



Issue Date: 02 July 2010

CASE No: 2010-AIR-00018

In the Matter of:

BRYAN LAWSON, *pro se*,

Complainant,

v.

DUNCAN WILKES ACQUISITION,  
d/b/a DOVE AIR, INC.,

Respondent.

**DECISION AND ORDER – GRANTING RESPONDENT’S MOTION FOR SUMMARY  
DECISION AND DISMISSING COMPLAINT  
AND  
ORDER CANCELLING SCHEDULED FORMAL HEARING**

The above matter is a complaint of employment discrimination under Section 42121 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (AIR-21 Act), 49 USC §42141 as implemented by federal regulations set forth in 29 CFR Part 1979. The case has been referred to the Office of Administrative Law Judges for formal hearing upon the March 26, 2010 request of the Complainant regarding the Occupational Safety and Health Administration March 9, 2010, determination that the Respondent was “not a person within the meaning of Sections 40102 and 42121(e) of the Act.” A formal hearing in this matter is scheduled for Tuesday, 9:00 AM, July 27, 2010, in Winston-Salem, North Carolina, before this Administrative Law Judge.

A conference call to set a formal hearing date was held of April 29, 2010, with the Complainant (*pro se*) and Respondent’s non-attorney representatives. During the conference call the “Advice to Participants (Party) without representation” and the seven initially identified issues in the case, as subsequently set forth in the May 4, 2010, “Notice of Hearing, Rights and Scheduling Order”, were verbally set forth for the participants. At the close of the conference call, the formal hearing was set for 9:00 AM, Tuesday, July 27, 2010, in Winston-Salem, North Carolina.

On May 26, 2010, Respondent’s counsel filed his appearance and a Motion for Summary Decision by facsimile transmission. The original documents were filed on May 28, 2010.

Respondent's counsel submits that "Dove Air is not covered by the whistleblower provision of the Wendell H. Ford Aviation and Investment and Reform Act for the 21<sup>st</sup> Century ('AIR 21'), which is codified at 49 U.S.C. §42121(a), because Dove Air is neither an 'air carrier,' nor the contractor or subcontractor of an air carrier." He seeks to have the complaint dismissed with prejudice. The Complainant has not filed a response to the Motion.

## **STATUTORY AND REGULATORY PROVISIONS**

The AIR-21 Act sets forth the whistleblower portion of the Act at 49 USC §42141(a) as:

"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 employee) .... [engaged in any one or more of four specified protected activities relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety]."

The AIR-21 Act at 49 USC §40102(a) defines:

"(2) 'Air carrier' means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation."

"(15) 'citizen of the United States' means (A) an individual who is a citizen of the United States; (B) a partnership each of whose partners is an individual who is a citizen of the United States; or (C) a corporation or association organized under the laws of the United States or a State ... of which at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States."

"(5) 'Air transportation' means foreign air transportation, interstate air transportation, or the transportation of mail by aircraft."

"(23) 'foreign air transportation' means the transportation of passengers or property by aircraft for compensation, the transportation of mail by aircraft, or the operation of aircraft in furthering a business or vocation, between a place in the United States and a place outside the United States when any part of the transportation or operation is by aircraft."

"(25) 'interstate air transportation' means the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft - (A) between a place in - (i) a State, territory, or possession of

the United States and a place in the District of Columbia or another State, territory or possession of the United States; (ii) Hawaii and another place in Hawaii through the airspace over a place outside Hawaii; (iii) the District of Columbia and another place in the District of Columbia; or (iv) a territory or possession of the United States and another place in the same territory or possession; and (B) when any part of the transportation is by aircraft.”

“(30) ‘mail’ means United States mail and foreign transit mail.”

Implementing federal regulations at 29 CFR §1979.101 repeat the statutory definition of “air carrier” and further defines the terms “contractor”, “employee” and “person” as those terms are used under the whistleblower portion of the AIR-21 Act. Specifically,

“Contractor means a company that performs safety-sensitive functions by contract for an air carrier.”

“Employee means an individual presently or formerly working for an air carrier or contractor or subcontractor of an air carrier, an individual applying to work for an air carrier or contractor or subcontractor of an air carrier, or an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier.”

