



Issue Date: 27 December 2018

CASE NO.: 2012-AIR-00014

In the Matter of:

ROBERT STEVEN MAWHINNEY,
Complainant,

v.

TRANSPORT WORKERS UNION LOCAL 591,
Respondent.

**ORDER GRANTING RESPONDENT'S MOTION FOR DISPOSITIVE ACTION AND
ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION**

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. The purpose of AIR 21 is to protect employees who report alleged violations of air safety from discrimination and retaliation by their employer. Complainant, Mr. Robert Mawhinney, filed a complaint against American Airlines and Respondent, the Transportation Workers Union Local 591 (TWU). Complainant alleges he was “threatened, ignored, abandoned, and subjected to a hostile work environment” and ultimately terminated from employment on September 23, 2011, by American Airlines acting in concert with TWU.¹

To prevail in an AIR 21 claim, a complainant² must prove by a preponderance of the evidence that he engaged in protected activity, and the respondent subjected him to the unfavorable personnel action alleged in the complaint because he engaged in protected activity. *Palmer v. Canadian National Railway/Illinois Central Railroad Co.*, ARB No. 16-035, 2016 WL 6024269, ALJ No. 2014-FRS-00154 (ARB Sep. 30, 2016); §42121(b)(2)(B)(iii).

¹ Mawhinney Complaint filed October 5, 2011 (2011 Complaint).

² Complaints and filings by pro se litigants should be construed “liberally in deference to their lack of training in the law.” *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 7 (ARB Apr. 30, 2010). However, “while adjudicators must accord a pro se complainant ‘fair and equal treatment, [a pro se complainant] cannot generally be permitted to shift the burden of litigating his case to the [trier of fact], nor avoid the risks of failure that attend his decision to forgo expert assistance.’ *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 10 n.7 (ARB Feb. 29, 2000), quoting *Dozier v. Ford Motor Co.*, 707 F.2d 1189, 1194 (D.C. Cir. 1983).” *Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 2003-STA-047, slip op. at 2, n.2 (ARB Apr. 26, 2005).

Mr. Mawhinney was an employee of American Airlines when he previously filed a whistleblower claim, which was resolved by settlement on January 23, 2003. The settlement included reinstatement of Mr. Mawhinney's position at American Airlines. In the present claim, he alleges that since returning to work he has been subjected to threats and wrongful termination. Complainant contends TWU is liable for the acts of its members who were acting on behalf of the union in the course of their duties at American Airlines.

ISSUE PRESENTED

Whether there is a genuine issue of material fact such that summary decision should not be granted; whether TWU is a proper party or the case should be dismissed for failure to state a claim upon which relief can be granted.

Background³

On September 30, 2016, counsel for TWU filed a Motion for Summary Decision and Order of Dismissal of all claims in this case. The motion includes a Declaration in support and evidentiary Attachments A through G. TWU contends there is no genuine dispute as to any material fact and cites the following reasons for granting summary decision.

- (1) Complainant has failed to allege that Local 591 is a successor to Local 564, and the undisputed facts do not support successor liability;
- (2) Local 591 never functioned as a "contractor" or "subcontractor" as defined by AIR21;
- (3) Local 591 never functioned as Complainant's employer;
- (4) Complainant's claims are time-barred;
- (5) Complainant has not provided any evidentiary basis for his allegation that TWU was involved in the disciplinary actions taken by American Airlines; and
- (6) The claims are subject to collateral estoppel as an arbitration decision determined that Complainant never engaged in protected activity under AIR 21.

TWU's arguments for summary decision are essentially as follows: (1) TWU is not a proper party to Complainant's claim; and/or (2) the claim was not filed within the statute of limitations; and/or (3) collateral estoppel prevents Complainant from relitigating the issues of his AIR 21 claim that were decided against him in arbitration.

On October 17, 2016, Complainant filed a response opposing the Motion for Summary Decision with Exhibits A through WW. Complainant argues the material cited by TWU does not establish the absence of a genuine dispute, and that Complainant has provided confirmation that a genuine dispute does exist.

On January 19, 2017, I stayed the proceedings in this matter pending the resolution of the issue of whether arbitration was properly compelled in this matter and, on September 26, 2018, the Ninth Circuit held that it was not. TWU thereafter dismissed its pending petition in U.S.

