LETTER
AIRLINE MANAGEMENT

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IN THIS ISSUE

Second Circuit Prohibits Northwest Flight Attendants From Striking Over Pay Cuts

A three-judge panel of the Second Circuit Court of Appeals has held that flight attendants employed by Northwest Airlines cannot strike over terms and conditions of employment imposed by Northwest after the airline rejected the flight attendants' collective bargaining agreement (CBA) and imposed new terms and conditions in accordance with a Bankruptcy Court's § 1113 order. *See In re Northwest Airlines* (2d Cir. March 29, 2007). According to the Second Circuit, Section 2, First of the Railway Labor Act (RLA) forbids an immediate strike when a Bankruptcy Court approves a debtor-carrier's rejection of a CBA that is subject to the RLA and permits it to impose new terms and conditions of employment.

In this case, the Association of Flight Attendants (AFA), the union representing Northwest's flight attendants, sought relief from the Second Circuit after a federal District Court enjoined AFA from engaging in any form of work stoppage in response to Northwest's rejection of the flight attendants' CBA and implementation of new terms and conditions of employment. (See the October 2006 issue of the *Airline Management Letter*, http://www.fordharrison.com, for a discussion of the District Court's decision).

Upholding the lower court's injunction, the Second Circuit held that a carrier-debtor that rejects its CBA and imposes new terms and conditions of employment pursuant to a § 1113 order abrogates, but does not breach, its CBA. According to the court, the status quo provisions of the RLA do not survive this abrogation,

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Bankruptcy Court Refuses to Modify § 1113 Order

The Bankruptcy Court for the Southern District of New York has rejected AFA's motion for relief from its 2006 § 1113 order. *See In re Northwest Airlines Corp.*, (Bankr. S.D.N.Y. April 13, 2007). Here, AFA filed a motion with the Bankruptcy Court asking it to reconsider the § 1113 order in light of Northwest's improved financial condition. The court denied this request, noting that granting such relief to AFA would result in similar motions by other unions that have entered into new collective bargaining agreements based on the threat of an adverse § 1113 ruling. Such relief would "likely reverse much, if not all, of the financial improvement upon which AFA relies and defeat the very foundation of its motion." The court also held that according to the Second Circuit's decision enjoining AFA from striking (discussed on page 1), the § 1113 rejection abrogated the CBA, which then ceased to exist. Thus, there is nothing for the Bankruptcy Court to "revive" as requested by AFA.

Additionally, the court held that the Bankruptcy Act's provision for relief in "extraordinary" situations does not apply in this case because a debtor's change in financial condition is not an extraordinary circumstance that would justify revising a § 1113 order. "This is especially true where the change in financial performance is founded on labor concessions that would be largely undone if [such] relief were granted." Further, the court held that the provision for relief in extraordinary circumstances is an equitable provision, to which AFA is not entitled because it has threatened to engage in CHAOS in response to the § 1113 order (which was the reason Northwest sought the injunction approved by the Second Circuit), has sought be released from the NMB process, and still plans to engage in CHAOS if it can. •

PSA Airline's Stock Clerks Decertify the IBT

In a rare occurrence under the Railway Labor Act (RLA), the Stock Clerks at PSA Airlines have decertified their labor representative and reverted to union-free status. The International Brotherhood of Teamsters (IBT) was certified by the National Mediation Board (NMB) to represent the Stock Clerks on April 3, 1996. IBT and PSA began negotiations for a collective bargaining agreement shortly after the NMB's certification. The parties were able to reach a tentative agreement on two occasions; however, the Stock Clerks rejected both agreements. As of April 10, 2007, IBT had failed to deliver a collective bargaining agreement to the Stock Clerks.

Apparently frustrated by IBT's inability to negotiate a satisfactory collective bargaining agreement, the Stock Clerks began signing cards in support of the International Association of Machinists (IAM) in late 2006. On January 31, 2007, the IAM filed an Application for Investigation of a Representation Dispute with the NMB. IBT disclaimed interest in the Stock Clerks on February 28, effectively withdrawing its representation from the Stock Clerks. The NMB thereafter authorized an election on March 5. Only the name of the IAM appeared on the ballot.

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On April 10, the PSA Stock Clerks resoundingly voted against representation by the IAM. Only two voters out of twenty-three Stock Clerks voted in favor of representation by the IAM. As a result of the election, PSA Stock Clerks are now unrepresented.

