

## Recent Election Results

**Northern Air Cargo** – – On April 25, 2006, the IBEW sent a letter to the NMB disclaiming representation of Flight Deck Crew Members. (Revocation of Certification, May 15, 2006).

**Air Logistics, Inc.** – – OPEIU lost an election to represent Mechanics & Related Employees. Out of 331 eligible employees, OPEIU received 164 votes and there was 1 vote for other. (Dismissal, May 9, 2006).

**Frontier Airlines** – – IBT won an election to represent Stock Clerks. Out of 19 eligible employees, IBT received 13 votes. (Certification, March 15, 2006).

**Flight Options, LLC** – – IBT won an election to represent Pilots. Out of 795 eligible employees, IBT received 533 votes and there were 2 votes for other. (Certification, March 3, 2006).

**GoJet Airlines, LLC** – – IBT won an election to represent Pilots. Out of 34 eligible employees, IBT received 31 votes. (Certification, February 24, 2006).

**Jet Linx Aviation Corp.** – – An individual, Anthony J. Yonkers, lost an election to represent Pilots. Out of 28 eligible employees, Yonkers received 0 votes and the Jet Linx Pilots Group received 7 votes. (Dismissal, February 16, 2006).

**Empire Aero Center, Inc.** – – USWA lost an election to represent Mechanics and Related Employees. Out of 158 eligible employees, USWA received 25 votes. (Dismissal, February 15, 2006). •

Bankruptcy Courts - Continued from pg. 4

amic model is relevant information necessary to evaluate the airline's proposal for concessions from a union and that Mesaba's failure to provide the model violated a procedural requirement of § 1113.

Additionally, the court held that Mesaba did not confer in good faith with the unions because it failed to credit savings achieved in a Letter of Agreement with the pilots against the proposed concessions under § 1113. Addressing § 1113's substantive requirements, the court held that Mesaba failed to adequately support its assumption regarding employee attrition that would result from a downsizing imposed by a fleet reduction it was undergoing.

The court determined that the unions had good cause to reject Mesaba's proposal to the extent it did not provide them with sufficient financial information to enable them to evaluate Mesaba's proposals and based on the provisions that

the court found substantively lacking. However, the unions did not have good cause to reject or oppose Mesaba on the remaining substance of the proposal "or to maintain that position to the point of litigating these issues at such length."

Additionally, the court found it "almost embarrassing" that the unions argued that the proposed concessions were unnecessary, since if they were implemented the unions might call a strike and the airline would be unable to continue its operations. The court found the unions' strike threat to be "posturing in the height" and compared it to "standing under a high bridge, and hearing a voice coming from above: 'If you don't give me what I want, I'm going to grab you and take us both over the edge!'" The court concluded that there is no logical link between the possibility of strike and the necessity element of § 1113(b). At the time of publication, we understand that the parties are continuing negotiations. •

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Further, the judge agreed with Spirit's argument that AFA should not have filed a grievance or should have withdrawn Flight Attendant's Lawsuit Dismissed as Minor Dispute under the RLA Flight Attendant's Lawsuit Dismissed as Minor Dispute under the RLA the pending grievance, if it was confident that the dispute was a major dispute. AFA's MEC chair then testified under oath that she was withdrawing the pending grievance. After the court held that the dispute was a minor dispute, AFA requested the court reinstate the grievance; however, the judge stated that she lacked jurisdiction to do so.

If you have any questions about the issues in this case, or any other labor or employment related issue, please contact Peter Petesch, the Ford & Harrison attorney who represented Spirit in this case, [ppetesch@fordharrison.com](mailto:ppetesch@fordharrison.com), 202-719-2013, or the Ford & Harrison attorney with whom you usually work. •



LETTER

# AIRLINE MANAGEMENT

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## LETTER

# AIRLINE MANAGEMENT

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## Bankruptcy Courts Say Airlines Can't Reject Collective Bargaining Agreements

However, both airlines have the opportunity to continue negotiations with their employees' unions and may, if the negotiations are unsuccessful, return to the court with another § 1113 motion.

Two different federal bankruptcy courts have denied the requests of Comair and Mesaba to reject their employee collective bargaining agreements (CBA) under the procedures of § 1113 of the Bankruptcy Code. However, both airlines have the opportunity to continue negotiations with their employees' unions and may, if the negotiations are unsuccessful, return to the court with another § 1113 motion.

### ***The Comair Decision***

In April 2006, the bankruptcy judge denied Comair's § 1113 motion to reject the CBA between it and the union representing Comair's flight attendants (IBT), finding that Comair did not confer in "good faith" as required by § 1113 because it did not reduce the total value of its § 1113 proposal from the levels it had previously determined were necessary. *See In re*

*Delta Airlines*. The court also held that contingency provisions in the agreements Comair reached with the unions representing the pilots and mechanics were improper attempts to preempt the judicial role under § 1113. Further, the court held that the proposed concessions were not fair and equitable because they required the flight attendants to make concessions that were disproportionate to their share of payroll.

