FORD & HARRISON LLP
THE RIGHT RESPONSE AT THE RIGHT TIME
LETTER
AIRLINE MANAGEMENT

Airline Management Newsletter

3/30/2011

Trial Court Must Modify Injunction to Condition Relief on Union's Request to NMB for Determination of Representative of Frontier Mechanics

The Seventh Circuit recently answered in a novel way a question under the Railway Labor Act (RLA). The question was presented to it when a federal trial court issued an injunction prohibiting Frontier Airlines from altering unilaterally its mechanics' pay, work rules or working conditions unless and until the National Mediation Board (NMB) rules, as part of a single carrier case, that the International Brotherhood of Teamsters (IBT) is not the mechanics' lawful representative as a consequence of the operational integration of Frontier and Republic Airways Holdings' (RAH) other air carrier subsidiaries. Recognizing the RLA does not permit an employer to seek such a determination from the NMB, and that IBT had no incentive to do so, the Seventh Circuit noted that the trial court's injunction essentially maintained the representation status of what may well be an illegal minority union. Accordingly, the Seventh Circuit ordered the trial court to modify the injunction to condition its continuance "on the union's prompt application to the Board for a ruling on the representation of Frontier's mechanics: are they represented by the union, or by no one?" *See International Brotherhood of Teamsters Airline Division v. Frontier Airlines, Inc. and Republic Airways Holding, Inc.* (7th Cir. Dec. 13. 2010).

The NMB has exclusive jurisdiction to determine representation disputes. Representation disputes include (a) whether, and if so by what representative, employees are represented for purposes of collective bargaining, and (b) the identity of the carrier to which a union's certification would apply (*e.g.*, a single corporate airline entity, or a combination of airline entities that together comprise a "single carrier"). Representation disputes can arise under a broad variety of circumstances, which include situations in which previously separate air carriers are merged following an acquisition. When that happens, doubt can arise regarding whether a pre-existing union certification reaching the employees of one of those carriers continues in force at the new, larger, single carrier. In such cases, unions often seek judicial intervention to compel continued recognition and/or extend their representation status to cover employees of the smaller acquired airline. Under existing precedent, when confronted with representation disputes, courts almost uniformly have dismissed the complaint for lack of subject matter jurisdiction because the NMB has exclusive jurisdiction; thus, to issue an injunction enforcing the status quo would, even if temporarily, improperly decide the representation dispute.

This case arose after Republic Airways (whose mechanics are non-union) acquired Frontier Airlines and took steps to integrate the operations of Frontier with those of

RAH's other subsidiaries Republic Airlines, Chautauqua Airlines, and Shuttle America. IBT, which had been certified to represent Frontier's mechanics, claimed that certain of those measures violated that status quo. RAH, on the other hand, argued that all of its airline subsidiaries constituted a single carrier within the meaning of the RLA. Thus, according to RAH, because the Frontier mechanics were not a majority of the craft or class of mechanics within the single carrier, IBT did not represent a majority of the mechanics and, therefore, did not represent any of them. When the IBT filed for an injunction to maintain the status quo, RAH argued the court was presented with a representation dispute over which it lacked jurisdiction. The district court disagreed, holding that the fact that the IBT had not actually filed with the NMB an application to obtain *resolution* of the representation dispute meant that there was no representation dispute to resolve.

The Seventh Circuit disagreed and held that there was, indeed, a representation dispute. It did not, however, merely remand to the district court with an order that it dismiss the complaint. Rather, it ordered the continuation of the injunction, contingent upon IBT "promptly" seeking resolution of its representational status. According to the Seventh Circuit, the injunction "maintains for the indefinite future (it has no expiration date, and is 'preliminary' in name only), what may well be an illegal status quo – a union supported by only a fourth of the bargaining unit yet acting as the bargaining representative of that minority." The court noted that it has no reason to think that the majority of Republic's mechanics want to be represented by IBT and if not, they may be placed at a disadvantage if Republic were required to extend special privileges to Frontier's mechanics. At the same time, the carrier legally was barred from seeking an NMB investigation into IBT's representational status, and IBT had no incentive to do so because it did not want to lose its status as the bargaining representative for Frontier's mechanics.

The Seventh Circuit found that the union could not justify the standoff produced by the injunction issued by the trial court. The court held that it would be inequitable to permit the union, after obtaining an injunction in its favor, to foreclose by deliberate inaction a determination of whether it remains the legally authorized bargaining representative of the Frontier mechanics. Accordingly, the Seventh Circuit ordered the trial court to modify the injunction to condition it on the union's expeditious application to the Board for a ruling on the representation of Frontier mechanics.

The IBT's Petition for Rehearing *en banc* was denied by the Seventh Circuit on February 13, 2011. RAH is anxiously awaiting the district court modifying the injunction in accordance with the Seventh Circuit's mandate so the issue of IBT's representation status can finally be addressed and resolved by the Board.

