



**Issue Date: 15 October 2009**

CASE NO.: 2009-AIR-00017

In the Matter of

PAUL LUCIA,

Complainant,

v.

AMERICAN AIRLINES, INC.,

Respondent.

**DECISION AND ORDER DISMISSING COMPLAINT  
AND CANCELLING FORMAL HEARING**

This matter arises from a complaint filed under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (AIR 21), 49 USC 42121. It is subject to the federal regulations set forth at 29 CFR Part 1979. The current complaint was filed on October 10, 2008, and found to be without merit by the Regional Administrator, Occupational Safety and Health Administration on April 8, 2009. On May 12, 2009, Complainant requested a formal hearing pursuant to 29 CFR Part 1979. The case is scheduled for formal hearing in Ft. Lauderdale, Florida, commencing at 9:00 AM, Monday, October 26, 2009.

On May 29, 2009, a prehearing conference call was held with counsel for both Parties related to this case and two similar fact-based cases arising out of the Miami, Florida, area. Counsel identified six similar fact based cases pending with three other Administrative Law Judges, one had been withdrawn and the remaining five were scheduled to commence hearings between August 18, 2009, and October 19, 2009. By Order of June 8, 2009, this case was scheduled for formal hearing in Ft. Lauderdale, Florida, commencing at 9:00 AM, Monday, October 26, 2009.

By facsimile transmission of September 21, 2009, Complainant's counsel filed a pre-hearing statement broadly identifying witnesses and exhibits. On September 24, 2009, Respondent's counsel filed, by facsimile transmission, a request to stay the proceedings in this case and reported that the same issues and fact pattern before this Administrative Law Judge is now pending before an arbitration panel as part of an Allied Pilots Association collective bargaining union grievance based complaint against Respondent. Respondent's counsel argued that a

favorable decision for the Complainant in arbitration will result in the current case being withdrawn. This implies that if Complainant is not satisfied with the result of the union based arbitration, Complainant will go forward with the current cause of action. Complaint's counsel failed to respond to Respondent's motion to stay the proceedings or continue the scheduled hearing, despite oral representations to officers of the Court that a written response would be submitted. It is noted that Complainant's counsel uses Allied Pilots Association letterhead for her correspondence with the Court.

By Order of October 2, 2009, the Parties were directed to show cause why the case should not be dismissed due to the election of the Parties to treat the complaint as a labor-management dispute and not a *bona fide* air transportation safety based complaint.

### **Position of the Parties**

#### *Complainant's Position:*

Complainant's counsel filed her response on October 8, 2009. She asserts "that there is no basis in fact or law for the Court to dismiss the above captioned AIR 21" case. Complainant's counsel reports that the Respondent implemented the "Frequency/Pattern Sick Policy (FPP)" in 2007 and "has never provided a copy of the FPP to the pilots or to the pilots' representative agent, the Allied Pilots Association." She states that the Allied Pilots Association "filed a Hill Presidential Grievance on July 9, 2007, objecting to the FPP on the ground that the FPP violated [specific sections] of the collective bargaining agreement and past practices established between the parties. ... As of this writing, the Hill Presidential was arbitrated before the System Board of Adjustment, closing briefs were filed, and the System Members are in the process of deciding the outcome of the grievance. As individual pilots had pay docked under the FPP, [the Allied Pilots Association] filed individual grievances for each pilot objecting to the discipline imposed by the [Respondent] in connection with the FPP. [An AIR 21 complaint was not asserted in the individual grievance.] To date, those grievances have not been arbitrated."

Complainant's counsel argues that the doctrine of "complete preemption" does not apply in this case because there is no state law<sup>1</sup> in this matter and pursuing a grievance pursuant to the Railway Labor Act under a collective bargaining agreement does not preempt relief under the AIR 21 statute. She cites three whistleblower statutes, the Surface Transportation Assistance Act (STAA), 49 USC §31105; the Energy Reorganization Act of 1974 (ERA), 42 USC §5851; and the Clean Air Act (CAA), 42 USC §7622, for the proposition that whistleblower complaints are permitted to proceed because arbitration under a collective bargaining agreement does not deprive the Department of Labor of jurisdiction under AIR 21 statutes. She cited three supporting cases which were contradicted in federal court proceedings in other jurisdictions.

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<sup>1</sup> This case arose in Miami, Florida. Florida has a state whistleblower statute that has been found by this Administrative Law Judge to be completely preempted by the AIR 21 statute in an unrelated case that did not involve the Railway Labor Act.

