

U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
(412) 644-5005 (FAX)



Issue Date: 02 July 2007

CASE NO: 2006-AIR-15

In the Matter of:

DAVID LEWIS
Complainant

and

NETJETS LARGE AIRCRAFT, INC. CO., LLC and
BERKSHIRE HATHAWAY, INC.
Respondents

AND

CASE NO: 2006-SOX -97

In the Matter of:

DANIEL D. CARSON
Complainant

v.

NETJETS LARGE AIRCRAFT, INC. CO., LLC and
BERKSHIRE HATHAWAY, INC.
Respondents

**DECISION AND ORDER GRANTING NETJETS
LARGE AIRCRAFT COMPANY, LLC'S
MOTION FOR SUMMARY DECISION**

These cases arise under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) and Section 806 of the Corporate and Criminal Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX) and are presently scheduled for a hearing before the undersigned in Atlanta, GA from August 14-17, 2007. On May 18, 2007

Respondent Netjets Large Aircraft Company, LLC (NJLA) and Berkshire Hathaway, Inc. (Berkshire) filed separate Motions for Summary Decision. The Complainants filed a Memorandum in Opposition to the Motion of NJLA for Summary Decision on June 20, 2007. On June 21, 2007 the complainants filed Unopposed Motion to Dismiss their complaints against Berkshire and to dismiss their complaints under SOX against NJLA. In light of the complainants' Motion to Dismiss their complaints against Berkshire and under Sox will be dismissed and I will only decide NJLA's Motion for Summary Decision under AIR 21.

Summary of Relevant Facts

NJLA is engaged in the management and charter operations of 737-700 IGW Boeing Business Jets (BBJ). Its sister company, NetJets Aviation (NJA), manages and operates eleven types of aircraft. Both firms have separate certificates issued by the Federal Aviation Administration. NJLA and NJA are commonly controlled and are indirect subsidiaries of Berkshire. Berkshire maintains an ethics hotline whereby its employees and the employees of its subsidiaries may make complaints about legal and ethical violations. All pilots, whether they fly aircraft operated under NJLA's certificate or NJA's certificates are NJA pilots. NJA employs the pilots who are members of the bargaining unit, whether they fly aircraft operating under NJA's FAA certificates or whether they fly aircraft operating under NJLA's FAA certificates.

Although NJLA and NJA are separately incorporated, they both essentially run as divisions of an umbrella parent corporation, NetJets, Inc. NJLA identifies the BBJ fleet and holds the Boeing 737 Air Carrier Certificate for NetJets, Inc. All administrative, operational and support functions essential to the operation of NJLA were provided by NetJets, Inc., NJA, Netjets Services, or another related NetJets entities. During the pertinent time, customer service, flight planning and dispatch services, scheduling, distribution of records, payroll, benefits, and management of other personnel and security matters such as TSA compliance, drug screening, initial hiring, duty records, vacation, sick leave, transfers, and non-aircraft training were provided to all NetJets affiliates without regard to corporate boundaries.

The different NetJets fleets shared customers and provided backup to each other as needed and aircraft availability dictated. When a pilot moves from aircraft operated under the NJA certificates to aircraft operating under the NJLA certificate there is no new waiting period before an employee can use the contractual grievance process. Pilots are allowed to move from one type of aircraft to another type whether the aircraft operates under the NJA certificates or the NJLA certificates.

While NJLA has its own chief pilot (paid by NJA), each fleet by aircraft type operated by NJA also has its own chief pilot. The necessity to have multiple chief pilots arises from the aircraft type, not any corporate separation. Both the chief NJLA pilot and the chief NJA pilot maintained their offices at the NJA facility in Columbus, Ohio. Meetings between representative of the union and NJLA management relating to disciplinary matters take place at NJA's office in Columbus. Certain pilots and flight attendants hired by NJA are assigned to NJLA to operate BBJ aircraft exclusively. Even though these pilots and flight attendants are employees of NJA, they are under the operational control of NJLA during the period of assignment. NJLA and NJA jointly train and direct the training for NJA employees assigned to the BBJ aircraft. NJLA does

not have its own payroll; paychecks are issued to NJA employees on checks noting that they are payable by NJA and its subsidiaries.

Complainant Carson was hired by NJA on November 5, 2001. He was initially assigned as a captain to NJLA and was subsequently promoted to Director of Training for NJLA. Complainant Lewis was hired by NJA on December 11, 2000, initially assigned as a captain to NJLA, and subsequently joined the NJLA management team as Chief Pilot. In mid-December 2004, a BBJ aircraft with tail number N156QS flew a passenger trip from the Maldives to Moscow with a refueling stop at Ankara, Turkey. The flight crew was composed of Mark Atterbury, Captain Michael Matoon, and First Officer Robert Fretz. While in Moscow the crew experienced an intermittent problem with the right engine igniter. The right engine was shut down and a second start was attempted using both igniters which was successful. Although the aircraft was flown without incident from Moscow to Luton, England, it was flown without meeting the Minimum Equipment List (MEL) requirements specified by the manufacturer and in violation of several FAA regulations.