“Person means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any group of persons.”

The term “common carrier” is not defined by statute or regulation as the term relates to the aviation industry. The Federal Aviation Authority defined the guidelines for determining status as a “common carrier” in aviation in Advisory Circular No. 120-12, “Private Carriage verses Common Carriage of Persons or Property”, on April 24, 1986. Those guidelines provided:

“A carrier becomes a common carrier when it ‘holds itself out’ to the public, or to a segment of the public, as willing to furnish transportation within the limits of its facilities to any person who wants it. ... There are four elements in defining a common carrier; (1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation.”

The federal courts have addressed the term “common carrier” within the aviation industry since 1927.<sup>1</sup> The objective test for whether an air carrier is a “common carrier” under the AIR-21 Act is whether the air carrier (1) has held itself out to the public, or a definable segment of the public, as (2) being willing to transport persons or property (3) for hire (4) on an indiscriminate basis.

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<sup>1</sup> *Washington ex rel. Stimpson Lumber Co. v. Kuykendall*, 48 S.Ct. 41 (1927); *Weade v. Dichmann, Wright & Pugh, Inc.*, 69 S.Ct. 1326 (1949); *Las Vegas Hacienda, Inc. v. Civil Aeronautics Board*, 298 F.2d 430 (9<sup>th</sup> Cir. 1962), *cert. denied*, 82 S.Ct. 1158 (1962); *M&R Inv. Co. v. Civil Aeronautics Board*, 308 F.2d 49 (9<sup>th</sup> Cir. 1962); *United States v. Smith*, 215 F.2d 217 (6<sup>th</sup> Cir. 1954); *Woolsey v. National Transportation Safety Board*, 993 F.2d 516 (5<sup>th</sup> Cir. 1993); *Valdivieso v. Atlas Air, Inc.*, 305 F.3d 1283 (11<sup>th</sup> Cir. 2002); *Thibodeaux v. Executive Jet International, Inc.*, 328 F.3d 742 (5<sup>th</sup> Cir. 2003); *Med-Trans Corp. v. Benton*, 581 F. Supp. 2d 721 (E.D.N.C. 2008)

“What is crucial is that the common carrier defines itself through its own marketing efforts as being willing to carry members of [the public or] that segment of the public which it serves.” *Woolsey v. National Transportation Safety Board*, 993 F.2d 516, 524 (5<sup>th</sup> Cir. 1993); also *Thibodeaux v. Executive Jet International, Inc.*, 328 F.3d 724, 753 (5<sup>th</sup> Cir. 2003) citing *Woolsey*. A common carrier must serve all persons who apply for the transportation offered to the public, or identifiable segment thereof, in the same manner. See *Med-Trans Corp. v. Benton*, 581 F. Supp. 2d 721, 733 (E.D.N.C. 2008) and the cases cited therein.

## DISCUSSION

The Complainant alleges his employment as an aviation technician performing inspections and maintenance on aircraft was terminated by the Respondent on January 11, 2010, because he “brought up a safety issue [involving the condition of the vertical to horizontal stabilizer attachment points on a specific aircraft] that morning and stated that the FAA might need to get involved.”<sup>2</sup> He seeks remedies set forth under the AIR-21 Act.

Respondent submits that it is not subject to the AIR-21 Act since it is not an “air carrier” as defined by the Act. Respondent seeks to have the complaint dismissed with prejudice. To support the Motion for Summary Decision, Respondent has submitted the declaration of Joseph W. Duncan. The Complainant has not provided additional evidence to consider on the Motion for Summary Decision.

### *a. Summary of relevant evidence.*

On May 25, 2010, J.W. Duncan declared in writing and under penalty of perjury, that he and his wife are the sole owners of Dove Air, Inc., and Duncan Wilkes Acquisitions, L.L.C., located in North Carolina, and that he is the President of Dove Air, Inc., and manager of Duncan Wilkes Acquisitions, L.L.C.. He reports that neither company has a FAR Part 135 certificate to charter aircraft, neither company transports passengers, goods or mail for hire in any aircraft owned by Dove Air, Inc., neither company contracts or subcontracts with air carriers for any purpose, neither company leases or otherwise contracts to provide their aircraft to air carriers for the use of air carriers in providing air transportation, and neither company transports mail. He reports that both companies employ maintenance personnel to service and maintain the used aircraft purchased for resale by Dove Air, Inc., and that both companies exist solely to purchase and resale used aircraft. He denies that either company is a commercial air carrier or either company provides air transportation.

