

Airline Management Newsletter

7/1/2010

Judge Upholds NMB Final Rule Regarding Representation Elections

On June 25, 2010, the U.S. District Court for the District of Columbia denied the Air Transport Association of America, Inc.'s (ATA's) challenge to the National Mediation Board's (NMB's) recent change to its longstanding rule regarding how representation elections are conducted. The court granted the NMB's and IBT's motions for summary judgment and denied ATA's request for a preliminary injunction to block the rule from taking effect June 30, 2010. The court stated that it will issue an opinion with its reasoning no later than June 28, 2010.

As discussed in our May 10, 2010 Legal Alert, available on our web site at <http://www.fordharrison.com/shownews.aspx?show=6182>, the NMB's final rule changes the manner in which RLA elections have been conducted for over 75 years. Since the NMB's inception, the NMB 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 final rule will drastically change 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.

The rule was passed by two of the three members of the NMB (Harry Hoglander and Linda Puchala), over the vigorous and well-reasoned dissent of Chairman Elizabeth Dougherty.

The rule will take effect June 30, 2010. It is not clear whether ATA will appeal the order. We will continue to keep you updated regarding any further developments in this litigation.

Supreme Court Finds "On Property" Conferencing is not a Prerequisite to NRAB Jurisdiction

The U.S. Supreme Court has held that the failure to provide evidence of on-property conferencing prior to seeking arbitration before the National Railroad Adjustment Board (NRAB) does not deprive the NRAB of jurisdiction. See *Union Pac. R.R. v. Brotherhood of Locomotive Engineers & Trainmen*, 130 S. Ct. 584 (2009). In *Union Pacific*, the Court held that the requirement set forth in the RLA that the parties must attempt settlement "in conference" between representatives of the carrier and the grievant-employee is a "claims processing" rule and does not go to the NRAB's jurisdiction. Accordingly, the Court affirmed the Seventh Circuit's decision overturning

five NRAB orders that dismissed grievances initiated by the Brotherhood of Locomotive Engineers & Trainmen (the Union). However, the Supreme Court held that the Seventh Circuit should have resolved the issue on statutory rather than constitutional grounds.

Background

Section 3 of the RLA requires that, before resorting to arbitration, employees and carriers must exhaust the grievance procedures in their CBA, a stage known as "on-property" proceedings. As a final pre-arbitration step of the on-property proceedings, the parties must attempt settlement "in conference" between representatives of the carrier and the grievant-employee. If the parties fail to achieve resolution, either may refer the matter to the NRAB.

In Union Pacific, five employees were disciplined and the Union filed grievances on their behalves. When the grievances were not resolved through on-property proceedings the Union sought NRAB arbitration. The NRAB dismissed the grievances on the grounds that it had no jurisdiction to hear the claims because the record of the on-property proceedings submitted by the Union showed no written evidence of on-property conferencing. A federal trial court affirmed the NRAB. The Seventh Circuit overturned this decision, holding that the NRAB's proceedings were incompatible with Constitutional due process. The Seventh Circuit held that the NRAB had, in violation of the Union's due process rights, created a new, retroactive rule governing its proceedings by requiring that written evidence of on-property conferencing be included in the on-property record submitted to it.

Review of NRAB Order

Section 3(q) of the RLA identifies the grounds upon which a party may seek judicial review of an NRAB panel order: "failure . . . to comply with the requirements of [the RLA], . . . failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or . . . fraud or corruption by a member of the division making the order." The federal appeals courts are divided on whether, in addition to the RLA's statutory grounds for judicial review, courts may review NRAB proceedings for due process violations.

Rather than resolve the question of whether due process is an additional ground for judicial review of an NRAB order, in Union Pacific the Supreme Court held that by presuming authority to declare its procedural rules (that is, the requirement of written documentation of on-property conferencing) "jurisdictional," the NRAB failed to "conform or confine itself to matters [Congress placed] within the scope of [NRAB] jurisdiction."