*Respondent's Position:*

Respondent's counsel filed his response on October 9, 2009. Respondent submits that the complaint is not a complaint related to aviation safety but rather a grievance "under the long-standing Labor Agreement between [the Respondent] and [the Complainant's] union, the Allied Pilots Association [in which] the Labor Agreement specifies how pilots earn and may use accrued sick leave [and] includes a dispute resolution process to resolve disagreements over these terms", thus requiring dismissal for failure to state an aviation transportation safety claim upon which the Court may grant relief.

Respondent's counsel reports that "in 2006 and 2007, [Respondent] instituted new practices relating to pilots' collection of sick pay in certain circumstances: pilots who (a) were out sick 30 or more days, or (b) demonstrated unusually frequent or a suspicious pattern of paid sick leave use, were asked to submit medical documentation substantiating the illness or injury necessitating leave" known as "F/P cases." The President of the Allied Pilots Association filed a "presidential grievance" challenging the medical substantiation requirements for pilots who reported out sick for more than 30 days and for other pilots with less than a 30-day period of sick leave. Both grievances have gone to hearing before an arbitration panel. Those cases involving the more than 30-day sick leave periods have been decided by the arbitration panel to the effect that paid sick leave could not be withheld from pilots "based solely on their failure to provide past medical records to substantiate their claimed sickness, but [the airlines] could conduct full physical examinations of pilots [under the collective bargaining agreement] ... and based on the results of such exams could conduct an investigation and withhold sick pay or impose discipline" under the collective bargaining agreement. Those cases involving "F/P" cases", such as the Complainant's May 5, 2008, sick leave claim, have not yet been decided by the arbitration panel.

Respondent's counsel submits that the U.S. Supreme Court has declared that "Congress designed a comprehensive process for resolution of labor disputes in the aviation industry through the Railway Labor Act, 45 USC §151 et seq. ... [in order to] provide a framework for peaceful settlement of labor disputes between carriers and their employees ... [which] is achieved by ensuring that grievance and arbitration decisions shall be final and binding on both parties to the dispute."<sup>2</sup> He submits that decisions of the U.S. Supreme Court indicate that "the history and purpose of the Railway Labor Act [is] also intended to leave a minimum responsibility to the courts."<sup>3</sup>

Respondent's counsel argues that the Claimant's dispute is solely the reclassification of his May 5, 2008 sick leave from paid to unpaid status and that such a dispute "centers on collective bargaining agreement obligations [and] the Allied Pilots Association cannot sidestep the labor dispute resolution process by claiming the [Complainant's] case present some ancillary aviation safety issue that brings AIR 21 into play." He argues that the Complainant complied with federal aviation safety requirements by calling out sick and that requiring substantiation of such illness is also not a federal aviation safety requirement, so that the Complainant has no recourse under the AIR 21 Act.

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<sup>2</sup> *Union Pacific R.R. v. Price*, 360 US 601, 609 (1959)

<sup>3</sup> *Order of Railway Conductors v. Pitney*, 326 US 561, 566 (1946)

## **Agreed Facts**

From their respective filings, the Parties agree that the Complainant was a pilot for the Respondent, was based in Miami, Florida, at the time of the complained actions, and has been in a position covered by the collective bargaining agreement between Respondent and the Allied Pilots Association. The Complainant was scheduled to perform duties as a pilot for the Respondent on May 5, 2008, but called his supervisor that stated he was sick and could not perform the scheduled flight duties. The Complainant did not perform duties for Respondent as a flight crew pilot on May 5, 2008. The Complainant was not directed by Respondent to perform duties as a flight pilot on May 5, 2008.

By letter dated May 19, 2008, the Complainant was directed to submit medical documentation to substantiate his illness or injury for the use of sick leave per written notice to him dated April 25, 2008, which set forth the steps to substantiate use of sick leave. The Complainant failed to submit the requested medical documentation.

