclude an otherwise
18 appropriate transfer under Rule 41.2?

11:18:20

19 MR. GRANATH: Maybe not under the rule, Your Honor,
20 but under the constitutional right that my client has to a fair
21 trial. And I would note that there is juris prudence in this
22 circuit, as well as others, that have redirected judges on to
23 different cases when the bias standard wasn't met. And I think
24 that's an example of resolving doubts in favor of the
25 appearance as well.

11:18:40

11:19:01

1 THE COURT: I'm asking you whether you are saying that
2 your client could not get a fair trial if I transfer this case.
3 And if so, I'm going to be asking you for the specifics.

4 MR. GRANATH: Our position at this time, Your Honor,
5 is we do not think we could get a fair trial. 11:19:20

6 THE COURT: Okay. Tell me the specifics. We have all
7 day.

8 MR. GRANATH: And Your Honor, those specifics we
9 elaborated in our brief in Docket 648. And I could do no more
10 than repeat what's been written there. 11:19:35

11 THE COURT: Well, let's go through them then.

12 This is on Page 13 of your brief.

13 MR. GRANATH: Yes, sir.

14 THE COURT: At Line 13, quote, "Expression mid-trial
15 that, quote, 'there is a unique quality about the Nicolau Award 11:19:57
16 that established both a legal and an "honorable obligation" to
17 go forward with it,'" close quote.

18 How does that express prejudice or bias or unfairness?
19 That certainly expresses a view, but how is that biased or
20 unfairly deprive you of a fair trial? 11:20:13

21 MR. GRANATH: The objection there Your Honor is that
22 that goes beyond the law of the honorable obligation phrase.

23 THE COURT: So that reflects a lack of a fair trial?

24 MR. GRANATH: It does to the extent, Your Honor, that
25 it appears there that the Court was prejudging based on other 11:20:29

1 than legal criteria.

2 THE COURT: Well, not at all. This is a fair
3 observation on a view of the evidence and nothing more than
4 what judges do routinely in cases.

5 Let's go to the next one. Quote, "The Court's
6 declaration at the outset of litigation that USAPA's seniority
7 proposal was 100 percent victory for the East Pilots and 100
8 percent defeat for the West Pilots, a statement made by the
9 Court before it reviewed any of the conditions and restrictions
10 which USAPA's constitution mandates be included in order to
11 protect the un-merged career expectations of the West Pilots,"
12 close quote.

11:20:49

11:21:07

13 Now, we had -- that was the other side's point of view
14 and looking at what was before me at that time, it certainly
15 looked that way. And with the benefit of eight days of trial
16 and exposing things, how could -- you had a different view and
17 the West Pilots had a different view. How could this be
18 something not grounded in evidence that's a reflection of bias
19 and prejudice, Mr. Granath?

11:21:26

20 MR. GRANATH: It's a fair question, Your Honor. I can
21 only say we respectfully disagree in that our point in making
22 this was this is what we had said to the appellate court, right
23 or wrong, and that now for a transfer to come in, we have a
24 judge that already went through this and expressed strong
25 rulings. My point is that there's a random judge that's fresh.

11:21:45

11:22:03

1 I understand the Court disagrees with our perspective here, and
2 I respect that.

3 THE COURT: This is my responsibility, to review the
4 evidence. And I frankly don't remember the context of this
5 particular discussion. But this is in no way an indication of 11:22:20
6 bias or prejudice or lack of a fair trial.

7 Your next quote at Line 18, the Court's statement that
8 basically, that this looks like a situation where the union
9 members who had the political muscle did what they wanted.

10 Now, that -- you had a different view that was 11:22:48
11 presented. It was tried. And upon different evidence, that
12 might come to a different result. Is this not just another
13 example of dealing with evidence and contentions describing
14 them that the Court has to deal with in order to do its job?

15 MR. GRANATH: It's possible Your Honor. 11:23:12

16 THE COURT: All right. And then the next quote, at
17 the top of Page 14, "The Court's comment that USAPA was, quote,
18 'created and selected by express campaign promises to disregard
19 the interests of West Pilots,'" close quote, well, that was an
20 issue that was tried to the jury and I accepted the jury's 11:23:32
21 conclusion. I was persuaded to the same on the evidence. How
22 is that anything other than discharge of the Court's duty to
23 resolve issues?

24 MR. GRANATH: I have nothing to add on that, Your
25 Honor. 11:23:47

1 THE COURT: Well, I could go -- the others are of the
2 same character.

3 MR. GRANATH: Yes, sir.

4 THE COURT: So we won't belabor it.

5 But the only thing that I, for this discussion, raise 11:23:54
6 is whether you have said anything different in your briefing to
7 the Court of Appeals that I haven't read. So if there's
8 something I should be aware of that would bear on either my
9 impartiality or the appropriateness of a transfer, I would want
10 to know. But I'm going to assume unless you tell me otherwise, 11:24:14
11 Mr. Granath, that whatever else you said in your Court of
12 Appeals brief is of this same character. Is that correct?

13 MR. GRANATH: Actually, Your Honor, it was far less
14 than what was in this brief and it was a very, I think, limited
15 and pointed. We felt we had good faith basis to make it. 11:24:29

16 THE COURT: All right.

17 MR. GRANATH: It's not out of a lack of respect for
18 the Court. It was our position, and I don't want any of my
19 comments to be construed today that we're abandoning that
20 position. 11:24:47

21 THE COURT: Did you have any other issues you wanted
22 to address?

23 MR. GRANATH: On the transfer motion, No, Your Honor.
24 No, I don't on any matter.

25 THE COURT: All right. 11:24:57

1 Thank you.

2 MR. GRANATH: Thank you.

3 THE COURT: We'll hear from Mr. Harper in reply.

4 MR. HARPER: Your Honor, I have nothing to add to what
5 has been said before. 11:25:12

6 THE COURT: All right. Very well. Thank you,
7 counsel. I don't set many oral arguments, but this is
8 important so I appreciate you all -- well, you all advised me
9 this is the time you are available so I set it when available.

10 The motions are taken under advisement, and I want to 11:25:28
11 go back and look at specifically, some of these new authorities
12 mainly that Mr. Granath has cited me to. I will look at those
13 and I will try to get these rulings out quickly.

14 We'll be adjourned.

15 MR. GRANATH: Thank you, Your Honor. 11:25:44

16 (Proceeding concluded at 11:25 a.m.)

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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 14th day of October, 2010.

s/Laurie A. Adams

Laurie A. Adams, RMR, CRR