FORD & HARRISON LLP

AIRLINE MANAGEMENT LETTER

Requiring IME for Pilot Returning from Disability Leave is a Minor Dispute

Reversing the order of a federal trial court, the Sixth U.S. Circuit Court of Appeals recently held that an airline's requirement that a pilot returning from disability leave submit to an independent medical examination (IME) before being permitted to fly is a minor dispute under the RLA. *See Airline Professionals Ass'n, Teamsters Local Union 1224 v. ABX Air* (March 10, 2005). In this case, the pilot applied for disability benefits after he was diagnosed as suffering from stress and anxiety. ABX ordered the pilot to undergo an IME, which revealed that he was unfit to fly. The pilot received disability benefits and, after being on leave for approximately a year and a half, sought to return to work.

Although the pilot presented a second-class medical certification from the FAA clearing him to fly, the airline was concerned about his fitness to fly and directed him to undergo another IME. The pilot refused to do so. Subsequently, the union filed a grievance on the pilot's behalf, claiming that the airline violated the terms of the union contract by requiring him to submit to an IME before returning to work. While the grievance was pending, the union filed a complaint in federal court claiming that the airline's action

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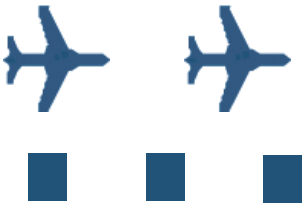
Arbitration Award in Favor of Discharged Pilot Affirmed; Board Must Clarify Remedy

In *Airline Pilots Ass'n, Int'l v. Pan American Airways Corp.*, (April 19, 2005), the First U.S. Circuit Court of Appeals affirmed the enforcement of an arbitration award in favor of a Pan Am pilot who was passed over for promotion and discharged for a first offense. However, the court remanded the case to the System Board of Adjustment to clarify the award with regard to the amount of back pay to which pilot was entitled.

In this case, the pilot, Shahir Selim, claimed Pan Am promoted a less senior pilot to captain without giving him the chance to train for and be upgraded to captain. Selim also claimed he was improperly discharged when Pan Am fired him after he had a conflict with flight personnel who instructed him to check his bags on a flight on which he was a passenger. Selim claimed the discharge was inappropriate because it was a first offense.

The First Circuit affirmed the Board's award in the failure to promote case, including the award of back pay to the date the pilot should

▸ *Continued on page 5*



IN THIS ISSUE

Pilot Fired for Drinking in Uniform Cannot Proceed with Discrimination Claim

A federal court recently dismissed a lawsuit by the Equal Employment Opportunity Commission (EEOC) claiming Trans States Airlines (TSA) discriminated against a pilot based on his race, national origin, and religion when it discharged him after receiving reports the pilot was drinking in a bar while in uniform. *See E.E.O.C. v. Trans States Airlines Inc*. In this case the pilot, Mohammed Shanif Hussein, was a probationary pilot who worked for TSA and was staying in a hotel in St. Louis when the September 11, 2001, terrorist attacks occurred. Two days after the September 11 attacks, another TSA pilot reported to TSA's vice-president in charge of flight operations, Daniel Reed, that he had seen Hussein drinking in a bar while in uniform. After determining that Hussein was a probationary employee, Reed ordered his discharge.

Hussein subsequently filed an EEOC charge alleging he was discharged because of his race, religion, and national origin in violation of Title VII; he then intervened in the federal discrimination lawsuit filed by the EEOC against the airline. The federal court granted summary judgment in favor of TSA, finding that the EEOC and Hussein failed to present any evidence that the airline's legitimate, nondiscriminatory reason for discharging Hussein (reports that he was drinking in a bar while in uniform in violation of company rules) was pretext for discrimination.

In reaching this decision, the court noted that although Hussein denied that he was drinking or in a bar while in uniform, neither he nor the EEOC presented any evidence to contradict the fact that Reed received a telephone call telling him Hussein was seen in a bar while in uniform. In establishing an issue of fact for trial, the focus is not on whether the employee actually engaged in the conduct of which he is accused but whether the employer's reasons for discharging the employee were pretext for discrimination.

The court also held that the fact that TSA did not follow its progressive discipline policy when it discharged Hussein was not evidence of pretext because the union contract provided that probationary pilots are not entitled to progressive discipline. Additionally, there was evidence that other probationary pilots who were accused of drinking in a bar while in uniform were also discharged without going through the progressive discipline process.