In this case, Comair sought protection under Chapter 11 of the Bankruptcy Code in September 2005. In its efforts to emerge from bankruptcy and resume operations, Comair proposed to reduce its operating costs by almost \$48 million per year, the majority of which came from proposed labor cost savings.

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## Airline's Suspension of 401K Contribution is Minor Dispute Under the RLA

A federal court in Florida has dismissed a lawsuit against Spirit Airlines in which Association of Flight Attendants (AFA) challenged the airline's decision to suspend its practice of matching contributions to employees' 401k plans. See *Association of Flight Attendants v. Spirit Airlines, Inc.* (March 16, 2006). The court held that the issue was a minor dispute under the Railway Labor Act (RLA), thus it lacked jurisdiction to hear the case.

In this case, Spirit suspended contributions to the flight attendants' 401k plans, as it was permitted to do under their collective bargaining agreement (CBA). The company also suspended contributions to other employee groups' 401k plans, where this was permitted by their CBAs. The flight attendants' CBA stated that Spirit **could** match up to 5% of the flight attendants' 401k contributions and that the flight attendants would be treated no less favorably than other employee groups with regard to this benefit. Thus, Spirit argued that its actions were justified under the terms of the CBA, since the contributions were optional and the flight attendants were not treated less favorably than other employee groups.

AFA filed a grievance over the suspension and sued the airline in federal court, claiming the suspension of contributions was a unilateral change to the CBA. AFA sought an injunction prohibiting Spirit from violating the RLA's collective bargaining and status quo provisions.

Under the RLA, a minor dispute is a dispute growing out of a grievance or out of the interpretation or application of a CBA. Minor disputes must be resolved through the RLA's exclusive grievance procedures and courts have no jurisdiction to hear such disputes. A major dispute under the RLA involves the formation of agreements or the creation of contract rights. Unlike a major dispute, a minor dispute can be conclusively resolved by interpreting the existing CBA.

The court held that the adjudication of AFA's claims required the interpretation and application of the CBA, as demonstrated by the parties' briefs and arguments made at the hearing. Additionally, the court held that Spirit's justifications for suspending the 401k contributions were not frivolous or obviously insubstantial. Continued on page 5

## Flight Attendant's Lawsuit Dismissed as Minor Dispute Under the RLA

The Sixth U.S. Circuit Court of Appeals has held that a flight attendant's federal court complaint based on her employer's refusal to let her make benefits payments as an active employee while on leave for an on the job injury is preempted by the RLA. See *Brokate v. Express Jet Airlines, Inc.* (March 2006).

Here, the flight attendant's employment was covered by a collective bargaining agreement (CBA) between Express Jet and the IAM. She suffered an on the job injury and went on occupational injury leave. The flight attendant claimed Express Jet violated the CBA when it refused to let her make benefits payments as an active employee while she was on leave, and filed a grievance in accordance with the CBA's procedures. The grievance was unsuccessful; however, the IAM did not pursue the grievance to the final step of the CBA procedure (final and binding arbitration before the System Board of Adjustment (Board)).

Instead of appealing her claim individually to the Board, the flight attendant filed a lawsuit in federal court making various tort claims. The Sixth Circuit held that the claims involved in her lawsuit were a minor dispute and, thus, preempted by the RLA.

A minor dispute under the RLA is one that arises out of the interpretation or application of a CBA. Adjustment Boards have exclusive jurisdiction over minor disputes. Courts do not have jurisdiction to resolve minor disputes and state law claims arising from such disputes are preempted by the RLA. However, there are some limited exceptions to the jurisdictional bar, such as when pursuing arbitration would be futile or impossible.

The court held that the union's refusal to represent the flight attendant before the adjustment board was not evidence that arbitration would be impossible for her. The court noted that she could have retained her own counsel at arbitration before the board. The court further held that while the flight attendant may have wanted the union to represent her before the board, its failure to do so did not bar her from arbitrating her claim. Accordingly, she did not fall within this limited exception to the jurisdictional bar and the court dismissed her complaint. •

# FAA Issues Enforcement Guidelines on the Pilot Records Improvement Act

The FAA recently issued enforcement guidelines on the Pilot Records Improvement Act (PRIA). PRIA requires part 121 and 135 air carriers and part 125 air operators to request, receive, and evaluate background safety information for any pilot applicant before allowing the applicant to begin service as a pilot. The enforcement guidelines are designed to familiarize FAA inspectors with PRIA and provide procedural information that may be used by the air carrier.

