

AIRLINE MANAGEMENT LETTER

Ford and Harrison attorneys recently obtained important victories for our clients in three cases that could have a significant impact on the airline industry.

Flight Attendants Not Subject to California Wage and Hour Laws

In *Fitz-Gerald v. SkyWest Airlines, Inc.*, a California state court recently dismissed a class action lawsuit filed on behalf of current and former SkyWest flight attendants, holding that SkyWest flight attendants are not subject to California’s state wage and hour laws. The flight attendants claimed SkyWest violated California state laws regarding minimum wage, overtime, and meal and rest periods. The plaintiffs also sought “waiting time” penalties and treble damages under the “unfair business practices” provision in the California Business and Professions Code.

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Court Upholds Right to Make Unilateral Changes During First Contract Negotiations

In *IBT v. North American Airlines* (N.D. Cal. September 14, 2005), a federal court in California upheld the airline’s right to make unilateral pay cuts during first contract negotiations. In this case, the court denied IBT’s motion for a preliminary injunction seeking to reinstate various pay and benefit cuts the carrier unilaterally implemented while negotiations were in process, holding that the union failed to show any probability of success on its claims that the carrier violated the RLA by implementing the changes.

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NLRB Affirms Determination that ALPA Committed Unfair Labor Practice

The National Labor Relations Board (NLRB) has affirmed the decision of an administrative law judge (ALJ), which held that the Air Line Pilots Association (ALPA) committed an unfair labor practice (ULP) in violation of the National Labor Relations Act (NLRA) by attempting to enforce a scope provision against the former parent of an airline. The ALJ held that ALPA violated the secondary boycott provisions of the NLRA, specifically Sections 8(b)(4)(ii)(A) and (B), by pursuing a grievance against DHL Holdings (USA), Inc., seeking to compel this NLRA-covered company to cease using ABX Air, Inc. (an RLA-covered airline) to haul its overnight air freight.

In this case, ALPA had negotiated a scope clause with the former DHL Airways in 1998 specifying that all future flying on behalf of DHL Airways would be performed exclusively by pilots on ALPA/DHL Airways’ seniority list. DHL Worldwide, which at the time owned DHL Airways, signed a side letter in 1998, which ALPA contends bound it and all of its affiliates to this scope clause. ALPA contended this scope clause survived DHL Airways’ sale of DHL Airways (now known as ASTAR Air Cargo, Inc.) in July 2003. The issue came to a head in August 2003 after DHL Worldwide (renamed DHL Holdings (USA), Inc.) acquired Airborne Inc. Because of foreign ownership restrictions, ABX Air, which had formerly been owned by Airborne Inc., was spun off as an independent, publicly traded airline at the time DHL acquired Airborne. ABX Air, however, continued to perform its historical work

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In dismissing the case, the court held that the California state law is pre-empted by the Railway Labor Act (RLA), as well as the 1978 Airline Deregulation Act (ADA), and that application of the state law to flight attendants would violate the Commerce Clause of the U.S. Constitution by impermissibly burdening interstate commerce. This decision is significant because requiring SkyWest (or any other carrier) to comply with California's laws regarding meal and rest periods would result in a tremendous disruption of operations. Additionally, the decision appears to be the first case in which a California trial court dismissed a California class action wage/hour lawsuit on the basis of a substantive motion for summary judgment.

In *SkyWest*, the court held that the state law unduly burdens interstate commerce in an area where uniformity is necessary. According to the court, applying California's labor laws to SkyWest could result in different employees on the same flight being treated differently simply because of state domicile, when there is a need for uniform treatment of all flight attendants. Additionally, the court found that SkyWest's compensation and flight schedule system is standard in the industry; thus, to apply California's laws in this context would be tantamount to regulating the entire airline industry.

The court also found that the plaintiffs' claims were pre-empted by the RLA. State laws are pre-empted by the RLA if their resolution requires interpretation or application of a collective bargaining agreement. SkyWest's flight attendants are represented by the SkyWest In-Flight Association (SIA). SIA is not a union certified by the National Mediation Board (NMB). The court held that the RLA does not require that an employee representative be certified by the NMB to have a collective bargaining agreement with its employees.

SkyWest and the SIA negotiated a Crewmember Policy Manual, which governs the terms and conditions of SkyWest's flight attendants' employment. The court held that the Crewmember Policy Manual has all the attributes of a collective bargaining agreement. Since resolution of the flight attendants' state law wage and hour claims would require an interpretation of the Crewmember Policy Manual, the court found these claims to be pre-empted by the RLA.

The court also held that the plaintiffs' rest and meal break and overtime claims were pre-empted by the ADA. This Act provides that state laws "relating to rates, routes, or services of any air carrier" are pre-empted. The court found that California's rest and meal break and overtime requirements would have a significant impact on SkyWest's prices, routes and services because the only way the carrier could comply with these rules would be to rearrange its flight schedules by decreasing the number of flights to California or hire more flight attendants. Either option would have a relation to and impermissible significant direct effect on SkyWest's prices, routes, and services.