Mr. Duncan declared that Dove Air, Inc., engages exclusively in the purchase and resale of used aircraft, its market is private citizens and small private companies, and the aircraft in the company’s inventory are owned, hangared, serviced, and demonstrated solely for the purpose of effectuating their sale or lease-purchase to private customers. He reports that Dove Air, Inc.’s primary facility is in Fletcher, North Carolina, but that it also operates out of a facility owned by Duncan Wilkes Acquisitions, L.L.C., in Wilkesboro, North Carolina.

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<sup>2</sup> “Complainant Questionnaire (OSH)” dated January 20, 2010 as part of the North Carolina Department of Labor “Employment Discrimination Complaint Form” filed in case number 043-10 by Complainant.

Mr. Duncan declared that the Complainant was employed by Duncan Wilkes Acquisitions, L.L.C., at the Wilkesboro, North Carolina, location, as a maintenance employee who performed maintenance on aircraft at the Wilkesboro location which were owned by Dove Air, Inc..

In his "Employment Discrimination Complaint Form" filed with the State of North Carolina, the Complainant states that he was employed by Duncan Wilkes Acquisitions in Wilkesboro, North Carolina, at the time of the employment termination on January 11, 2010. He identified the business as being that of aircraft acquisition and the principal service being aircraft acquisition and maintenance.

In his "Complainant Questionnaire" filed with his complaint to North Carolina, the Complainant indicated that he had told the Director of Maintenance, M. Timmons, that he could not install the horizontal stabilizer on a particular aircraft because the condition of the attachment points was a flight safety issue.

The investigation package that comprises the Complainant's complaint includes a January 14, 2010 "Termination Report" completed by the Director of Maintenance for Dove Air, Inc., M. Timmons. Mr. Timmons reports that on January 11, 2010, he had a discussion with the Complainant on how maintenance should be performed on aircraft N137WR. He reported that he had an argument with the Complainant and that the Complainant refused to work on the aircraft. He stated that he assigned another mechanic to complete the repair on aircraft N137WR. He reported that a decision was made to terminate the Complainant's employment and that later the same day the Complainant was personally notified that he was being terminated for excessive aggressive hostile behavior towards co-workers and supervisor, refusing to perform assigned work, and insubordination. Mr. Timmons reported that on January 13, 2010, he received a visit from an FAA safety inspector who stated that the Complainant had made statements about the manner aircraft maintenance was performed by Dove Air, Inc., employees. A January 26, 2010, FAA Aviation Safety Inspector letter indicated that the FAA "was investigating a complaint which alleges that [Dove Air, Inc., was] performing improper maintenance at Wilkes County Airport in North Wilkesboro, NC. ... [and] that our investigation has not established a violation of the Federal Aviation Regulations, and you may consider the matter closed."

*b. Complainant has failed to establish that Respondent is subject to the AIR-21 Act.*

There is no evidence that either Dove Air, Inc. or Duncan Wilkes Acquisition, L.L.C. were a contractor or subcontractor for any other company. Thus, in order to be subject to the AIR-21 Act as an "air carrier", Dove Air, Inc. and Duncan Wilkes Acquisitions, L.L.C., would have to be "citizens of the United States" that undertake "air transportation."

When the evidence is evaluated in a light most favorable to the Complainant, both companies are located in the State of North Carolina and are owned solely by Mr. J.W. Duncan and his wife. Mr. Duncan is President of Dove Air, Inc., and manages Duncan Wilkes Acquisitions, L.L.C., in North Carolina. Under these facts, both Dove Air, Inc., and Duncan Wilkes Acquisitions, L.L.C. are "citizens of the United States" as defined by 49 USC §40102(a)(15).