By letter dated July 15, 2008, the Complainant was advised that his 7 hours and 40 minutes of sick leave submitted for May 5, 2008, was being converted to unpaid leave and that the pay received for May 5, 2008, in the amount of \$1,419.64, would be recouped from his July 25, 2008 paycheck. The Allied Pilots Association added a grievance on behalf of the Complainant for Respondent's action of changing the May 5, 2008, sick leave from paid to unpaid status with the then pending arbitration. The Complainant filed his own AIR 21 complaint, through Allied Pilots Association counsel, on October 10, 2008, alleging that the Respondent retaliated against him for calling in sick rather than flying an aircraft in violation of Federal Aviation Regulation 61.53.<sup>4</sup>

## **Additional Findings of Fact**

After review of the documents submitted by counsel, the following findings of fact are entered:

1. On or about April 23, 2008, Complainant was counseled in a telephone conversation by the Chief Pilot for Respondent in Miami, Florida, that his pattern of sick leave use would be monitored and he would be asked to submit medical documentation to substantiate future illness if paid sick leave was declared by Complainant.
2. The April 23, 2008, counseling was memorialized in a April 25, 2008, letter to Complainant which contained a reference list of medical resources, a Medical Certificate form to substantiate illness or injury, and detailed steps that would be utilized should Complainant be asked to substantiate future absence for paid sick leave.

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<sup>4</sup> FAR 61.53 prohibits a person required to hold a current aviation medical certificate from acting as a command pilot or as a required flight crew pilot while that person is taking medication, receiving treatment or has a medical condition that results in that person being unable to meet the requirements for the medical certificate necessary for pilot operations.

3. Requiring pilots to supply medical documentation to support the pilot's use of sick leave is not a violation of Federal Aviation Administration standards.
4. The Complainant's failure to submit substantiation of his illness or injury on May 5, 2008, was the basis of the Respondent changing the requested sick leave from paid to unpaid status directly leading to recoupment of \$1,419.64 from the Complainant's May 25, 2008, pay period and is the basis for Complainant's grievance pending before arbitration.
5. The failure to submit substantiation of illness or injury for use in evaluating the propriety of paid versus unpaid sick leave is not protected activity under AIR 21 statute and regulations.

### **Discussion**

Protections under the AIR 21 statute and its implementing federal regulations are part of U.S. Code, Title 49, Subtitle VII, Part A, provisions for aviation commerce and safety and require that assertions of "whistleblower" actions by employees against commercial air carriers must be filed initially with the Department of Labor. The federal regulations provide for an appeal to a formal hearing before an administrative law judge, subsequent appeal to the Administrative Review Board, and appeal of the final Agency decision to the U.S. Court of Appeals within which the cause of action arose. 49 USC §42121(b)

Complainant's election to proceed with binding arbitration under the Air Transport Labor Act precludes his proceeding under AIR 21 whistleblower provisions.

The AIR 21 statute specifically limits collateral attack on a final Order issued by an administrative law judge or the Administrative Review Board under the aviation whistleblower protection program. The statutory provision in U.S. Code, Title 49 [Transportation], Subtitle VII [Aviation Programs], Chapter 421 [Labor-Management Provisions], Subchapter III [Whistleblower Protection Program], at 49 USC §42121(b)(4)(B) provides:

“(B) LIMITATION ON COLLATERAL ATTACK. – An order of the Secretary of Labor with respect to which review could have been obtained under subparagraph (A)<sup>5</sup> shall not be subject to judicial review in any criminal or other civil proceeding.”

In the statutory section immediately preceding the provision for the Whistleblower Protection Program, federal statutes requires air carriers to comply with the provisions of Title II of the Railway Labor Act, 49 USC §42112. Subchapter II of Chapter 8 [Railway Labor] in U.S. Code, Title 45 [Railroads] sets forth the provisions that apply to air carriers. Subchapter II, §181 provides that all the provisions of Subchapter I related to railroad labor applies to common air

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<sup>5</sup> Subparagraph (A) provides for appeal of a final Order under the AIR 21 whistleblower protection program to be appealed to an appropriate U.S. Court of Appeals.

carriers, except the provision for the National Railroad Adjustment Board in 45 USC §153. Accordingly, the congressional purpose of the labor-management provisions set forth in 45 USC §151a to “provide for prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions” and “to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of interpretation or application of agreements covering rates of pay, rules, or working conditions” applies to the Parties in this case. The statute provides for settlement of covered disputes through conference, mediation and arbitration. Where arbitration is selected, the arbitration award is filed in the U.S. District Court and “shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless [impeached in U.S. District Court on limited grounds or appealed to the U.S. Court of Appeals] ... the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.” 45 USC §159.