³ As the parties are aware, this case has a long and complex procedural history. The history summarized herein is limited to matters relevant to this Order.

District Court to confirm an arbitration award in its favor. In light of the Ninth Circuit's decision and TWU's dismissal of its petition to confirm the arbitration award in its favor, I vacated the stay in this matter. In light of the time that had passed, and in light of the new procedural posture of this case, the parties were given the opportunity to supplement their prior pleadings, or to file new or amended dispositive motions by December 14, 2018, and any response thereto within thirty days of service of any such pleading. On November 16, 2018, counsel for TWU Local 591 filed a supplemental brief in support of summary decision and a motion for dispositive action requesting that all claims against TWU Local 591 in this action be dismissed with prejudice.

TWU asserts that since the stay order issued January 19, 2017, "two substantive developments" have occurred which provide additional support for the pending summary decision motion. These two developments are the January 26, 2018 Arbitrator's ruling, and the September 26, 2018 Ninth Circuit Court of Appeals decision. TWU asserts that these two developments particularly support the following three grounds:

- (2) Local 591 never functioned as a "contractor" or "subcontractor" as defined by AIR21;
- (3) Local 591 never functioned as Complainant's employer;
- (6) The Complaint is subject to dismissal on collateral estoppel grounds in view of the prior determination of Arbitrator Sullivan that Complainant never engaged in protected activity under AIR21, and that there was no evidence that AA's termination of the Complainant was influenced by any conspiracy amongst the Complainant's co-workers.

On November 29, 2018, Mr. Mawhinney filed a Response to TWU's Combined Motion for Dispositive Action & Memorandum of Law, as well as a Response to TWU's Supplemental Memorandum of Law in Support of its Motion for Summary Decision on All Claims. Mr. Mawhinney also filed a Declaration in Support of these two responses on November 29, 2018.

APPLICABLE STANDARD

Summary Decision

An Administrative Law Judge may grant summary decision if the pleadings, affidavits, and other evidence show that there is no genuine issue as to any material fact, and the moving party is entitled to prevail as a matter of law. 29 C.F.R. § 18.72. If the moving party demonstrates an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish a genuine issue of material fact that could affect the outcome of the litigation. *Allison v. Delta Air Lines, Inc.*, ARB No. 03-150, ALJ Case No. 2003-AIR-00014 (ARB Sept. 30, 2004), citing *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 158 (1st Cir. 1998).

The non-moving party may not rely on allegations, speculation, or denials of the moving party's pleadings, but rather must identify specific facts on each issue for which he bears the ultimate burden of proof. *Id.*, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). If the non-moving party fails to establish a genuine issue of material fact, dismissal is appropriate as "a complete failure of proof concerning an essential element of the non-moving party's case

necessarily renders all other facts immaterial.” *Id.*, quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Motion for Dispositive Action

Disposition Without Hearing

§ 18.70 Motions for dispositive action.

- (a) In general. When consistent with statute, regulation or executive order, any party may move under § 18.33 for disposition of the pending proceeding. If the judge determines at any time that subject matter jurisdiction is lacking, the judge must dismiss the matter.
- (b) Motion to remand. A party may move to remand the matter to the referring agency. A remand order must include any terms or conditions and should state the reason for the remand.
- (c) Motion to dismiss. A party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness. If the opposing party fails to respond, the judge may consider the motion unopposed.
- (d) Motion for decision on the record. When the parties agree that an evidentiary hearing is not needed, they may move for a decision based on stipulations of fact or a stipulated record.

DISCUSSION

Transport Workers’ Union, Local 591 (TWU) argues in its September 30, 2016 Motion for Summary Decision and Order of Dismissal of All Claims that the record does not include any evidence supporting Complainant’s position that TWU participated in or influenced American Airlines’ disciplinary actions and ultimate termination decision. Further, TWU asserts that any alleged threats from union members constitute independent acts for which TWU is not liable. TWU argues that even if these alleged acts were attributable to official TWU activity, they are time-barred as they occurred more than 90 days prior to Complainant’s October 5, 2011 claim. TWU argues that the claim is also barred by collateral estoppel based on the November 24, 2014 arbitration decision by Arbitrator Sullivan between Complainant and American Airlines.