However, applying the same standard to the evidence on the issue of “air transportation”, neither company undertakes “air transportation” as defined by the AIR-21 Act and federal court decisions. Under the Act, “air transportation” includes “foreign air transportation”, “interstate air transportation” and “transportation of mail by aircraft.” 49 USC §40102(a)(5) There is no evidence of record that either Dove Air, Inc., or Duncan Wilkes Acquisitions, L.L.C., operated aircraft between a point within the United States and a point outside the United States. Therefore there is no evidence to establish that either company engaged in “foreign air transportation.” Additionally, the uncontradicted evidence is that neither company was involved in the “transportation of mail by aircraft.”

Accordingly, in order for Dove Air, Inc. and Duncan Wilkes Acquisitions, L.L.C., to be an “air carrier” under the AIR-21 Act, the companies must undertake “interstate air transportation” as defined by the Act at 49 USC §40102(a)(25). This requires that the companies transport passengers or property as a common carrier for compensation. In evaluating the evidence of record in a light most favorable to the Complainant under the four-part objective standard for classification as a “common carrier” under the Act, there is (1) no evidence that either company held itself out to the general public, or identifiable segment of the general public, for the (2) transportation of persons or cargo as a service. The evidence establishes that the owned aircraft were flown to test the aircraft and to demonstrate the aircraft to potential purchasers and leasees and not for transportation of persons or cargo from place to place. There is no evidence that either company (3) accepted compensation for the transportation of persons or cargo. Finally, the evidence does permit the reasonable inference that (4) all persons who presented themselves to the companies were treated in substantially the same manner. Accordingly, the evidence of record viewed in a light most favorable to the Complainant, fails to establish that either Dove Air, Inc., or Duncan Wilkes Acquisitions, L.L.C., were a “common carrier” for the purposes of “interstate air transportation” under the AIR-21 Act. Thus, neither company engaged in “interstate air transportation” as defined by the Act.

In that neither Dove Air, Inc. nor Duncan Wilkes Acquisitions, L.L.C., transported mail by aircraft, engaged in foreign air transportation or engaged in interstate air transportation, and were not a contractor or subcontractor for another “air carrier” under the AIR-21 Act, neither company is subject to the whistle blower provisions set forth under 49 USC §42141 of the Act. Accordingly, the complaint must be dismissed.

## **FINDINGS AND CONCLUSIONS OF LAW**

After deliberation of the evidence of record, this Administrative Law Judge finds that:

1. The Complainant filed a timely complaint under the AIR-21 Act against Dove Air, Inc. and Duncan Wilkes Acquisitions, L.L.C.
2. Both Dove Air, Inc. and Duncan Wilkes Acquisitions, L.L.C., are “citizens of the United States” as defined by 49 USC §40102(a)(15) of the Act.

3. Neither Dove Air, Inc. nor Duncan Wilkes Acquisitions, L.L.C., engaged in “foreign air transportation” as defined by 49 USC §40102(a)(23) of the Act.
4. Neither Dove Air, Inc. nor Duncan Wilkes Acquisitions, L.L.C., engaged in the “transportation of mail by aircraft”.
5. Neither Dove Air, Inc. nor Duncan Wilkes Acquisitions, L.L.C., engaged in “interstate air transportation” as defined by 49 USC §40102(a)(25) of the Act.
6. Neither Dove Air, Inc. nor Duncan Wilkes Acquisitions, L.L.C., engaged in “air transportation” as defined by 49 USC §40102(a)(5) of the Act.
7. Neither Dove Air, Inc. nor Duncan Wilkes Acquisitions, L.L.C., are an “air carrier” as defined by 49 USC §40102(a)(2) of the Act.
8. Neither Dove Air, Inc. nor Duncan Wilkes Acquisitions, L.L.C., are contractors or subcontractors of an “air carrier” as defined by 49 USC §40102(a)(2) of the Act.
9. The activities of January 11, 2010, which compose the basis of Complainant’s complaint are not covered by the AIR-21 Act.
10. The Complainant is not entitled to relief under the AIR-21 Act.

## **ORDER**

**It is hereby ORDERED** that

1. **Respondent’s Motion for Summary Decision is GRANTED;**
2. **The hearing for July 27, 2010 is CANCELLED;** and
3. **The complaint is DISMISSED.**

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ALAN L. BERGSTROM  
Administrative Law Judge

ALB/jcb  
Newport News, Virginia

**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).