

AIRLINE MANAGEMENT LETTER

Northwest Airlines Not Required to Permit Observers in Negotiating Sessions

A federal judge in Minnesota has ordered the Aircraft Mechanics Fraternal Association (AMFA) to resume bargaining with Northwest Airlines without the presence of observers at the negotiating sessions. See *Aircraft Mechanics Fraternal Ass'n v. Northwest Airlines Corp.*, Case No. 05-cv-00076 (D. Minn. February 11, 2005).

AMFA represents mechanics, aircraft cleaners, and custodians at Northwest. In previous negotiations with AMFA, Northwest had permitted observers, who are union members but not part of AMFA's negotiating team, to attend negotiating sessions. However, Northwest contended that the observers delayed negotiations and adversely affected the

dynamics at the bargaining table because the AMFA Negotiating Committee aggrandized more when the observers were present, precluding more candid, solution-oriented discussions.

When the parties began negotiations in 2004, AMFA requested a number of bargaining protocols including that Northwest agree to the use of observers during the negotiations and that negotiating sessions be conducted in multiple city locations to accommodate the observers. Northwest refused both of these conditions. Because Northwest would not agree to negotiate with observers present, AMFA refused to implement the aggressive bargaining schedule requested by the airline. ▶ *Continued on page 2*

Amendment to USERRA Creates New Obligations for Employers

President Bush has signed the Veterans Benefits Improvement Act of 2004, which amends the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA provides for reinstatement rights and continuation of benefits for employees who are members of the uniformed services and who meet the requirements of USERRA.

The Veterans Benefits Improvement Act of 2004 improves and extends housing, education, and other benefits for veterans and uniformed service members. Specifically, the Act makes the following changes

to employers' responsibilities under USERRA:

The Act extends the maximum period for which an employee may elect to continue employer-sponsored health insurance coverage from 18 months to 24 months. Under USERRA, 38 USC 4317(a)(1), an employee who has coverage under an employer's health plan and is absent from work because of service in the uniformed services is entitled to elect to continue his or her employer-sponsored health insurance coverage during this absence, even if the employer is not covered by COBRA. The

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Because of AMFA's refusal to implement an aggressive bargaining schedule and its insistence on the presence of observers in negotiating sessions, Northwest applied to the National Mediation Board (NMB) for mediation. The NMB established mediation ground rules, including a rule prohibiting observers from attending the sessions. The parties did not commence mediation because of a dispute regarding whether observers could attend the mediation.

AMFA and Northwest representatives met on January 12, 2005, in Minneapolis, but Northwest refused to bargain because AMFA refused to exclude the AMFA observers and observers from the Professional Flight Attendants Association (PFAA). AMFA sued in federal court, claiming Northwest violated the RLA by: (1) interfering with the choice of AMFA representatives; (2) interfering with the organization of employees; (3) failing to engage in mandatory collective bargaining; and (4) failing to treat with certified labor representatives. AMFA asked the court to enjoin Northwest from conditioning bargaining on the exclusion of observers and to order Northwest to engage in bargaining with observers present.

Northwest counterclaimed, alleging AMFA violated the RLA by refusing to bargain unless AMFA and PFAA observers were allowed to attend bargaining sessions and by refusing to participate in mediation under the terms directed by the NMB. Northwest



sought a preliminary injunction requiring AMFA to participate in the mediation without observers.

The federal court held that the AMFA observers are not representatives as defined by the RLA. The court noted that AMFA has designated a Negotiating Committee to act for the union in bargaining and the observers are not part of that committee. The court also noted that the observers were not designated by the employees, but were selected by lottery to attend negotiating sessions each day. Additionally, the observers did not act for the employees, but instead silently observed the negotiating process for a few hours.

Thus, since the observers are not representatives as defined by the RLA, Northwest did not infringe on AMFA's members' right to choose their representatives by excluding observers from the negotiations. Accordingly, the court denied AMFA's requested injunction because AMFA failed to demonstrate a probability of

success on the merits of its claims and failed to show irreparable harm.

Additionally, the court found that Northwest had demonstrated that AMFA refused to participate in mediation as directed by the NMB and that the airline would suffer irreparable harm if AMFA prolonged and delayed negotiations by insisting on observers. Therefore, the court ordered the parties to mediate under the auspices of the Board without observers present. ■

▶ *USERRA - Continued from page 1*

maximum period of coverage for such an employee and that employee's dependants is now the lesser of 24 months beginning on the date the employee's absence began or the day after the date on which the employee fails to apply for or return to a position of employment. Under USERRA, an employee who elects to continue employer-sponsored health insurance coverage cannot be charged more than 102% of the full premium under the plan. However, an employee who is absent from work because of service in the uniformed services for less than 31 days cannot be charged more than the employee share, if any, for the coverage. This amendment applies to elections made under section 4317 on or after December 10, 2004.