This decision is good news for all airlines with California operations because a determination that airlines doing business in California are subject to California's state wage and hour laws would create tremendous operational and administrative burdens. Plaintiffs have 60 days from the entry of the court's judgment to appeal and are expected to do so. ■

▶ **Unilateral Changes - *continued from pg. 1***

IBT was certified to represent North Americans' pilots in January 2004 and the union and carrier began collective bargaining negotiations in April 2004. IBT requested the assistance of the National Mediation Board (NMB) in December 2004. The negotiation process is continuing and the parties have not reached an agreement.

In an effort to control its operating costs, North American implemented a series of wage and benefit cuts for all of its employees including top management, unrepresented flight attendants and staff employees in January and February 2005. The IBT filed a complaint and motion for preliminary injunction after North American made the unilateral changes, contending the changes violate the RLA's status quo requirements.

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RLA MINOR DISPUTE RULINGS

In two recent decisions, federal courts have addressed the issue of what constitutes a minor dispute under the RLA.

Subcontracting of Jobs

In *Alaska Airlines v. International Ass'n of Machinists and Aerospace Workers* (June 2, 2005), a federal court in Washington held that Alaska Airlines' decision to subcontract ramp work before the National Mediation Board (NMB) released the airline and IAM from mediation is a minor dispute.

IAM represents Alaska Airlines' ramps and stores employees. The airline and union were in mediation with the NMB over changes to the union contract when the airline announced that it was soliciting bids from outside contractors to perform ramp work. Subsequently Alaska Airlines entered into a contract with an outside vendor to perform ramp work at the SeaTac airport and replaced airline employees with the contractor's employees.

IAM filed an emergency motion for preliminary injunction seeking to stop the airline from using contract workers to perform the ramp duties. The court denied this motion, finding the dispute to be a minor dispute over which it lacked jurisdiction. The court applied the "arguably justified" standard and held that since Alaska Airlines' decision to subcontract was based on a provision of the existing, but expired, union contract, its decision was arguably justified by the terms of the contract.

Hiring From Acquired Airline

In *Smith v. American Airlines* (July 18, 2005), the Eighth U.S. Circuit Court of Appeals affirmed a lower federal court's holding that American Airlines' refusal to hire a former Trans World Airline pilot following American's purchase of TWA was a minor dispute. In *Smith* the plaintiff was not hired by American after it purchased TWA's assets because she had been previously terminated by American. ALPA attempted to grieve American's failure to hire Smith and six other pilots under the transition collective bargaining agreement that was in place after the purchase, but American refused to do so on the ground that the ineligible pilots were not American employees covered by that agreement.

American did provide for informal processes by which the pilots could seek review of the decision not to hire them, but Smith did not use these procedures. Smith subsequently sued in federal court claiming American's failure to hire her violated the transition agreement and that she could litigate her RLA breach of contract claim in federal court because American repudiated the transition agreement when it refused to process her grievance under that agreement.

The court rejected this claim, noting that whether Smith was an employee within the meaning of the RLA is an aspect of the merits of her claim, which is a minor dispute under the RLA. A minor dispute is a controversy over the meaning of an existing collective bargaining agreement in a specific situation. A minor dispute must be resolved by the carrier's internal dispute resolution processes and an adjustment board. The court also held that the repudiation exception to the limitation on the court's ability to resolve minor disputes under the RLA did not apply. According to the court, American did not repudiate the terms of the transition agreement; it simply took the position they did not apply to Smith's dispute. Thus, the court held that the plaintiff's claim was a "classic dispute over arbitrability" and the best way to resolve it was a suit to compel arbitration, which Smith did not seek. ■

Jerry Glass Returns to Ford & Harrison to Lead Consultancy Group

Ford & Harrison is pleased to announce the return of Jerry Glass, the former Executive Vice President and Chief Human Resources Officer at US Airways, to lead J. Glass Associates – a consultancy division of the firm. Glass will spearhead a firm-wide initiative to expand Ford & Harrison's consulting services. Glass' experience and leadership will be of particular value to airlines facing restructuring issues similar to those addressed at US Airways, such as labor costs, pension restructuring, healthcare management, and retiree issues.

► Unilateral Changes *continued from pg. 2*

Although the RLA does not contain an explicit status quo provision, the U.S. Supreme Court has held that § 2 First, along with §§ 5, 6, and 10 of the RLA create an implicit status quo requirement. Section 2, First requires parties to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions and to settle all disputes arising out of the application of such agreements to avoid any interruption to commerce. In denying the IBT's motion for preliminary injunction, the court had to determine when status quo requirements in these sections take effect.

