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LETTER

AIRLINE MANAGEMENT

Airline Management Newsletter

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Ford & Harrison Partner and F&H Solutions Group President to Serve as Advisors to Dunlop II Committee

The National Mediation Board (NMB) has asked Ford & Harrison partner Claude Sullivan and F&H Solutions Group President Jerry Glass to serve as advisors to the Dunlop Committee Reports Review Committee (Dunlop II). Dunlop II is a committee convened by the NMB to evaluate the Board's compliance with the recommendations of the original Dunlop Committee Reports.

In the mid-1990s, then-President Clinton convened a Commission on the Future of Worker-Management Relations known as the Dunlop Commission. As part of the Dunlop Commission's recommendations for improvement, the Commission created two airline and railroad joint labor-management committees and instructed them to issue recommendations to the NMB. The committees each issued a report (the "Dunlop Committee Reports") containing recommendations for the NMB and recommending that no legislative changes be made to the RLA, although they did recommend changes in the NMB's administration.

The current members of the NMB recently reviewed the original Dunlop Committee Reports, particularly suggestions that were made to improve the NMB's internal functions. In an effort to improve the agency's internal structure and further relationships with the airlines, railroads and labor organizations, the NMB decided to initiate an independent examination of the Dunlop Committee Reports. Accordingly, the NMB convened Dunlop II, a committee that will evaluate the Board's current compliance with the Dunlop Committee's original recommendations.

The NMB has asked the committee to report its recommendations in less than 100 days and has asked it to focus its efforts on examination of the internal functions of the NMB and the delivery of services to the agency's customers.

Court finds USAPA Breached Duty of Fair Representation to Former America West Pilots

A federal court in Arizona recently entered an order requiring the US Airline Pilots Association (USAPA) to negotiate in good faith for a single contract including an arbitrated seniority list for all 5,200 pilots at US Airways following the airline's 2005 merger with America West. *See Addington v. US Airline Pilot's Ass'n* (July 17, 2009). The court entered the order after a jury found that USAPA breached its duty of fair representation to former America West pilots by abandoning an arbitrated seniority list in favor of a date-of-hire list.

This case arose out of the 2005 merger of America West with US Airways. At the time of the merger, there were approximately 5,100 pilots on the US Airways seniority list ("East pilots") and approximately 1,900 pilots on the America West seniority list ("West pilots"). Both pilot groups were represented by ALPA from the time of the merger until April 2008.

ALPA's merger representatives were unable to reach an agreement on integration of the pilot seniority lists and the issue ultimately was submitted to an arbitration panel. The arbitration panel's award placed 500 senior East pilots at the top of the list because of their experience with wide body international aircraft that America West did not operate before the merger. It placed approximately 1,700 East pilots who were furloughed at the time of the merger at the bottom of the list because of their diminished career expectations. Then it blended the remainder of the East Pilot list with the West Pilot list generally according to the relative position of the pilots on their original lists.

After the arbitration award was issued, a group of East pilots who were unhappy with the award formed USAPA. USAPA was certified as the representative of the East and West pilots in April 2008. In September 2008, USAPA submitted a seniority proposal to the airline, which was substantially less favorable to the West pilots than the arbitration award. The company continued to operate under two seniority lists and furloughed approximately 175 West pilots who would not have been furloughed under the terms of the arbitration award's seniority list.

Subsequently, six furloughed West pilots sued USAPA alleging the union breached its duty of fair representation. Ruling in favor of the pilots, the court found that USAPA breached its duty of fair representation because its sole object in adopting and presenting its seniority proposal to the airline was to benefit the East pilots at the expense of the West pilots. The court held that USAPA failed to prove that any legitimate union objective motivated its acts.

Rejecting USAPA's argument that the pursuit of date-of-hire seniority principles automatically legitimates its actions, the court noted that the significance of date-of-hire seniority varies from one labor negotiation to the next. Here, the court found that the union's "date-of-hire agenda is just a means of changing the arbitrated outcome for no purpose other than to favor the majority."

Further, the court held that that the union's claim that its seniority proposal was necessary to get a single CBA was pretextual, finding that the evidence showed that any asserted impasse was a pretext for bare favoritism of the East Pilots. Additionally, court held that even if an impasse did exist, it would not justify USAPA's actions as a matter of law. "Majority opposition does not defeat the duty of fair representation; the duty exists to restrain the majority."

The court entered an injunction ordering USAPA to make all reasonable efforts to negotiate and implement a single CBA with US Airways implementing the arbitration award seniority proposal and to defend the seniority rights arising from the arbitration award. Additionally, the court prohibited USAPA from negotiating for separate CBAs for the separate pilot groups.

Fiduciaries of Continental Pension Plan Sue Pilots for Fraudulent Divorces

The fiduciaries of Continental Airlines' defined benefit pension plan have sued a group of Continental pilots, claiming the pilots obtained fraudulent divorces, which allowed

them to receive retirement distributions from the plan while still employed by the airline. See *Pilots Retirement Plan Administrative Committee v. Brown* (S.D. Tex., filed 5/20/09). The lawsuit claims the pilots "deceptively manipulated" divorce laws, resulting in the premature payouts totalling between \$10 and \$11 million to the pilots' spouses.