Among other things, the enforcement guidance:

- outlines what is required and the procedures for completing a PRIA request;
- sets out a recommended procedure for completing a PRIA request;
- discusses the air carrier's obligations to maintain PRIA records;
- states that records pertaining to drug and alcohol testing must be maintained in an area that ensures their confidentiality and cannot be contained in the company's primary system of records;
- recommends that other records required under PRIA be maintained separately from the company's primary system of records;
- identifies forms that have been developed to help air carriers comply with PRIA. (The most current version of the official PRIA request forms can be found on the FAA web site at <http://forms.faa.gov/>);
- identifies what an air carrier who receives a PRIA request must do to comply with the request;
- clarifies that records of both positive and negative results of the applicant's drug and/or alcohol tests must be provided in response to the PRIA request;
- clarifies that the employer to employee verbal questioning required by DOT-agency testing rules is unrelated to and separate from the employer to employer questions required by PRIA;
- clarifies that PRIA drug and alcohol records are not limited to the document retention requirements under the DOT's regulations, but, like all PRIA records, must be maintained for a period of at least five years;
- discusses violations and penalties for violations;
- includes a PRIA Air Carrier Basic Compliance Checklist; and
- includes a list of PRIA sanctions and suggested penalties.

The guidelines are available on the FAA web site at [http://www.faa.gov/pilots/lic\\_cert/pria/forms\\_docs/](http://www.faa.gov/pilots/lic_cert/pria/forms_docs/). (Click on FAA Order 8000.88, PRIA Guidance for FAA Inspectors). •

## Ford & Harrison Launches F&H Solutions Group

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In addition to pay cuts for non-union employees, Comair proposed \$17.3 million in concessions from the pilots, \$8.9 million from the flight attendants and \$1.0 million from the mechanics. The pilots and mechanics ratified the proposed concessions, contingent on all other employee groups accepting the proposed concessions. After the flight attendants refused to agree to the concessions, Comair filed a motion to reject the flight attendants' CBA under § 1113.

Section 1113 requires the debtor to limit its proposal to changes it reasonably believes are "necessary" to successful reorganization and also requires the debtor and union to confer in good faith before the permitting rejection of the CBA. The court in *Comair* held that § 1113's requirement to confer in good faith means the debtor must be willing to moderate its initial proposal and reach a compromise. In reaching this decision, the court relied on *In re Carey Transportation*, in which the Second U.S. Circuit Court of Appeals held that "necessary" under § 1113 does not mean the "bare minimum." In *Carey*, the court analyzed the necessity of a debtor's proposed concessions and noted that a debtor who proposes truly minimal changes has no room for good faith negotiations.

However, the bankruptcy court in *Comair*, when relying on this language from *Carey*, did not acknowledge that *Carey* involved issues of necessity, fair and equitable treatment, and good cause to reject. The court in *Carey* did not even address the issue of the duty to confer, and the employer in *Carey* ultimately prevailed on its motion to reject even though it did not change its position on three central, disputed issues during negotiations.

The bankruptcy court's decision in *Comair* places the debtor in a no-win situation. Requiring a debtor to materially decrease its proposed concessions after it has determined that these are genuinely necessary to its restructuring could have a significant negative impact on its ability to emerge from bankruptcy or continue its operations after emerging. Alternatively, if a debtor pads its proposal with unnecessary changes so that it can meet the court's requirement to reduce the value of its proposal to establish good faith, the debtor risks violating the requirements of the bankruptcy statute.

Additionally, the court's determination that Comair attempted to preempt the court's authority by agreeing to

contingency clauses with the unions representing the pilots and mechanics will make reaching agreements in situations involving multiple unions much more difficult. This decision impedes a debtor's ability to assure the first union to settle that its employee group will not be treated less favorably than other groups if other unions refuse to reach an agreement. It is likely that unions will be reluctant to settle, or be the first to settle, for fear another group will get a better deal.

Comair has requested the bankruptcy court reconsider its decision. We will keep you updated on this case.

### ***The Mesaba Decision***

In another recent decision, a bankruptcy court denied Mesaba's request to reject its CBAs with the unions representing its pilots, flight attendants, and mechanics (ALPA, AFA, and AFMA). See *In re Mesaba Aviation, Inc.* (May 18, 2006). In this case, unlike the *Comair* decision, the court held that Mesaba did not fail to act in good faith by insisting that the three original points of its concessions (a 19.4% overall reduction of labor costs, a six year duration, and no provision for "snap backs") were non-negotiable. The court noted that negotiations under § 1113 are not like those under § 6 of the RLA where the parties go through "an extended exercise of posturing, blustering, grinding and incremental falling back." Under § 1113, Mesaba did not show a lack of good faith by structuring the boundaries of the bargaining and its outcome with these three points as a given.

However, the court denied Mesaba's § 1113 motion because it found that the airline failed to meet some of the statute's procedural and substantive requirements. Procedurally, the court held that Mesaba failed to provide the unions with the relevant financial information necessary to evaluate the proposal because it refused to provide them with a "live" model of the computer program it used to prepare a financial forecast for its post-bankruptcy operations.

The program Mesaba used for its financial forecast used a "steady-state" fleet configuration of 49 Saab turbo-prop aircraft, which the airline considered to be the base for a restructuring. The airline refused to provide the computer program to the unions in part because it claimed that the model could not generate reliable financial forecasts using other fleet configurations. The court held that an airline's dy-

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