



Issue Date: 23 August 2012

CASE NOS: 2012-AIR-00014

In the Matter of:

ROBERT STEVEN MAWHINNEY,
Complainant,

v.

TRANSPORTATION WORKERS UNION,
CHRIS ORIYANO,
JOHN RUIZ,
ROBERT NORRIS,
AARON KLIPPELL,
AARON MATTOX,
FRANK KRZARNIC,
JOSE MONTES,
LARRY COSTANZA, and
KEN MACTIERNAN,
Respondents.

ORDER OF DISMISSAL

This case arises under the employee protection provisions of the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century (“AIR21”), 49 U.S.C. § 42121 et seq. and its implementing regulations found at 29 C.F.R. § 1979. On July 19, 2012, I issued an order severing this case from Case No. 2012-AIR-017, and ordered the parties to show cause why the case should not be dismissed as against the Respondents in this case – i.e., all Respondents in the two previously-consolidated cases other than American Airlines.

All parties have submitted responses to my Order to Show Cause, and, for the reasons set forth below, this matter will be dismissed.

The employee protection provision of AIR21 provides:

(a) **DISCRIMINATION AGAINST AIRLINE EMPLOYEES.** 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)

(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 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 under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding 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 under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

....

(e) CONTRACTOR DEFINED. In this section, the term 'contractor' means a company that performs safety-sensitive functions by contract for an air carrier.

At issue here is whether the Transportation Workers Union or any of the individual Respondents is an air carrier or a contractor or subcontractor of an air carrier. If so, they may be held liable for any adverse employment action taken against Complainant Robert Mawhinney because he engaged in protected activity. If not, they cannot be held liable under any set of facts.

Liability as an Air Carrier

The employee protection portion of the statute does not define “air carrier.” That term is defined in the implementing regulations as “a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.” I will assume for purposes of this Order that all named Respondents are citizens of the United States. It is clear, however, that none of them provides air transportation. Each of the individual named defendants is or was an employee of American Airlines, and many were also members of Respondent Transportation Workers Union. As employees of American Airlines, however, they are not air carriers for purpose of AIR21. American Airlines is an air carrier, but individual employees who are part of the organization that provides air transportation do not themselves qualify as air carriers. Congress knows how to impose individual liability in employment-related statutes. See, e.g., the Surface Transportation Assistance Act, 49 U.S.C. § 31105(a)(1)(A) (“A *person* may not discharge an employee, or discipline or discriminate against an employee....”) (emphasis added). That Congress chose not to do so under AIR21 is apparent from the omission of similar language from that statute.

As for the Transportation Workers Union, the analysis is the same. The Union acts as the representative of its members with respect to their relationship with American Airlines. That representation necessarily has some effect on American’s operations, but that effect does not convert the Union into an air carrier.

I find, therefore, that none of the named Respondents is liable as an air carrier.

Contractor or Subcontractor Liability

A contractor or (by extension) a subcontractor of an air carrier is defined as a “*company* that performs safety-sensitive functions by contract for an air carrier.” (Emphasis added.) Because the individual respondents are not companies, they cannot be held liable for any violation of AIR21 as contractors or subcontractors of an air carrier. Likewise, the Transportation Workers Union is not a company; it is a labor organization formed for the purpose of representing its members in forming a collective bargaining agreement with American. Although again the provisions of the collective bargaining agreement may have an effect on American’s operations, that it does so does not convert the Union into a company. Because none of the Respondents is a company, they by definition cannot be a contractor or subcontractor subject to liability under AIR21.

Accordingly, I find that none of the named Respondents is liable as a contractor or subcontractor of an air carrier.

ORDER

In light of the foregoing, IT IS ORDERED that Mr. Mawhinney’s complaint against the Transportation Workers Union, Chris Oriyano, John Ruiz, Robert Norris, Aaron Klippell, Aaron Mattox, Frank Krznic, Jose Montes, Larry Costanza, and Ken MacTiernan is DISMISSED.

SO ORDERED.

A

PAUL C. JOHNSON, JR.

Associate Chief 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, 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). In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov. 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).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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).