Hussein and the EEOC also argued that discriminatory animus based on Hussein's race, religion, and national origin could be inferred from the timing of his discharge in relation to the September 11 terrorist attacks. The court rejected this argument, noting that there was no evidence that anyone at TSA made negative comments about Hussein's race, religion, or national origin, nor was there any evidence that anyone at TSA spoke against or took action against people of Middle Eastern descent after the September 11 attacks. There was evidence, however, that Reed was not aware of Hussein's race, religion, or national origin when he discharged him. The court held that evidence of the proximity of the discharge in relation to the September 11 attacks did not create an issue for trial regarding whether the reason given for Hussein's discharge was pretext for discrimination. Accordingly, the court granted summary judgment in favor of TSA. ■

SAVE THE DATE:

Ford & Harrison, along with *Aviation Week* magazine, is hosting a seminar -

"Spanning the Globe of Airline Labor & Employment Law"

in New York on Thursday, November 10.

Our lawyers and airline industry labor professionals will discuss the challenging labor and employment issues airlines are facing today. For more information, contact Dori Feinman at 404-888-3987 or dfeinman@fordharrison.com.

FedEx Must Arbitrate Jumpseat Policy

The U.S. Court of Appeals for the District of Columbia has held that FedEx must arbitrate a grievance challenging a unilateral change in its jumpseat policy that caused other carriers to deny jumpseats to FedEx pilots. *See Air Line Pilots Ass'n v. Federal Express Corp.* (April 8, 2005). Prior to the September 11, 2001, terrorist attacks, FedEx permitted pilots from other carriers to "jumpseat"– ride for free using available seats in the cockpit, cabin, or cargo compartment. In return, FedEx pilots were given such privileges on other airlines. Following September 11, a federal security directive prohibited offline jumpseaters from using cockpit seats. Other carriers complied with this directive, but permitted offline pilots to jumpseat in passenger cabins and cargo compartments. However, FedEx decided that, for security reasons, no pilot other than one working for FedEx could jumpseat on FedEx aircraft. As a result, other carriers began denying FedEx pilots reciprocal jumpseat privileges on their aircraft.

In February 2002, the FedEx Pilots Association filed a grievance on behalf of all FedEx pilots, complaining that the company's position on jumpseating conflicted with the collective bargaining agreement and jeopardized the continued existence of FedEx's reciprocal jumpseat agreements. FedEx refused to process the grievance, claiming that the inability of non-FedEx employees to use FedEx jumpseats is in no way related to the terms and conditions of employment of the FedEx pilots.

The union appealed to the System Board of Adjustment and FedEx reiterated its position that the inability of non-FedEx employees to use FedEx jumpseats did not affect the pilots covered by the union contract, but was instead a benefit only to individuals not employed by FedEx and not represented by the union. Thus, according to FedEx, the denial of jumpseat access was not a subject covered by the union contract or the RLA.

The arbitrator ruled that the grievance was within the jurisdiction of the System Board, but noted in his finding that "any ruling I make is not final and binding" and "court action is required if either party refuses to abide by the ruling." When FedEx refused to accept the arbitrator's decision, the union sued in federal court. The federal trial court ruled in favor of FedEx, holding that "the only conclusion to be drawn is that the plaintiff, an association representing non-FedEx pilots, cannot place a properly arbitrable issue before the grievance board."

The Court of Appeals for the District of Columbia reversed the trial court's decision, noting that the trial court apparently thought ALPA was not the FedEx pilots' collective bargaining representative (ALPA became the pilots' representative while the action was pending). The court held that the FedEx Pilots Association, the union that originally filed the grievance, did so on behalf of FedEx pilots in order to preserve the benefits they received from the reciprocal jumpseat agreements. The court further held that it would assume that a favorable resolution of the grievance would promote the interests of the FedEx pilots because they would again enjoy the privilege of traveling for free on the aircraft of other carriers who had reciprocal jumpseat agreements with FedEx. The court noted that the fact that the union's success at arbitration might also assist pilots of other airlines did not affect the analysis of this question. ■

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Recent Election Results

GoJet Airlines

On February 7, 2005, the IBT invoked the services of the NMB to determine who may represent the pilots of GoJet Airlines Inc. At the time the application was received the pilots were represented by IBT through voluntary recognition by the carrier. The NMB determined that a majority of eligible employees in the craft or class of pilots had signed authorization cards authorizing the IBT to represent them for the purposes of the RLA and that the carrier did not object to representation by the IBT. Thus, the NMB certified IBT as the pilots' representative. However, on April 21, 2005, Donald R. Treichler, director of IBT's Airline Division, filed a letter with the NMB requesting revocation of its certification. (Revocation of Certification – April 21, 2005).

Petroleum Helicopters, Inc.

On July 19, 2004, OPEIU filed an application for accretion of Flight Deck Crew Members who are periodically employed outside the territorial jurisdiction of the United States to the craft or class of Flight Deck Crew Members at PHI. On May 10, 2005, the NMB determined that Flight Deck Crew Members employed outside the territorial jurisdiction of the United States are not subject to the RLA and dismissed the case. (Dismissal – May 10, 2005) ■

▸ IME - *continued from pg. 1*

violated the RLA by imposing new working conditions not authorized by the union contract.