In determining that the on-property conferencing requirement is not jurisdictional, the Court noted that the on-property conferencing requirement is independent of the CBA process and is instead set forth in the "[g]eneral duties" section of the RLA, § 152. The Court held that this section is not moored to the "[e]stablishment[, . . . powers[, and duties]" of the NRAB set out in § 153 First. Because the conferencing requirement is rooted in § 152 and is "often informal in practice," the Court held that conferencing "is surely no more 'jurisdictional' than is the pre-suit resort to the EEOC held forfeitable" in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Thus, the Court reasoned, if the requirement to conference is not jurisdictional, then failure initially to submit proof of conferencing cannot be jurisdictional.¹

¹ Although the Court held that the NRAB did not lack jurisdiction over the employees'

claims, it recognized the Board's authority to adopt claim-processing rules backed by effective sanctions. "We also recognize that NRAB panels, in managing individual arbitrations, may prescribe and enforce reasonable procedural requirements."

NACA Letter to the President Responds to ALPA President's Criticism of Supplemental Airlines

The National Air Carrier Association (NACA) recently wrote to President Obama to rebut statements made in correspondence to the President by ALPA President John Prater in which Prater criticized the DOT's delay in issuing a proposed rule updating pilot and flight attendant time limits and rest requirements. In this letter, Prater stated, "the current outdated regulations permit even looser safety regulations for pilots flying for supplemental airlines, which transport the vast majority of our military troops. Allowing this disparity to continue is outrageous and action must be taken."

The NACA assured the President that:

NACA carriers provide leading-edge technology flight operations in partnership with the Department of Defense (DOD) in the Civil Reserve Air Fleet (CRAF) program. These carriers operate in accordance with 14 CFR Part 121, Subpart S, while flying DOD flights, which rule sets out flight, duty, and rest requirements for supplemental or non-scheduled air transportation. This federal order mandates non-scheduled operations to the same high regulatory standard as any U.S. airline flying large aircraft – scheduled or non-scheduled.

The letter further explains that the current safety regulations are not "loose" but instead are merely different from those that govern scheduled services in certain areas because the operations are very different in important aspects. Additionally, the letter states:

It is, further, completely unfounded and disturbing for Mr. Prater to suggest that the Department of Defense allows troops to be transported by airlines that operate under safety standards less rigorous in any respect than the absolute highest levels set by FAA or any other U.S. Government agency. There is rigorous DOD safety and performance oversight of these carriers and their vital national security operations, in addition to FAA review.

NACA carriers are committed to safety and have a long-term track record of safe operations. Any suggestion to the contrary is unjustified. These same carriers have also worked hard to ensure that flight and duty time rule changes ultimately proposed by FAA enhance, rather than diminish, safety, and do not impose unsustainable financial burdens on airlines whose services are vital to support our nation's defense and economy.

Finally, the NACA assure the President that "until the rule-making process is complete, America's supplemental, non-scheduled, carriers are committed to achieve the highest safety objectives under existing regulations."

Fifth Circuit Reinstates Jury Verdict in ADA Claim Against Southwest

The Fifth Circuit recently overturned a lower court's decision vacating a jury verdict of

\$80,000 in favor of a former Southwest Airlines flight attendant who claimed the airline discriminated against him in violation of the Americans with Disabilities Act (ADA). See *Carmona v. Southwest Airlines* (March 2010).

In *Carmona* the plaintiff suffered from psoriasis and psoriatic arthritis, which caused him to miss work frequently. Eventually Southwest discharged him for accumulating an unacceptable number of absences. Carmona sued Southwest for, among other things, discrimination in violation of the ADA. A jury returned a verdict of \$80,000 in his favor, but the trial court vacated this award, holding that Carmona failed demonstrate that he was an individual with a disability or that he had been discriminated against because of his disability.

The ADA defines an individual with a disability as one who has a mental or physical impairment that substantially limits one or more major life activities. In reversing the trial court's decision, the Fifth Circuit held that a reasonable juror could determine that Carmona was a qualified individual with a disability. According to the Fifth Circuit, a rational juror could have concluded that Carmona was substantially limited in the ability to walk during flare-ups of arthritis based on his testimony of his limitations, even though medication eased his pain somewhat. The court also held that the jury could reasonably conclude that Carmona was substantially limited in the ability to walk even though he could work in sedentary positions in jobs he held after his termination from Southwest.

The Fifth Circuit also held that Carmona was not precluded from establishing he was disabled as a matter of law even though his arthritis flared up intermittently and an earlier Fifth Circuit decision held that intermittent flare-ups cannot be considered substantially limiting. The court held that the earlier case, in which the plaintiff's flare ups were "few and far between" was distinguishable from Carmona's situation because Carmona "spends anywhere from about one-third to about one-half of each month unable to walk without excruciating pain."