Flying the 737 BBJ with the right engine igniter inoperative is unsafe and the aircraft did not meet the MEL. Repair of the right engine igniter is not deferrable as in the event of an engine failure, it is the only way to restart an engine. There is a potential to lose power and force an emergency landing. The fact that the right engine igniter failed to start on a later flight indicates that it was faulty. The BBJ flown from Moscow to Luton was not airworthy because of the inoperable right engine igniter.

On or about December 28, 2004, Carson was informed by an NJA pilot of the unsafe manner in which the Moscow to Luton flight was made. On the same day Carson filed an oral complaint with Steven Galett, NJLA's President regarding the flight and Mark Atterbury's falsification of training records. Carson told Galett that this information should be brought to the attention of the FAA. Between December 29, 2004 and January 18, 2005, Carson approached Galett several times telling him that NJLA should report to the FAA regarding Atterbury's falsification of training records and the unsafe flight from Moscow to Luton. Galett refused to inform the FAA and told Carson that he could cover up the incident.

On January 17, 2005 an anonymous call was placed by Carson to the Berkshire hotline regarding the Moscow to Luton flight. He also related Galett's failure to disclose the unsafe flight to the FAA. On January 18, 2005, Lewis made an anonymous call to the Berkshire hotline regarding the Moscow to Luton flight, and in a subsequent anonymous call to the hotline, Lewis reported Atterbury's attempt to falsify training records. NJA referred the hotline complaints to William Boisture, the President of NJA, who requested that David MacGhee, Executive Vice President of Flight Operations, conduct a fact-finding review of NJLA's flight operations, safety, maintenance, and training. On or about January 20, 2005, Carson met with Boisture at his office in Columbus, OH to inform him of the illegal and unsafe operations within NJLA. Boisture introduced Carson to MacGhee and told him to cooperate with MacGhee in his internal investigation.

Carson met with Boisture and MacGhee approximately one dozen times in Columbus, OH., but most of the meetings were only with MacGhee. During the meetings, Carson continued

to outline Atterbury's illegal activities and Galett's attempts to cover them up. Carson and Lewis provided MacGhee with many documents and oral information about the illegal activities of Atterbury and Galett. Carson and Lewis provided MacGhee with names of individuals that he could call or bring in as witnesses of the unsafe practices of Galett and Atterbury.

Although the complaints of Carson and Lewis to the hotline were anonymous, anyone at NJA or NJLA who knew of the complaints would know from the nature of the complaints that they had been made by Carson and Lewis. Carson's position as Director of Training and Lewis's position as Chief Pilot put them in unique positions to know of these matters and to be able to ascertain the truth of these matters. They also disclosed to Boisture, Galett, and MacGhee that it was they who had called the Berkshire hotline.

MacGhee completed his review on March 14, 2005 and forwarded his findings to Boisture. Boisture discussed the Moscow to Luton flight with Galett who later issued a written reprimand to Atterbury regarding the flight and the inoperable engine igniter. Boisture later disclosed the results of the investigation of NJLA to NJLA management. On March 11, 2005, Galett met privately with Carson and Lewis and told them he knew what they had done and that they had almost killed the Boeing program. He told them that he would be watching them closely and he revoked some of their management privileges and reduced their authority. Galett told Carson not to speak to the FAA and told him that he would be reporting to Atterbury.

On March 11, 2005, Carson and Lewis submitted their resignations to Boisture which were accepted. They indicated that they would return to duty as line pilots. Ultimately Carson and Lewis were assigned to the Hawker 800XP aircraft and reported to Chief Pilot, Dave McCormick, who reported to Gary Hart, Vice President of Flight Operations/Director of Operations. Carson and Lewis underwent training to fly the Hawker aircraft. Lewis attempted to obtain a medical leave of absence from NJA due to his back problems. His back problems made it difficult for him to fly the cramped Hawker aircraft and to perform the required duties, but they did not prevent him from flying the larger Boeing planes flown by Vision Airlines. Carson and Lewis began flying for Vision Airlines in the summer of 2005. Flying for other commercial airlines while employed by NJA is permitted by the contract and recognized in the Flight Operations Manual. The flying of Carson and Lewis for Vision Airlines was not competitive with the operations of NJLA or NJA because it was pursuant to a contract with the United States Government in support of military operations.

On September 21, 2005 NJA Director of Security Jeff Parson received an anonymous phone call stating that Carson and Lewis were flying for another airline while employed by NJA. The caller provided Parson with information concerning the flying activity of Carson and Lewis while simultaneously employed by NJA. MacGhee ordered that an outside investigator be hired to investigate Carson and Lewis' flying for another airline. The investigation was conducted from September 27 to October 7, 2005 by Irwin Cohen. Cohen contacted Hart on or about October 4, 2005 requesting information regarding whether pilots are obligated to report commercial flying they performed for other carriers. The following day Cohen contacted Hart to inform him that he was investigating Carson and Lewis. He requested that Hart provide him Carson and Lewis' employment status with NJA on the July and August dates that the Premier flight logs indicated that they were flying for that carrier. Cohen also wanted to know if Carson

and Lewis had notified NJA personnel that they were flying for another company. On October 6, 2005, Hart advised Cohen that a review of NJA's operations documents and records had found no evidence that either Carson or Lewis had ever submitted any "other commercial flying report" as required by the FOM corresponding with the dates the Premier flight logs show that they also flew as Premier pilots.