The Act also amends USERRA by adding a new section, 4334, which requires employers to "provide

to persons entitled to rights and benefits under [USERRA] a notice of the rights, benefits, and obligations of such persons and such employers." Employers can meet the notice requirement by posting the notice where they customarily place notices for employees. Within 90 days, the Secretary of Labor will make available to employers the text of the notice required by the Act. Employers will be required to post the notice as of March 10, 2005. As of the date of publication of the *Airline Management Letter*, the DOL had not issued the text of the notice.

If you have any questions regarding the Act or your rights and obligations under USERRA, please contact the Ford & Harrison attorney with whom you usually work. ■

Litigation Fallout from American Purchase of TWA

The Third Circuit Court of Appeals has held that a class of former TWA pilots who lost their seniority when American Airlines purchased TWA's assets and hired the pilots for a subsidiary can proceed with its breach of fair representation claims against the Air Line Pilots Association (ALPA). See *Bensel v. Allied Pilots Ass'n*. The Third Circuit's decision reversed the trial court's dismissal of the pilots' claims against ALPA, but upheld the dismissal of claims against Allied Pilots Association (APA) and American.

In *Bensel*, ALPA waived the *Allegheny-Mohawk* provisions in the TWA pilots' CBA to ensure execution of the purchase agreement by American. Although American stated that it would use its reasonable best efforts with APA (the union representing American pilots) to secure a fair and equitable process for the integration of seniority, APA and American ultimately signed an agreement regarding seniority provisions that was not favorable to most of the former TWA pilots. ALPA filed a grievance against American, claiming it did not use its reasonable best efforts to protect the pilots' seniority protections, but the arbitrator ruled in favor of American. Subsequently, the former TWA pilots asserted a series of breach of duty of fair representation claims against ALPA based on its failure to ensure their seniority rights were protected.

The trial court held that these claims were time barred and that the pilots failed to state a claim upon which relief could be granted. The Third Circuit reversed this decision and held that the pilots' claims were timely, applying the "rays of hope" doctrine. Under the "rays of hope doctrine," if a union purports to continue to represent an employee pursuing relief, the employee's duty of fair representation claim against the union will not accrue as long as the union proffers "rays of hope" that the union can remedy the cause of the employee's dissatisfaction. The court held that the agreement between APA and American was not the inevitable outcome of ALPA's waiver of the pilots' *Allegheny-Mohawk* provisions. According to the court, despite waiving an important labor protective provision, rays of hope remained that, with continued representation by ALPA, a more propitious seniority agreement could have been obtained for the class. Accordingly, the court held that the pilots' claims were not time barred. Additionally, the Third Circuit reversed the trial court's determination that the pilots failed to state a claim for breach of the duty of fair representation and remanded the case to permit the parties to engage in discovery regarding the claims.

The Third Circuit affirmed dismissal of the pilots' breach of duty of fair representation claims against APA, finding the union owed them no duty before it became their bargaining representative and that the status quo provisions of the RLA were not implicated by the imposition of the seniority agreement between APA and American.

The court also affirmed dismissal of the pilots' claims against American. The pilots alleged a breach of the duty to treat with the class' certified representative under 42 USC § 152 Ninth and failure to negotiate in good faith under 42 USC § 152 First (the court treated this as a claim under 42 USC § 152 Second, finding that provision more clearly establishes the duty to bargain in good faith). The Third Circuit held that 42 USC §§ 152 Second and Ninth do not create a private right of action in favor of the pilot class and that the class had no standing to bring these claims because they were not and never had been the certified representative of the TWA pilots. The court also affirmed dismissal of the pilots' state law claims against American and APA, finding they were preempted by the RLA.

In another case arising out of American Airline's purchase of TWA and the merger of seniority lists, a federal trial court in New York dismissed claims against American brought by the International Association of Machinists (IAM), which represented TWA flight attendants until the NMB issued a single carrier determination. The court held that IAM had no standing to bring a failure to bargain claim because it is no longer the flight attendants' certified representative. See *Cooper v. TWA Airlines, LLC*. Additionally, the court held that the flight attendants' and IAM's state law claims against American and the Association of Professional Flight Attendants were preempted by the RLA. ■

FAA Proposes Amending Airman Medical Certification

The FAA has issued a notice of proposed rulemaking stating that it intends to amend the airman medical certification standards to disqualify an airman based on an alcohol test result of 0.04 or greater breath alcohol concentration (BAC) or a refusal to take a drug or alcohol test required by the Department of Transportation (DOT) or a DOT agency.

The FAA regulations are being revised to comply with revisions made by the DOT in 2000 and 2001 to its Procedures for Transportation Workplace Drug and Alcohol Testing Programs.

The FAA proposes to revise the airman certification requirements (14 CFR §§ 61.14, 63.12b, and 65.23) to include refusals to take a pre-employment or return to duty test. Currently, these sections only address refusals committed by an individual actually performing a safety-sensitive function.

The FAA also proposes to add the following disqualifying factors to the definition of substance

abuse for the three classes of airman medical certificates: (1) an alcohol test result of 0.04 or greater BAC on an alcohol test required by the DOT or a DOT agency; and (2) a refusal to submit to an alcohol or drug test required by the DOT or a DOT agency. (14 CFR 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2)).