Additionally, the Fifth Circuit held that Carmona's frequent absences did not render him unqualified to perform the job of flight attendant. "Even if we assume that attendance was an essential function of Carmona's job, Southwest's own measure of whether or not a flight attendant's attendance was adequate was its attendance policy, which was extremely lenient." Thus, the court held that since Carmona had managed to meet Southwest's attendance requirements for seven years, despite his disability, the disability did not make him unqualified for his job even though it caused him to miss work.

The court also held that, based on the evidence presented, a reasonable jury could have concluded that Southwest allowed other flight attendants with the same attendance record as Carmona's to continue employment. Additionally, the court noted there was evidence that some of Carmona's supervisors made comments indicating they were irritated by his disability-related absences. Accordingly, the court concluded that "a reasonable jury could have found Southwest's proffered explanation for Carmona's discharge was false and that the true reason was his disability."

This case demonstrates the importance of consistently enforcing employment-related policies, including attendance policies.

DOL Finds AIR21 Complaint Filed 16 Months after Termination is Untimely

In a case handled by Ford & Harrison attorneys, the U.S. Department of Labor's Office

of Administrative Law Judges (OALJ) recently upheld the dismissal of a pilot's AIR21 whistleblower claim. The OALJ held that the claim, which was filed more than 16 months after the pilot's termination from a regional carrier, was untimely. In reaching this decision, the OALJ held that the time frame for the complainant to file his AIR21 complaint began running on the date the adverse employment decision (his termination) was made and communicated to him, not on the date his union grievance was decided. The OALJ also held that the complainant failed to demonstrate that the time period for filing his AIR21 claim should be tolled.

The complainant in this case was employed by a regional carrier as a first officer. He was discharged in April 2008, after failing in his second attempt to upgrade to captain. According to the complainant, he filed a charge with the Federal Aviation Administration's (FAA) Office of Civil Rights in May 2008. Additionally, the union appealed the complainant's discharge under the CBA. In June 2009, the System Board of Adjustment upheld the complainant's discharge. In August 2009, the complainant filed an AIR21 whistleblower claim with OSHA, which the agency subsequently dismissed as untimely. The complainant appealed the dismissal of his AIR21 claim to the OALJ.

AIR21 protects employees of air carriers from retaliation for having disclosed information to their employer or to the government concerning "any violation or alleged violation of any order, regulation or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety..." An AIR21 complaint must be filed within 90 days of the date on which the alleged violation occurs. The filing period commences when the allegedly discriminatory decision has been made and communicated to the complainant.

In finding that the complainant should have filed his whistleblower complaint within 90 days of when he received notice of his termination, the OALJ rejected the complainant's argument that the filing period did not begin until the conclusion of his grievance, noting that "it is well established that the filing of a grievance does not operate to toll the limitations period for filing a complaint under the whistleblower statutes." Additionally, the OALJ noted that filing a grievance under a CBA after a termination "does not act as a continuation of the adverse action."

The OALJ also rejected the complainant's argument that the period for filing his AIR21 complaint should be tolled. The filing period for a whistleblower complaint will be tolled only when (1) the employer has actively concealed or misled the employee; (2) the employee was prevented from asserting his right in some extraordinary way; or (3) the employee raised the precise statutory claim in the wrong forum.

Here, the OALJ held that there was no evidence that the carrier actively concealed or misled the complainant. Although the complainant alleged that attorneys told him "off the record" that he needed to exhaust his administrative remedies before filing his whistleblower complaint, he presented no evidence that these conversations actually occurred or that any of these attorneys were employed by or represented the carrier. Further, the OALJ determined that the complainant was not prevented from asserting his right in any extraordinary way, such as because of his own mental illness or that of his attorney. Finally, the OALJ held that the complainant did not raise this precise statutory claim in the wrong forum, since there was no evidence that either his EEOC charge or union grievance "evinced an intent to pursue an AIR21 claim."

Court Dismisses DFR Claim by Flight Attendant Discharged for Failure to Pay Back Dues

A federal trial court in Chicago has dismissed a breach of duty of fair representation (DFR) claim filed against the Association of Professional Flight Attendants (APFA) by an American Airlines flight attendant who was discharged for failing to pay her union dues. See *Jolicoeur-Vasseur v. Ass'n of Prof'l Flight Attendants*, 2010 U.S. Dist. LEXIS 15273 (N.D. Ill., 2/19/10).