Second Circuit Rejects Former Flight Attendant's RLA Discharge Claim

The Second Circuit Court of Appeals recently affirmed judgment in favor of JetBlue on a flight attendant's claim that the airline discharged her because of her participation in union-related activities in violation of the Railway Labor Act (RLA). *See Amarsingh v. JetBlue* (2d Cir. Feb. 10, 2011). The court held that the former flight attendant failed to present sufficient evidence to convince a jury that she was discharged for any reason other than because she told an unruly passenger to "get the f--- out of my face."

The plaintiff worked as a flight attendant for JetBlue from 2000 until 2007. Beginning in late 2006 or early 2007, she became involved with AFA's efforts to unionize the JetBlue flight attendants. In June 2007, while working and preparing for a flight from Las Vegas to New York City, the plaintiff became involved in a confrontation with an

agitated and apparently intoxicated JetBlue passenger. The confrontation ended when the plaintiff told the passenger to "get the f--- out of my face." The passenger subsequently filed a complaint with JetBlue's Customer Service department. After investigating the incident, JetBlue discharged the plaintiff. She then filed a lawsuit in federal court claiming JetBlue fired her because of her efforts to unionize the flight attendants. A federal trial court in New York ruled in favor of JetBlue and the Second Circuit affirmed this decision.

The RLA prohibits employers from engaging in discriminatory actions designed to impede or inhibit employees' exercise of their right to organize for collective bargaining purposes. In analyzing whether the plaintiff could show that JetBlue discharged her because of her efforts to unionize the flight attendants in violation of the RLA, the Second Circuit adopted the analysis courts have used for similar cases under the National Labor Relations Act (NLRA). Under this analysis, the complaining employee bears the burden of showing that her protected conduct was a substantial or motivating factor prompting the discharge. If the employee meets this burden, the employer must show that it would have reached the same decision in the absence of the protected conduct. *See Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. 1083, 1083-88 (1980).

To show that her protected activity was a substantial or motivating factor in her discharge, the plaintiff had to show that: 1) she engaged in activity protected by the RLA; 2) the employer was aware of her protected activity; 3) the employer harbored animus toward the protected activity; and 4) the animus was a causal factor in her termination. The court held that there was no dispute that the plaintiff engaged in protected activity (efforts to organize the flight attendants) and that JetBlue management was aware of this activity. The court also found that the record supported a reasonable inference that JetBlue "did not look favorably" on the plaintiff's ongoing protected activities. However, the court held that the plaintiff failed to show that JetBlue discharged her because of its opposition to her unionization efforts.

The court held that the plaintiff's behavior during the Las Vegas incident was "manifestly enough" to justify her discharge and that she failed to present sufficient evidence to permit a jury to find that JetBlue discharged her for any reason other than this behavior. The court noted that the plaintiff's behavior was clear violation of JetBlue policy, which prohibits "all forms of threats, harassment, intimidation . . . including verbal, physical or psychological assaults by any Crewmember against another Crewmember, Customer or Business Partner" and which provides that JetBlue employees may be fired on account of one occurrence of "a severe single issue." The court also noted that the plaintiff herself admitted shortly after the incident that she was worried that JetBlue would fire her because of her "use of the f--- word." The court found it significant that the plaintiff "did not imply that she feared a retaliatory firing; the clear implication of her testimony is that she understood that she had violated company policy in a manner that made discipline likely, and firing at least possible." (emphasis in original).

Accordingly, the Second Circuit affirmed the trial court's order of summary judgment in favor of JetBlue.

Fifth Circuit Finds USERRA does not Permit Harassment Claims

In *Carder v. Continental Airlines* (5th Cir. March 22, 2011), the Fifth Circuit Court of Appeals held that the Uniformed Services Employment and Reemployment Rights Act (USERRA) does not provide a cause of action for harassment claims. Accordingly, the Court affirmed the dismissal of a class action filed against the airline by a group of

pilots who claimed they were subjected to a hostile work environment because of their military service and service obligations.

One of the purposes of USERRA is to prohibit discrimination and acts of reprisal against service members because of their service. Specifically, USERRA provides that members of the uniformed services "shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment" on the basis of that membership. Although the text of the statute defines "benefits of employment" to include a long list of terms, it does not refer to "harassment, hostility, insults, derision, derogatory comments, or any other similar words." Thus, the court held that the express language of the statute does not provide for a hostile work environment claim.

Further, the court found that Congress did not intend to create a cause of action under USERRA for harassment of service members. First, the court noted that the language of USERRA is not similar to that of other antidiscrimination laws that have been held to prohibit harassment. The court noted that in *Meritor Sav. Bank, FSB v. Vinson*, the U.S. Supreme Court relied heavily on Title VII's language prohibiting discrimination with respect to the "terms, conditions or privileges of employment" in permitting a plaintiff to assert a harassment claim under Title VII. The court held that the *Meritor* opinion makes it clear that it is the word "conditions" in particular that the Supreme Court relied on in inferring a claim for harassment under Title VII.