Generally, ERISA prohibits distributions from defined benefit plans prior to retirement. However, payouts can be made in the case of a divorce, where the ex-spouse receives a qualified domestic relations order (QDRO). In this case, the lawsuit claims the pilots divorced their spouses and entered into settlements that assigned 100% of the pension plan benefits to the ex-spouse. The ex-spouses then obtained QDROs from state courts providing that the transfer of the pilots' pension benefits would be immediately disbursed to the ex-spouse in the form of a lump-sum distribution.

The lawsuit claims the divorces were shams and that the pilots remarried their spouses after the spouses received the lump-sum distributions from the plan. Most of the pilots have since been terminated or retired.

The plan fiduciaries claim that the lawsuit is necessary to protect plan assets.

DC Court of Appeals Upholds DOT Regulation Requiring Direct Observation of Certain Urine Drug Tests

The Federal Appeals Court for the District of Columbia has upheld the Department of Transportation's (DOT) revised regulation requiring that urine drug tests for transportation employees with safety-sensitive duties who are returning to work after failing or refusing to be tested be conducted under direct observation with partial disrobing. In *BNSF Ry. Co. v. United States DOT* (May 15, 2009), the court rejected claims by a railroad and several transportation unions that the rule violates the Administrative Procedures Act and the Fourth Amendment.

DOT regulations require that employees in the transportation industry who either fail or refuse to take a drug test successfully complete a drug treatment program and pass a series of urine tests before being permitted to perform any safety-sensitive duties. To prevent cheating, the DOT revised this regulation in 2008 to require that such tests be conducted under direct observation. Additionally, the regulation requires that immediately prior to all direct observation tests, employees must raise their shirts above the waist and lower their lower clothing to expose their genitals and allow the observers to verify the absence of any cheating devices. The partial disrobing requirement became effective on August 27, 2008; however, the D.C. Circuit stayed the direct observation requirement pending resolution of challenges to the requirement.

Upholding the regulations, the court found that the DOT did not act arbitrarily or capriciously in determining that that the growth of an industry devoted to circumventing drug tests, coupled with returning employees' higher rate of drug use and heightened motivation to cheat, presented an elevated risk of cheating on return-to-duty and follow-up tests that justified the mandatory use of direct observation.

The court also rejected the plaintiffs' argument that both the DOT's suspicionless use of direct observation for returning employees and the partial disrobing requirement violate the Fourth Amendment. "Given the combination of the vital importance of transportation safety, the employees' participation in a pervasively regulated industry, their prior violations of the drug regulations, and the ease of obtaining cheating devices capable of defeating standard testing procedures, we find the challenged regulations facially valid under the Fourth Amendment."

NLRB Accuses ALPA of Failure to Bargain in Good Faith

The General Counsel of the National Labor Relations Board (NLRB) has filed a complaint against ALPA, claiming the union failed to bargain in good faith with its professional unionized employees. In a Complaint and Notice of Hearing issued June 30, 2009, the General Counsel agreed with the Union of ALPA Professional and Administrative Employees' (UALPAPAE) claim that ALPA management failed to fulfill its collective bargaining obligations under the National Labor Relations Act (NLRA) by laying off employees without offering the union the opportunity to negotiate over the layoffs. The General Counsel also recommended that ALPA immediately reinstate the affected employees and that the employees be made whole for any loss of earnings or benefits as part of the remedy for the unfair labor practices.

This action is the first step in the processing of UALPAPAE's unfair labor practice charge filed against ALPA in March. A hearing is scheduled for September 2009.

Recent Election Results: August 2009

Cape Air (Hyannis Air Service Inc.)

Cape Air Pilots Association (CAPA) won an election to represent Pilots. At the time of the election, the Pilots were represented by the IBT. Out of 139 eligible employees, there were 51 votes for CAPA, 40 votes for IBT, 2 votes for other and 1 void vote. (Certification May 12, 2009). The NMB is currently investigating charges of election interference filed by the IBT.

Horizon Air Industries, Inc.

IBT won an election to represent Mechanics and Related Employees. Out of 484 eligible employees, there were 245 votes for IBT, 187 votes for AMFA and 1 vote for other. Certification April 21, 2009.

Aeko Kula, Inc. d/b/a/ Aloha Air Cargo

IBT lost an election to represent Stock Clerks. Out of 5 eligible employees, there were 0 votes for IBT and 0 votes for IAM. Dismissal April 17, 2009.

Aeko Kula, Inc. d/b/a/ Aloha Air Cargo

IBT won an election to represent Fleet Service Employees. Out of 210 eligible employees, there were 83 votes for IBT and 42 votes for IAM. Certification April 17, 2009.

Great Lakes Aviation, LTD

UTU won an election to represent Flight Attendants. Out of 19 eligible employees, there were 16 votes for UTU and 2 votes for IBT. Certification April 9, 2009.

Great Lakes Aviation, LTD

UTU won an election to represent Pilots. Out of 273 eligible employees, there were 209 votes for UTU, 0 votes for IBT and 3 votes for other. Certification April 9, 2009.

US Airways, Inc.

TWU lost an election to represent Airport Services Training Instructors. Out of 38 eligible employees, there were 12 votes for TWU. Dismissal February 23, 2009.