It is unusual for a craft or class of employees covered by the RLA to transform itself from a represented group to an unrepresented group. To accomplish this change, the employees must engage in a process similar to the one taken by the PSA Stock Clerks; that is, the employees must collect signature cards indicating an interest in a new representative from 51% of the group, the NMB must authorize an election, and a majority of the employees must then refuse to vote for representation by either the incumbent union or the new union. Because of the tedious process, represented groups rarely revert to unrepresented groups. •

Comair and Pilots Reach Agreement on Concessions

Comair has reached an agreement with its pilots, represented by the Airline Pilots Association (ALPA), in which the pilots agreed to concessions in pay and benefits necessary to enable the airline to emerge from bankruptcy. Comair and ALPA had previously reached an agreement on concessions, but it was contingent on approval of similar agreements by other union-represented employee groups. When the flight attendants agreed to more modest concessions than originally planned, Comair and ALPA were required to renegotiate the pilot agreement.

The parties reached an agreement after Comair received approval from a federal Bankruptcy Court in December 2006 to impose concessions on the pilots. The Bankruptcy Court issued an injunction in prohibiting the pilots from striking or engaging in any kind of work stoppage if Comair imposed concessions.

In exchange for the pilots' concessions, the airline agreed to a new profit sharing plan, committed to maintain at least twelve 70-seat jets, and agreed to other minimum fleet provisions. •

Flight Attendants Cannot Challenge Arbitration Award in Federal Court

The Fifth Circuit Court of Appeals has held that, under the Railway Labor Act (RLA), an employee cannot seek judicial review of an arbitration award in federal court, if that worker's employment is governed by a collective bargaining agreement that establishes a mandatory, binding grievance procedure and vests the union with the exclusive right to pursue claims on behalf of aggrieved employees. *See Mitchell v. Continental Airlines, Inc.* (5th Cir. March 2007). In reaching this decision, the Fifth Circuit followed cases establishing the same rule under the Labor Management Relations Act and the National Labor Relations Act (NLRA).

In this case, flight attendants for Continental Airlines challenged the decision of a Systems Board of Adjustment regarding seniority issues between Continental and its flight attendants, who are represented by the International Association of Machinists (IAM). The IAM pursued grievances on behalf of two of the plaintiff flight attendants, but the grievances ultimately were denied. The flight attendants sued Continental and IAM in federal court and asked the court to vacate the award, claiming it did not comply with the RLA and violated their constitutional rights to due process.

The federal District Court dismissed the case and the Fifth Circuit upheld this decision. The Fifth Circuit noted that when a worker's employment is governed by a mandatory, binding grievance procedure that gives a union the exclusive right to pursue claims on behalf of aggrieved employees, the results obtained by the union normally are conclusive of the employee's rights under the CBA. That means the employee generally lacks standing to independently attack the results of the grievance procedure in court, unless the employee argues the union has breached its duty of fair representation by "arbitrarily refusing to pursue a claim through the grievance process or by doing so in a perfunctory or otherwise inadequate manner." However, to recover, the employee must prove that the union breached its duty of fair representation and that the employer breached the CBA.

The plaintiffs argued that this line of case law, established under the NLRA, does not apply to claims under the RLA. The court rejected this argument, holding that "regardless of whether a CBA is established under the LMRA, NLRA, or RLA, its existence is premised on effectuating a key purpose behind federal labor statutes, placing the interests of the group ahead of the interests of the individual employees." Thus, since the flight attendants did not claim that the union violated its duty of fair representation, the court held that they lacked standing to challenge the arbitration award and affirmed the dismissal of their claims. •

ARB Dismisses Reinstated Pilot's AIR 21 Complaint

The DOL's Administrative Review Board (ARB) has held that a pilot who was discharged for whistleblowing and reinstated two days later did not suffer an adverse employment action and, therefore, cannot recover under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). *See Hirst v. Southeast Airlines* (DOL ARB Jan. 31, 2007). Applying the standard set forth by the U.S. Supreme Court in *Burlington N. & Santa Fe Ry. Co. v. White* (2006), the ARB held that a reasonable employee would not have been dissuaded from making safety complaints or otherwise engaging in protected activity by the airline's treatment of the pilot, thus his discharge and subsequent reinstatement did not constitute an adverse employment action.