Although USERRA was passed in 1994, years after the Supreme Court's decision in *Meritor* was announced, it does not include the phrase "terms, conditions, or privileges of employment" or similar wording. The court held that if Congress intended to create a cause of action for harassment based on military service under USERRA, it could have easily expressed that intent by using this phrase. According to the court, the fact that Congress did not do so but instead used the narrower term "benefits of employment" indicates that "Congress intended to create a somewhat more circumscribed set of actionable rights under USERRA."

Further, the court found little evidence that employers harbor a negative stereotype about military service "or that Congress believes they do." The court also found nothing in the legislative history of USERRA to indicate that Congress "believed invidious and irrational harassment of members of the military in the workplace comparable to harassment addressed by Title VII is a widespread social problem in need of a remedy." Bolstering its decision, the court noted that the Department of Labor's regulations implementing USERRA do not mention employer harassment on the basis of military service, the creation of a hostile work environment or any other type of comparable claim.

Thus, while clarifying that "nothing in this opinion alters the ability of service members to sue under USERRA for the denial of contractual benefits of their employment on the basis of military service as defined in the statute," the court concluded that "service members may not bring a freestanding cause of action for hostile work environment against their employers."

House to Consider Legislation Reversing NMB Voting Rule

The U.S. House of Representatives is scheduled to begin debate on the FAA Reauthorization and Reform Act of 2011 (H.R.658) on March 31. The legislation includes a provision that would reverse the NMB's controversial change to its longstanding rule regarding how representation elections are conducted. The NMB's new rule, which took effect June 30, 2010, changed the way RLA elections have been

conducted for over 75 years. Since the NMB's inception, the agency has repeatedly held that, in order for a union to be certified as the bargaining representative for a craft or class, a majority of eligible employees must vote for representation. The NMB's revised rule drastically changed this requirement, allowing a union to be certified as the bargaining representative if a majority of employees who vote cast ballots for representation, regardless of how many employees actually vote in the election. Section 903 of the FAA Reauthorization Act would make the NMB's rule have "no force or effect."

The Senate version of the legislation, the FAA Air Transportation Modernization and Safety Improvement Act, S. 223, which was approved in February, did not include this provision. Accordingly, if the provision is included in the final House legislation, the issue will have to be resolved before Congress approves a final version of the bill.

Modification of NMB Procedures

Modification of Write-in Vote Procedures

In a notice issued February 16, 2011, the NMB announced that it will eliminate the silence option for write-in votes. 38 NMB No. 31. According to the notice, voters who select the write-in option must affirmatively speak-in (telephone) or write-in (internet) the name of an individual or organization for the vote to be counted as valid. If a telephone vote is silent or a write-in vote is blank, the system will not allow the voter to register a valid vote. Additionally, if a voter enters a vote for "any other organization or individual" it will be considered a void vote and will not be counted.

Modification of Representation Manual Dealing with Run-Off Elections

The Board is also modifying Representation Manual Section 16.0 dealing with run-off elections. The most recent version of Section 16.0 states that in the event of a tie vote between votes for representation and votes for no representation, a run-off election will be held. According to the Board's notice, it is removing this provision "as it is inconsistent with actual Board practice." This modification applies to all elections authorized on or after March 21, 2011.

Recent NMB Results

Ryan International Airlines

IBT lost an election to represent Mechanics and Related Employees. Out of 50 eligible employees, 42 valid votes were cast. There were 20 votes for IBT and 22 no votes. Dismissal February 4, 2011.

Bristow U.S. LLC

OPEIU lost an election to represent Mechanics and Related Employees. Out of 309 eligible employees, 277 valid votes were cast. There were 125 votes for OPEIU, 2 votes for other and 150 no votes. Dismissal January 28, 2011.

Allegiant Air

TWU lost an election to represent Flight Dispatchers. Out of 12 eligible employees, 12 valid votes were cast. There were 5 votes for TWU, 1 write-in vote and 6 no votes. Dismissal January 25, 2011.

ExpressJet Airlines

IBT won an election to represent Stock and Stores Employees. Out of 78 eligible employees, there were 62 valid votes. There were 54 votes for IBT, 1 write-in vote and 7 no votes. Certification January 21, 2011.

Allegiant Air

TWU won an election to represent Flight Attendants. Out of 392 eligible employees, there were 357 valid votes. There were 218 votes for TWU, 2 write-in votes and 137 no votes. Certification December 23, 2010.

Piedmont Airlines

CWA won an election to represent Fleet and Passenger Service Employees. Out of 2,867 eligible employees, there were 1,808 valid votes. There were 1,107 votes for CWA, 40 votes for IAM, 2 votes for IBT and 21 votes for other. Certification November 5, 2010.