The trial court held that the complaint raised a major dispute under the RLA and granted summary judgment to the union. The Sixth Circuit overturned this decision, finding the dispute to be minor. In analyzing the issue, the Sixth Circuit noted that the parties had served Section 6 notices on each other and were in the process of renegotiating the union contract. However, the court held that the expiration of a contract and the filing of Section 6 notices did not automatically require the dispute at issue to be classified as a major dispute.

Additionally, the Sixth Circuit rejected the trial court's determination that the airline's position was not arguably justifiable because the union contract did not explicitly allow ABX to demand an IME, there was no past practice and custom that would establish the requirement of an IME as an implied term, and the airline had other methods to ensure flight safety. The Sixth Circuit held that the fact that the union contract did not explicitly permit ABX to require an IME before allowing a pilot to return to work after disability leave did not, either alone or in conjunction with the trial court's findings on past practice and the availability of other methods to ensure safety, lead to the conclusion that the airline's position was not arguably justifiable. The court held that "unless under the CBA or the law . . . ABX did not even arguably retain discretion to determine the fitness of its pilots to fly, this dispute is a minor one and the district court lacked jurisdiction to review its merits."

ABX argued that neither the union contract nor federal regulations require that the FAA be the sole determiner of when a pilot is fit to fly and that ensuring a pilot is fit to fly is a safety function within the managerial discretion afforded ABX by the implied terms of the union contract. Thus, requiring an IME before a pilot returns to duty following disability leave is an exercise of that discretion.

The court held that the airline's claim that it has the right to require pilots to submit to an IME before returning from disability leave is neither obviously insubstantial or frivolous or made in bad faith, but rather is arguably justified under the terms of the union contract and applicable law. Thus, the issue of whether the union contract permits ABX to require such an IME is a minor issue under the RLA and must be determined by the System Board of Adjustment. ■

Arbitration Award - *continued from pg. 1*

have been promoted to captain, even though he had not undergone captain's training and could not have worked as a captain on that date. The court rejected Pan Am's argument that the Board's decision was ambiguous and that it could not have meant to award the pilot back pay prior to his completion of captain's training because that would have violated several provisions of the union contract. The court held that the Board's decision was not ambiguous, nor did the Board exceed its jurisdiction in deciding that the pilot "should not be penalized for Pan Am's failure to provide him with the opportunity to train for and become a Captain."

The court also affirmed the Board's reduction of Selim's discharge to a ninety-day suspension. The court held, however, that the award of back pay was ambiguous and sent the case back to the Board for clarification.

Here, the Board ordered Selim reinstated with back pay as of January 13, 2002. Pan Am argued that Selim would have been placed on unpaid furlough as of September 12, 2002, like all other pilots with his seniority, and would not have been recalled until June 23, 2003. Thus, the airline argued that Selim should not receive back pay for the period of time he would have been on furlough.

The issue of whether Selim should receive back pay for the furlough period was not raised before the Board, thus the award did not address whether the pilot was to receive pay for this time period. The First Circuit found the award to be ambiguous with regard to how back pay should be calculated in light of the furlough. The union argued that Pan Am forfeited the right to have the Board clarify the award by not raising the issue before the Board originally. The court held that this is an issue of procedural arbitrability, which should be determined by the Board.

Selim also has a lawsuit pending in Florida state court claiming violations of the Florida Civil Rights Act and the Florida Whistleblower Act. In this case, the Florida Fourth District Court of Appeal overturned the trial court's summary judgment order in favor of Pan Am and held that Selim's claims are not barred by res judicada or collateral estoppel, nor are they preempted by the Airline Deregulation Act (ADA) or the RLA.

In finding no res judicada or collateral estoppel, the court relied on the *Gardner-Denver* line of cases and held that the union could not waive the pilot's statutory claims and that the arbitration agreement did not preclude these claims. The court also held that Selim's state law discrimination claims were not preempted by the ADA because they were not related to airline service but instead were "about discrimination in employment on the basis of national origin/race." The court noted that the primary rationale relied upon by courts in concluding that such claims are not preempted by the ADA is "the assumed fact that an employee's race and age have little to do with airline safety or competitive efficiency in the marketplace." Similarly, the court held that Selim's whistleblower claim was not preempted by the ADA because it was too tenuously related to airline service to be preempted.

Finally, the court held that Selim's state law discrimination claims were not preempted by the RLA because "preventing discrimination is not one of the purposes of the RLA" and "Selim's FCRA claims are independent of the interpretation of any terms of the CBA." The court also held that Selim's whistleblower claims were not preempted, relying on the U.S. Supreme Court's decision in *Hawaiian Airlines, Inc. v. Norris*. The Fourth DCA's decision permits Selim to continue with his state court lawsuit, which could subject the airline to liability for compensatory and punitive damages, in addition to any backpay awarded by the arbitrator in his grievance proceeding. ■

AIRLINE MANAGEMENT LETTER

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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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