In this case, Hirst, a pilot for Southeast Airlines, claimed he was discharged when he refused to fly because his aircraft was over the FAA legal weight limit. According to Hirst, in response to his refusal to fly the aircraft, Southeast's Director of Operations told him he was "off the payroll" and that he should turn in his company manuals and ID. Hirst subsequently met with the Chief Pilot who told him he was still employed and that the airline was investigating the situation. The Chief Pilot discussed the situation with the Director of Operations and Southeast's President and, the next day, called Hirst and told him he still had his job. The following day, the Chief Pilot sent Hirst a letter reiterating that he was still employed. Hirst did not return to work, but sent Southeast a letter stating that he believed the airline had terminated his employment.

Subsequently, Hirst filed an AIR 21 whistleblower complaint with the DOL. The DOL Administrative Law Judge (ALJ) ruled in favor of Hirst, awarding him back pay and attorney fees. The ARB reversed the ALJ's decision.

AIR 21 prohibits air carriers from discharging or otherwise discriminating against an employee who has complained about a violation of the laws governing air carrier safety. To prevail in an AIR 21 case, a complainant must demonstrate that: (1) he engaged in protected activity; (2) his employer knew that he engaged in the protected activity; (3) he suffered an unfavorable ("adverse") personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action. If the complainant proves the airline violated AIR 21, he is entitled to relief unless the airline can show it would have taken the same action in the absence of the protected activity.

Here, Hirst engaged in protected activity, of which Southeast was aware, and he was discharged. However, the ARB dismissed Hirst's claim because Southeast did not take adverse action against him. The ARB held that, although the airline acted hastily and retaliated against Hirst by discharging him when he refused to fly because of safety concerns, it "quickly recognized this mistake, promptly corrected it, immediately informed Hirst that he was still employed, confirmed that fact in writing, and made sure that Hirst suffered no economic loss."

The ARB held that a reasonable worker would not be dissuaded from complaining of safety violations or otherwise engaging in protected activities based on the way Southeast treated Hirst. Instead, "a reasonable worker would see that [the airline] corrected its mistake within two days and that Hirst, at most, suffered only temporary unhappiness." The ARB found that the airline's actions sent a message that it will respect and protect employees who are concerned with safety, which "of course is the right message." •

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thus an injunction against a work stoppage cannot be based on violation of the status quo provisions.

However, the Second Circuit held that Section 2 First imposes a duty to "exert every reasonable effort to make [agreements] . . . and to settle all disputes," even when the rules governing the RLA's status quo provisions are not in effect. The court held that a strike by the union would violate this duty.

Thus, according to the Second Circuit, a Bankruptcy Court's § 1113 order absolves both parties of the RLA's status quo duty – that is, the duty to maintain agreements. It does not, however, absolve the parties of their Section 2 First obligation to make every reasonable effort to make agreements – that is, make a new contract that would create a new status quo.

The court did not identify the steps AFA must take to fulfill its duty to exert every reasonable effort to make an agreement, but held that it has not done so. The court also held that the duty to "exert every reasonable effort" requires Northwest to do more than "go through the motions" of negotiating.

The Chief Judge of the Second Circuit concurred with the majority's decision, but on different grounds. The concurrence held that an airline does not violate the RLA's status quo provisions when it acts in accordance with a Bankruptcy Court's § 1113 order because the § 1113 rejection process is a multilateral process that involves the airline, the union, and the Bankruptcy Court. Thus, the airline does not violate the RLA's prohibition on unilaterally changing the terms and conditions of employment when it acts in accordance with a § 1113 order and the union is not justified in striking. •

Recent Election Results

Piedmont Airlines
IBT withdrew its petition to represent Aircraft Records Specialists. (Dismissal January 9, 2007).

PSA Airlines
IBT disclaimed interest in the PSA Stock Clerks on February 27, 2007, and the NMB revoked its certification. (Certification revoked February 28, 2007).

Champion Air
IBT won an election to represent Mechanics and Related Employees. Out of 72 eligible employees, there were 47 votes for IBT and 6 void votes. (Certification March 15, 2007).

PSA Airlines
TWU won an election to represent Dispatchers. Out of 12 eligible voters, there were 8 votes for TWU. (Certification March 23, 2007). •

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