Unlike the Surface Transportation Assistance Act and the Energy Reorganization Act referenced by Complainant’s counsel in her argument, AIR 21 has no provision allowing for a complainant to proceed in a retaliation complaint under separate collective bargaining rights or for removal of the complainant from the Department of Labor to the U.S. District Court if the Secretary has not taken final action within a specific number of days of the whistleblower complaint.<sup>6</sup> The Clean Air Act referenced by Claimant’s counsel, is also silent on those two areas; however, the case relied upon by the Claimant’s counsel was an Administrative Law Judge level interpretation that an employee proceeding with a grievance under the Civil Service Reform Act of 1978 was not precluded from pursuing a retaliation complaint under the Clean Air Act.<sup>7</sup> However, the Civil Service Reform Act at 5 USC §7121(a)(1), (d) and (g), makes it clear that the employee must elect to proceed under either the collective bargaining agreement provisions or the federal statutory provisions of related Acts dealing with discriminatory actions against employees, but may not proceed under both.

Under the facts of this case, the Complainant has his complaint regarding the Respondent’s change of his claimed May 5, 2008, sick leave from paid sick leave to unpaid sick leave, before an arbitration panel under Title 45 of the U.S. Code. That arbitration panel has completed its

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<sup>6</sup> Surface Transportation Assistance Act (STAA) specifically provides for proceeding in arbitration under collective bargaining agreements and the deferral of Department of Labor proceedings following specific case-by-case evaluation, 29 CFR §1978.112(a) and (c). Additionally, the STAA provides for a complainant to remove a complaint under the STAA to U.S. District Court if final action has not been taken by the Secretary within 210 days of the complaint filing date and specifically provides that the STAA provisions do not preempt any right available to an employee under state or Federal law to redress a discharge or other discriminatory action, 49 USC §31105(c), (f) and (g).

The Energy Reorganization Act (ERA) specifically provides for a complainant to remove a complaint under the ERA to U.S. District Court if final action has not been taken by the Secretary within one year of the complaint filing date, 29 CFR §24.114(a). The ERA also specifically provides that the ERA provisions do not preempt any right available to an employee under state or Federal law to redress a discharge or other discriminatory action, 42 USC §5851(h).

<sup>7</sup> Claimant’s counsel cited *Kaufman v. U.S. Environmental Protection Agency*, ALJ case No. 2002-CAA-22 (Sept. 30, 2002). In the “Order Granting Partial Summary Decision”, the Administrative Law Judge looked at the legislative history of the Civil Service Reform Act of 1978 as well as whistleblower protection statutes and concluded that the Congressional intent was that the Civil Service Reform Act was not to limit any right or remedy which might be available under any other statute including whistleblower protection statutes.

hearing and is in deliberations. His requested relief of reinstatement of paid status for May 5, 2008, will be either granted or denied by the panel. The Complainant has also filed the current complaint under the AIR 21 whistleblower protection program seeking reinstatement of his paid status for the May 5, 2008, sick leave period. In the current case, a hearing is scheduled for the near future and a decision would normally be entered granting or denying the reinstatement of the May 5, 2008, paid status. While the fact pattern involved in the arbitration and whistleblower complaint are the same, it is possible that the results of the arbitration panel and this Administrative Law Judge could be apposite. Such findings cannot exist since the AIR 21 order cannot be collaterally attacked in any other civil action and the arbitration award is conclusive and binding on the parties when entered by the U.S. District Court. As noted above, there is no provision to remove an AIR 21 case directly to U.S. District Court for fact finding and determination, an action which would permit the decisions under arbitration and whistleblower protection to be aligned. In order to ensure judicial integrity in the final determination, the Complainant must, similar to the Civil Service Reform Act, elect to proceed under either the federally provided collective bargaining agreement provisions of U.S. Code, Title 45, Subchapter I, or the federal whistleblower provisions of U.S. Code, Title 49, Part A, Subpart I, Chapter 421.

By the actions of Complainant's labor representatives in pursuing the issues in this case through a grievance procedure provided under a collective bargaining agreement, the Complainant has effectively declared that his complaint is related to wage and working conditions and not to public air transportation safety and has effectively elected to proceed under the provisions of 45 USC §157 and not 49 USC §42121. Accordingly, his complaint filed under 49 USC §42121 must be dismissed.

## ORDER

In view of the foregoing, **IT IS ORDERED** that the **Complainant is DISMISSED** and the **formal hearing** set to commence Monday, October 26, 2009, is **CANCELLED**.

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ALAN L. BERGSTROM  
Administrative Law Judge

ALB/jcb

**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, Suite S-5220, 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).