In this case, APFA claimed the plaintiff owed over \$600 in back dues. The collective bargaining agreement (CBA) governing the plaintiff's employment provides that when back dues are owed, a flight attendant will be notified of the dues delinquency by certified mail and informed that failure to pay the delinquency could result in discharge. In accordance with this provision, APFA attempted to notify the plaintiff of the dues delinquency; however, certified letters sent to her were returned. Subsequently, a union official hand-delivered a letter to the plaintiff, explaining that she owed back dues and could be discharged if she did not pay the arrearage. The plaintiff refused to sign an acknowledgment that she had received the letter and stated that she did not owe any money.

After the plaintiff failed to pay the back dues, American discharged her at APFA's request. After several unsuccessful attempts to be reinstated, the plaintiff filed a lawsuit levying a DFR claim against APFA and seeking reinstatement from American.

Under the Railway Labor Act (RLA) a collective bargaining representative has a duty to fairly represent all union members. To show a breach of duty of fair representation, an employee must show "substantial evidence of fraud, deceitful action, or dishonest conduct." The court held that APFA fulfilled its obligation under the CBA to provide notice of the dues delinquency and the possibility of discharge for failure to remedy the delinquency. The court rejected the plaintiff's argument that APFA breached its duty of fair representation by not ensuring that she read and understood the delinquency notice. The court refused to read into the CBA a requirement that the plaintiff be fully apprised of all the issues (that is, her dues delinquency and the grievance procedure), when the CBA did not include such a provision.

The court held that the plaintiff could not argue that APFA breached its duty of fair representation because she did not read the notice letter or CBA procedures. The court also held that APFA did not breach its duty of fair representation by refusing to reverse its decision to terminate the plaintiff, when it followed the CBA provisions and the plaintiff provided no authority supporting her claim that the union should have reversed its decision.

Because the court found that APFA did not breach its duty of fair representation, it dismissed the claim for reinstatement against American, holding "there is no additional relief that plaintiff could seek, on this complaint, against American."

Recent NMB Results

Frontier Airlines

AFA won an election to represent Flight Attendants. Out of 879 eligible employees, there were 456 votes for AFA, 234 votes for IBT and 1 write-in vote. Certification May 20, 2010.

Center for Emergency Medicine, Western PA –STAT MedEvac

OPEIU lost an election to represent Flight Deck Crew – Line Pilots. Out of 65 eligible employees, there were 26 votes for OPEIU. Dismissal May 14, 2010.

NJI, Inc./NetJets Aviation, Inc.

In an application filed by AFA to represent Flight Attendants at NJI, Inc, the NMB determined that NJI, Inc. and NetJets Aviation, Inc. do not operate as a single transportation system. Determination May 12, 2010.

Republic Airlines

IBT's certification as representative of Republic Airlines flight attendants extended to cover flight attendants employed by Midwest, which was acquired by Republic and merged into that airline in July 2009. AFA's certification as representative of Midwest flight attendants was terminated. Determination of certification April 6, 2010.

Republic Airlines/Frontier Airlines

On March 11, 2010, the NMB found that Republic Airlines d/b/a Midwest Airlines, Chautauqua Airlines, and Shuttle America operate as a single transportation system for representation purposes under the RLA. The NMB also determined that Frontier Airlines and Lynx are not part of this single transportation system.

Delta Airlines

IAM lost an election to represent Simulator Technicians. Out of 91 employees, there were 40 votes for IAM and 3 votes for other. Dismissal March 1, 2010.

Southern Air

Certification of Southern Air Crew Group as representative of Cockpit Crew Members transferred to IBT. Certification transferred February 24, 2010.

Continental Airlines

IBT won an election to represent Fleet Service Employees. Out of 7603 eligible employees there were 4102 votes for IBT, 27 votes for other and 19 void votes. Certification February 16, 2010.

Cape Air (Hyannis Air Services, Inc.)

IBT won an election to represent Pilots. Out of 121 eligible employees, there were 31 votes for Cape Air Pilots Association and 47 votes for IBT. Certification January 14, 2010.