In *Williams v. Jacksonville Terminal*, the U.S. Supreme Court held that the onset of negotiations for collective bargaining does not change the authority of the carrier to make changes regarding its employees; the prohibitions in § 6 against changes of wages or conditions pending bargaining are aimed at preventing changes in conditions fixed by collective bargaining agreements. The court in *North American* noted that the parties had not reached a full tentative agreement or even an agreement on any single section of a collective bargaining agreement when the carrier imposed the unilateral changes. Relying on *Williams* and a more recent case from the Second U.S. Circuit Court of Appeals, the court held that the status quo requirements of § 6 did not apply in this case.

The court also rejected the union's argument that it was entitled to an injunction under § 2, First because that was the only practical, effective means of enforcing the duty to exert every reasonable effort to make and maintain agreements. Where, as in this case, the parties were in still engaged in the negotiation process, particularly with the assistance of the NMB, the court could not say that an injunction was the only possible remedy to safeguard the union's right under § 2 First. Additionally, the court rejected the IBT's attempt to rely on cases decided under the National Labor Relations Act (NLRA), holding that the fact that the National Labor Relations Board has the authority to remedy unilateral changes under the NLRA does not give the court the authority to remedy those changes under the RLA.

The IBT also sought an injunction under § 2, Fourth of the RLA. This section prohibits carriers from interfering with the right of employees to organize. The court held that although there was no question pilots were treated differently than other employees with regard to the pay cuts, there was no evidence that this differential treatment was because of anti-union animus. The court noted that the company made changes affecting all employees' compensation, such as requiring them to pay for a portion of their health insurance premiums. The evidence in this case showed a company-wide objective to reduce costs, not a targeted effort to reduce pilots' compensation because they were unionized.

The court's well-reasoned decision, holding that a carrier is not bound by the RLA's status quo requirements when no agreement on a first contract has been reached, should be beneficial to other airlines who are faced with the need to make operational changes during the process of negotiating a first contract. ■

Recent Election Results

North American Airlines

IBT won an election to represent the Flight Attendants. Out of 229 eligible voters, IBT received 118 votes. (Certification for IBT September 1, 2005).

Pinnacle Airlines

TWU won an election to represent Flight Dispatchers. Out of 33 eligible voters, TWU received 17 votes; there was 1 void vote. (Certification for TWU August 10, 2005).

Saudi Arabian Airlines

IAM won an election to represent the Dispatchers. Out of 7 eligible voters, IAM received 6 votes. (Certification for IAM August 5, 2005).

Continental Airlines

TWU lost an election to represent the Fleet Service Employees. Out of 6,879 eligible voters, TWU received 3,122 votes; there were 10 votes for other and 3 void votes. (Dismissal July 29, 2005).

Frontier Airlines

AFA-CWA lost an election to represent the Flight Attendants. Out of 744 eligible voters, AFA-CWA received 320 votes; there were 8 votes for other and 1 void vote. (Dismissal July 22, 2005).

▶ **NLRB- continued from pg. 1**

carrying express freight on behalf of the now DHL-owned Airborne, Inc. after the DHL/Airborne merger.

ALPA filed a grievance shortly after the merger contending that DHL was bound by the 1998 scope clause and all of the flying being performed by ABX Air now belonged to the ALPA-represented ASTAR pilots. ALPA subsequently filed a lawsuit (counterclaim) in federal court in New York seeking to enjoin DHL from continuing to utilize ABX Air to carry its freight pending arbitration of this scope grievance.

ABX Air intervened in the New York lawsuit and persuaded the court to stay the case pending the outcome of an unfair labor practice charge that ABX Air filed against ALPA in which it contended that ALPA's scope clause was an illegal "hot cargo" provision in violation of Section 8(e) of the NLRA and that its grievance and lawsuit constituted unlawful coercion against a neutral employer (DHL) to force it to cease doing business with another person (ABX) in violation of Sections 8(b)(4)(ii)(A) and (B) of the NLRA.

The ALJ agreed with ABX and the NLRB affirmed the ALJ's decision, rejecting ALPA's argument that the Board lacked jurisdiction because of what it claimed was essentially a Railway Labor Act dispute. The Board held that while the employees involved in the dispute, ABX and ASTAR pilots, are covered by the RLA, only one of the two employers involved, ABX, is subject to the RLA. DHL, the "neutral" entity against whom the allegedly illegal conduct was directed, is covered by the NLRA. Thus, since ALPA, a NLRA-covered labor organization, chose to enmesh DHL, a NLRA-covered employer, in its dispute with ABX, an RLA employer, the Board had jurisdiction to determine whether ALPA violated the NLRA's secondary boycott provisions.

The Board adopted the ALJ's determination that ALPA's pursuit of its grievance and counterclaim constituted unlawful secondary boycott. The Board determined that the object of ALPA's conduct was to require DHL and Airborne to cease doing business with ABX in violation of NLRA. The court also held that this conduct was aimed at acquiring work for ALPA's members, not preserving their work. Thus, it was an unlawful secondary boycott. ■

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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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