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LETTER

AIRLINE MANAGEMENT

Airline Management Letter

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Ninth Circuit Holds that RLA Does not Pre-empt Employees' State Law Claims

The Ninth Circuit has held that the Railway Labor Act (RLA) does not completely pre-empt a group of plaintiffs' state law wage claims against Alaska Airlines. See *Moore-Thomas v. Alaska Airlines, Inc.* (9th Cir. 2009). Based on this determination, the Ninth Circuit remanded the case to state court for further proceedings.

In this case, the plaintiffs, a group of former Alaska Airlines employees, sued the airline in state court, claiming it failed to pay them all the wages due upon termination as required by state law. The plaintiffs were covered by a collective bargaining agreement (CBA) between Alaska Airlines and its clerical, office, and passenger-service employees while they were employed.

The Ninth Circuit reversed the trial court's decision, which dismissed the case based on complete pre-emption by the RLA. The Ninth Circuit held that the RLA does not completely pre-empt the plaintiffs' claims, finding that the trial court erred in relying on cases decided under the Labor Management Relations Act (LMRA), in which complete pre-emption was found.

Agreeing with the Second Circuit's decision in *Sullivan v. American Airlines*, the Ninth Circuit held that complete pre-emption does not apply under the RLA. The Ninth Circuit held that the RLA does not provide an exclusive federal cause of action because disputes that grow out of grievances or collective bargaining agreements must be submitted to internal dispute resolution processes and then to an adjustment board or arbitration board before a federal court can hear the dispute. According to the Ninth Circuit, only after the grievance has been heard by the adjustment board does exclusive jurisdiction rest with the federal court.

Based on its determination that complete pre-emption does not apply under the RLA, the Ninth Circuit held that the federal trial court lacked jurisdiction. Accordingly, the court reinstated the case and remanded it for further proceedings in state court.

NMB Finds Delta and Northwest Operate as Single Transportation System

On January 7, 2009, the NMB found that Delta and Northwest operate as a single transportation system. The finding comes in response to an application ALPA filed on November 4, 2008, alleging a representation dispute among flight deck crewmembers resulting from Delta's purchase of Northwest. Unions representing the dispatchers and

meteorologists also filed applications. However, other unions representing Northwest employees, including the IAM and AFA, have not filed applications.

The NMB began its analysis by citing the *Trans World/Ozark* factors relating to whether the carriers hold themselves out to the public as one, and whether the carriers have common ownership and have combined their operations from a managerial and labor relations perspective. The NMB then noted a number of ways in which Delta and Northwest are holding themselves out as one carrier. Signage informing the public of the merger has been placed at all Northwest ticket counters. The Northwest web site includes the Delta logo and merger information. Searches on the Northwest web site result in Delta flights and vice versa. Individuals may log on to the Delta web site using either a Delta Sky Miles membership or a Northwest WorldPerks membership number. Delta and Northwest flights are cross-sold in the computer reservation systems. Northwest advertising includes the Delta logo and advises the public that Northwest is a part of Delta. In addition, the vast majority of Northwest flight attendants and customer service agents have ordered Delta uniforms.

The NMB cited a number of other factors in support of its finding. Delta has acquired 100% ownership of Northwest. The carriers have a single Board of Directors and one senior management structure. One executive has authority for human resources and labor relations decisions. Non-contract employees are moving toward common benefit plans. Delta has assumed hiring responsibility for both carriers. The NMB also noted that the carriers' pilots and dispatchers are covered under joint collective bargaining agreements. In addition, the pilots, dispatchers, meteorologists and mechanics have resolved seniority integration. Northwest employees have Delta employee numbers, and both groups of employees have access to the other group's e-mail directory.

The Board concluded its analysis by noting that total integration of operations is not necessary to a single transportation system finding, so long as substantial integration has occurred. Thus, while Delta and Northwest do not currently have a single operating certificate (they plan to have such a certificate in approximately 15 months), the many other factors demonstrating integration show that they are a single transportation system.

The other issue before the NMB was whether it must review the certification status of all unions representing employees at Northwest, not just the unions that filed applications. The NMB determined that, presently, it would only examine certifications related to the unions that filed applications. Thus, for the time being, the NMB will not examine the certifications of the AFA and the IAM since those two unions have not filed applications. The NMB refused to take a position on whether the certification of a minority union can be preserved indefinitely, which is relevant because the number of Northwest employees in the various crafts or classes is less than the number of Delta employees. The upshot of the NMB's deferral is that no elections currently are scheduled for the flight attendants and the crafts or classes represented by the IAM on the Northwest side, such as fleet service and passenger service.

If you have any questions regarding this article, please contact the author, Don Lee, dlee@fordharrison.com, 404-888-3861, or the Ford & Harrison attorney with whom you usually work.

House Passes Airline Flight Crew Technical Corrections Act

The U.S. House of Representatives has passed the Airline Flight Crew Technical Corrections Act (H.R. 912), which now has been referred to the Senate Committee on Health, Education, Labor and Pensions. This Act would amend the Family and Medical

Leave Act (FMLA) to make flight attendants and flight crewmembers FMLA eligible if, during the twelve-month period preceding the leave, they were paid for or worked: (1) at least 60% of their full-time schedule and (2) a minimum of 504 hours. The House passed similar legislation in 2008; however, the Senate did not act on it before Congress adjourned.