Additionally, the FAA proposes to amend 14 CFR § 91.17(a) and (c) to recognize breath alcohol testing technology. Currently, this regulation only refers to blood alcohol testing.

Other proposed revisions include requiring employers to notify the FAA of refusals to take a return to duty or pre-employment drug or alcohol test; amending Appendix I to require the Medical Review Officer (MRO) to submit information to the Federal Air Surgeon within 2 working days from the date the MRO verifies a positive drug test result instead of the current 12 days; amending Appendix I to clarify that a substance abuse professional (SAP) must not recommend that an employer return to duty an individual

who has refused to take a drug test for a position that requires an airman medical certificate until the Federal Air Surgeon has issued the individual a new airman medical certificate; amending Appendix I to change the time for the employer to forward SAP reports to the Federal Air Surgeon from 12 working days to 2 working days of receipt of the SAP report; clarifying in Appendix I that an employee required to hold a part 67 certificate cannot be returned to the performance of safety-sensitive duty until an airman medical certificate has been issued after a verified positive drug test result or refusal to test; adding a record retention requirement to Appendix I; adding refusals to submit to testing to the existing record retention requirements in Appendix J; and revising 4 CFR 65.46a(f), 121.458(f), and 135.253(f) by deleting the lists of types of tests included as refusals and substituting the word "any."

The FAA will accept comments regarding the proposed revisions until March 14, 2005. ■

2005 Annual Client Conference

Ford & Harrison's 2005 annual client conference for airline employers will be held in Atlanta, Georgia, on Friday, May 6, 2005, at the Four Seasons Hotel located in Midtown Atlanta. The theme this year will be: "Riding the Currents of Change in Labor and Employment Law." There will be a welcome reception on Thursday evening at Ford & Harrison's offices (1275 Peachtree Street, Suite 600) beginning at 5:30 pm. Immediately following the reception, there will be a dinner for airline employers at The Peachtree Club (999 Peachtree Street, 28th floor).

The cost to attend is \$295 for clients, \$395 for non-clients and a \$50 discount for multiple registrants from the same airline.

For more information, please contact Lee Watts, lwatts@fordharrison.com, 404-888-3981 or to make reservations at the Four Seasons Hotel, call 404-881-9898, request the Reservations Department and ask for the Ford & Harrison group rate. ■

National Mediation Board Elections

Recent Election Results

Piedmont Airlines, Inc.

The IBT-CWA lost an election to represent the Fleet and Passenger Service Employees. At the time the application was received, these employees were partially represented by the IBT. Out of 1,979 eligible voters, the IBT-CWA received 722 votes and there were 9 write-in votes. (Dismissal, December 7, 2004).

Corporate Airlines, Inc. d/b/a American Connection

The IBT won an election to represent the Pilots. Out of 57 eligible voters, the IBT received 36 votes. (Certification for IBT, December 9, 2004).

Piedmont Airlines, Inc.

The IBT won an election to represent the Mechanics and Related Employees. At the time the application was received, these employees were represented in part by the IBT and the IAM. Out of 390 eligible voters, the IBT received 135 votes, and the IAM received 118 votes. (Certification for IBT, December 22, 2004).

Piedmont Airlines, Inc.

The IBT and IAM lost an election to represent the Stock Clerks. At the time the application was received, these employees were represented in part by the IBT and the IAM. Out of 46 eligible voters, the IAM received 12 votes, and the IBT received 10 votes. (Dismissal, December 22, 2004).

Piedmont Airlines, Inc.

The IAM won an election to represent the Flight Dispatchers. At the time the application was received, these employees were represented in part by the IBT and the IAM. Out of 15 eligible voters, the IAM received 11 votes, and the IBT received 1 vote. (Certification for IAM, December 22, 2004).

ASTAR Air Cargo, Inc.

On December 27, 2004, the IBT disclaimed its certification of the Ground School Crew Trainers. (Revocation of Certification, January 7, 2005).

Executive Air Terminal

An individual, Elbert Davis, Jr., won an election to represent the Mechanics and Related Employees. At the time the application was received, these employees were represented by the IAM. Out of 9 eligible voters, Elbert Davis, Jr. received 5 votes, and the IAM received 1 vote. (Certification of Elbert Davis, Jr., January 19, 2005). ■

Ford & Harrison Opens Three New Offices

On January 3, 2005, Ford & Harrison opened an office in Dallas, Texas. Michael P. Maslanka, former Partner and Chair of the Labor/Employment Section of Godwin Gruber LLP, has joined the firm and will be the managing partner of the Dallas office. Additionally, the lawyers and staff of Edwards Ballard, a labor and employment firm with offices in Spartanburg, South Carolina, and Asheville, North Carolina, joined the firm on January 1, 2005. This brings the total of Ford & Harrison offices to 15 throughout the country. ■

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Airline Management Letter is a service to our clients, providing general information on selected legal topics. Clients are cautioned not to attempt to solve specific problems on the basis of information contained in an article. For more information, please call Shannon Houghton at 404-888-3834 or write to the Atlanta office at the address below.

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