On October 14, 2005, McCormick notified Carson and Lewis that they needed to travel to NJA headquarters in Columbus for an interview on October 17, 2005 regarding discrepancies in their sick leave. The meeting did not take place but on November 4, 2005, McCormick phoned Carson and Lewis informing of the decision to discharge them and to give them an opportunity to resign. Carson asked McCormick about the reason that he had been asked to resign and McCormick responded that Carson's "sick leave was not in keeping that [he] was out flying and [he] didn't report [his] flying time." Termination notices were sent to Carson and Lewis on November 7, 2005.

Conclusions of Law

Section 42121 (a) of AIR 21 provides that:

No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee)or any person acting pursuant to a request of the employer)—

- (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of the Federal law relating to air carrier safety under this subtitle [49 USC §§ 40101 *et seq*] or any other law of the United States;

The standard for granting summary decision in whistleblower cases is the same as for summary judgment under the analogous Fed. R. Civ. P 56(e). Summary decision is appropriate if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision as a matter of law. If the non-moving party fails to show an element essential to his case, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Fullington v. AVSEC Services, LLC*, ARB No 04-019, slip opinion at 8 (ARB Oct. 26, 2005). See *Anderson v. Liberty Lobby*, 477 U. S. 242, 256-257 (1986). The determination of whether a genuine issue of material fact exists must be made in the light most favorable to the non-moving party. *Agristor Leasing v. Farrow*, 826 F. 2d 732, 734 (8th Cir. 1987)

As part of its *prima facie* case, a complainant in an Air 21 proceeding must show that the person making the adverse employment decision had knowledge of the protected activity. *Gary*

v Chataqua Airlines, ARB Case No. 04-112, ALJ Case No 2003-AIR-38 (ARB Jan 31, 2006). Assuming that the complainants engaged in protected activity and construing the facts in favor of the complainants, I find that the individual who terminated the complainants' employment, Gary Hart, did not know of complainants' protected activity. Carson and Lewis made oral complaints to Steven Galett, NJLA's President, regarding the failed engine igniter on the Moscow to Luton flight. They also made anonymous complaints on the Berkshire hotline. Although these complaints were conveyed to Boisture, there is no evidence that Boisture or MacGhee discussed them with Hart. Although in their response to the motion, the complainant's raise several theories as to how Hart could have gained knowledge of their protected activity, such a suggestion is pure conjecture as there is no evidence that Hart knew of the complainants' protected activity.

Even if I were to conclude that Hart did know of the Complainants' activities, the evidence clearly shows that they were not terminated because of their protected activity and that they would have been terminated in the absence of the protected activity. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2002-AIR-3 (ARB Jan 30, 2004). Complainants made their complaints about the Moscow to Luton flight in December 2004. They were not terminated until November 2005, a gap of eleven months, which undermines any inference that the termination was motivated by their complaints. Even more significant were the intervening events that occurred between the complainants' protected activity and their termination. The complainants were piloting planes for another air carrier while they reported to NJA that they were sick or injured. They did not report these extracurricular activities to NJA and were found out, ironically, by the reports of a whistleblower. The complainants' terminations were not accomplished in a precipitous or rash manner that would suggest that their employment by another carrier was a mere pretext for their firing and that the real reason was their protected activity. NJA authorized an investigation of complainants' activities using an outside investigator which confirmed the whistleblower's allegations, set up meetings which the complainants did not attend, and did not terminate them until two months after their outside activity was brought to its attention. It is irrelevant whether complainants' employment with another carrier is in violation of the FOM or whether it justified their dismissal. What is clear is that their terminations had nothing to do with their protected activity. I find that the complainants' protected activity was not a contributing factor in the decision to terminate them. *See Robinson v. Northwest Airlines, Inc.*, 2003-AIR-22 (ARB Nov. 30, 2005).

IT IS ORDERED THAT:

- (1) Complainants' Motion to Dismiss claims as to Respondent Berkshire Hathaway, Inc. and to Dismiss Claims under Sarbanes-Oxley Act against NetJets Large Aircraft, LLC. Is GRANTED;
- (2) Respondent NetJets Large Aircraft Company, LLC's Motion for Summary Decision is GRANTED and the complaints under the AIR 21 statute are DISMISSED; and
- (3) The hearing in this matter scheduled to begin on August 14, 2007, in Atlanta, Georgia, is hereby CANCELLED.

A
DANIEL L. LELAND
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge’s decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

If no Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).