It is not clear at this time whether the Senate will pass the Act this year. We will continue to keep you updated on the status of this legislation.

Federal Court Finds Flight Attendant Candidates Not Entitled to Compensation for Time Spent in Training

A federal trial court in Washington has held that Alaska Airlines was not required to pay prospective flight attendant candidates for the time they spent in training after receiving a conditional offer of employment. See *Ulrich v. Alaska Airlines, Inc.* (W.D. Wash. Feb. 9, 2009). Applying a six-factor test set forth by the Department of Labor (DOL), the court held that the plaintiff (who sought to represent a group of similarly situated flight attendant candidates) was not an employee and thus was not entitled to compensation under the Fair Labor Standards Act (FLSA) for the time spent in training.

The six factors which must be met in order for trainees not to be employees are as follows:

- 1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
- 2) the training is for the benefit of the trainees;
- 3) the trainees do not displace regular employees, but work under close observation;
- 4) the employer that provides the training derives no immediate advantage from the activities of the trainees; and on occasions his operations may actually be impeded;
- 5) the trainees are not necessarily entitled to a job at the completion of the training period; and
- 6) the employer and the trainees understand that the trainees are not entitled to wages for the time spent training.

The court found that the in-flight training, classroom training, and other exercises performed by the trainees were for the plaintiff's benefit – to allow her to qualify for employment with Alaska Airlines. Additionally, the court found that the trainees did not displace regular flight attendants on the training flights and that they worked under close observation of the flight attendants on the flights.

The court also found that Alaska Airlines received no immediate benefit from the plaintiff's work serving passengers on board the training flights, because the airline still had to staff the airplane with a full complement of regular flight attendants. The court rejected the argument that the training should be viewed as a benefit to the airline because it created a qualified labor pool of flight attendants for hire. The court further found that the plaintiff was not necessarily entitled to a job upon completion of training, noting that the "offer letter" the plaintiff received was only a conditional offer of later employment. The court also found that the plaintiff understood the training would be unpaid, noting that she signed an agreement reflecting this.

The court also held that California's wage payment laws did not apply to the plaintiff because she could not show that she performed any "work" in California. "California labor laws apply only to work performed in the State of California."

Based on its findings, the court entered judgment in favor of Alaska Airlines.

OSHA Orders American Airlines to Reimburse Pilots for Sick Time

The Department of Labor has ordered American Airlines to reimburse two pilots for sick time, interest and any other benefits associated with sick time following an investigation into the pilots' claims the airline retaliated against them for reporting they were too sick to fly. The investigation, conducted by the Labor Department's Occupational Safety and Health Administration (OSHA), found that in both cases, the airline erred in rejecting medical documentation provided by the pilots and illegally recouped sick pay already paid to the pilots. OSHA also ordered the airline to provide whistleblower rights information to its employees. American has indicated it intends to appeal the decision.

Save the Date: Ford & Harrison's 2009 Airline Labor and Employment Law Symposium

Ford & Harrison's 2009 Airline Labor and Employment Law Symposium will be held May 7-8, 2009 at the W Hotel Atlanta-Midtown. More information about the program agenda and registration will be posted on our web site at <http://www.fordharrison.com>.

Recent Election Results

JetBlue Airways Corp.

JetBlue Pilots Association (JBPA) lost an election to represent Cockpit Crew Members. Out of 1,937 eligible employees, JBPA received 595 votes and there were 51 votes for other. Dismissal February 4, 2009.

Atlas Air Inc./Polar Air Cargo Worldwide, Inc.

IBT won an election to represent Flight Dispatchers. Out of 30 eligible employees, there were 27 votes for IBT. Certification February 3, 2009.

Delta Airlines, Inc./Northwest Airlines, Inc.

ALPA was certified as the representative of Flight Deck Crewmembers following a determination that Delta and Northwest operate as a single transportation system for representation purposes under the RLA. Certification January 22, 2009.

Aeko Kula, Inc. D/B/A Aloha Air Cargo

The Mechanic's Committee (MC) lost an election to represent Mechanics and Related Employees. Out of 37 eligible employees IAM received 1 vote and MC received 0 votes. Dismissal January 21, 2009.

Lynx Aviation, Inc.

The Association of Flight Attendants-CWA (AFA-CWA) won an election to represent Flight Attendants. Out of 87 eligible employees, there were 55 votes for AFA-CWA. Certification January 13, 2009.

Ryan International Airlines, Inc.

The Association of Flight Attendants-CWA (AFA-CWA) won an election to represent Flight Attendants. Out of 167 eligible employees, there were 111 votes for AFA-CWA. Certification January 7, 2009.

Atlas Air, Inc. and Polar Air Cargo Worldwide, Inc.

IBT won an election to represent Flight Deck Crew Members. Out of 875 eligible employees, there were 532 votes for IBT, 256 votes for ALPA and 1 vote for other. Certification December 22, 2008.

Colgan Air, Inc.

ALPA won an election to represent Flight Deck Crew Members. Out of 449 eligible employees, there were 286 votes for ALPA and 27 votes for other. Certification December 18, 2008.

Mercy Air Service, Inc.

The National Emergency Medical Services Association (NEMSA) withdrew its petition to represent Flight nurses and Flight medics. Dismissal November 24, 2008.

Swissport USA, Inc.

The Retail, Wholesale and Department Store Union, UFCW (RWDSU) withdrew its petition to represent Cargo employees. Dismissal November 7, 2008.