TWU made additional arguments in two November 16, 2018 filings. In its Supplemental Brief in Support of the Motion for Summary Decision, TWU argues that the claim against TWU is also barred by collateral estoppel based on the Adler arbitration and so should be summarily dismissed. In its Combined Motion for Dispositive Action and Memorandum of Law in Support of its Motion On All Claims Against Transport Workers Union, Local 591, TWU argues Complainant has failed to state a claim upon which relief can be granted, and that there is a lack of subject matter jurisdiction, because Local 591 was not Complainant’s employer, and neither is it a “carrier,” “contractor,” or “subcontractor” as defined by AIR 21. Therefore, TWU asserts that Local 591 is not a covered entity under AIR 21.

As a preliminary matter, I first address the statute of limitations argument made by Complainant. Complainant asserts in his Response to TWU’s Supplemental Memorandum in Support of Its Motion for Summary Decision that “TWU’s attempt to raise the ARB’s decision

of September 18, 2014, now, on November 14, 2018, exceeds the statute of limitations within the proceedings of the DOL.”⁴ Complainant cites to § 1979.112(a) in support of this assertion. In fact, the ARB’s September 18, 2014 decision remanded the case to the OALJ for further consideration. On November 19, 2014, I ordered that discovery commence between Complainant and TWU. Complainant and TWU commenced the discovery process. On September 30, 2016, TWU filed a Motion for Summary Decision. Complainant’s case against TWU eventually went to arbitration, and then to the Court of Appeals for the Ninth Circuit. On January 17, 2018, I stayed the proceedings pending the outcome of the Ninth Circuit decision. On September 26, 2018, the Ninth Circuit issued an opinion reversing the district court’s order compelling arbitration. Based on that opinion, I issued an order vacating the stay in the case against TWU, and granting the parties time to file supplemental briefs and responses thereto. The parties did so, and I now consider those briefings in this order. This case is properly before me on remand from the ARB, and TWU’s November 18, 2014 filing does not exceed any statute of limitations.

I. Dismissal for Failure to State a Claim Upon Which Relief Can Be Granted §18.70(c)

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)

....

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

i. TWU is not an Air Carrier

An AIR21 claim against TWU is only made if TWU is an “air carrier or contractor or subcontractor of an air carrier.” TWU is not an air carrier. It is a labor organization. It does not provide air transportation. Thus, TWU is not covered by the Act as an “air carrier.”

ii. TWU is not a Contractor or Subcontractor under AIR 21

In my August 23, 2012 Order of Dismissal, I found that TWU is not a contractor subject to liability under AIR21. I noted that “[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.”⁵ I found that TWU “is not a company; it is a labor organization formed for the purpose

⁴ Complainant’s Response to “Respondent Transport Workers Union, Local 591’s Supplemental Memorandum of Law in Support of Its Motion for Summary Decision on All Claims Against Transport Workers Union, Local 591, Pursuant to Rule § 18.72” at 5.

⁵ *Mawhinney v. Transportation Workers Union, Chris Oriyano, John Ruiz, Robert Norris, Aaron Klippel, Aaron Mattox, Frank Krznaric, Jose Montes, Larry Costanza, and Ken MacTiernan*, 2012-AIR-00014.

of representing its members in forming a collective bargaining agreement with American.”⁶ In its Decision and Order Vacating and Remanding, the Administrative Review Board (ARB) held that TWU may be a “contractor” under AIR21.⁷ The ARB noted that Black’s Law Dictionary defines “company” as “a corporation – or, less commonly, an association, partnership, or union – that carries on a commercial or industrial enterprise.” *Mawhinney*, ARB No. 12-108, citing BLACK’S LAW DICTIONARY at 318 (9th ed. 2009). The ARB also found that since there is a collective bargaining agreement between TWU and American Airlines, and according to Black’s Law Dictionary, a collective bargaining agreement is defined as “a contract between an employer and a labor union regulating employment conditions, wages, benefits, and grievances,” and “contractor” is defined as “a party to a contract,” TWU may be a “contractor.”⁸ The ARB held that the question to be determined on remand is “whether the CBA or any other contract between the TWU and AA provides for performance of safety-sensitive functions.”

When this case reached the Ninth Circuit, the court did not decide the issue of whether the Union was a “contractor” for purposes of AIR21, stating that this was a separate matter not before the court. *Transport Workers Union, Local 591 v. Mawhinney*, No. 16-56643 (9th Cir. September 26, 2018). However, the Ninth Circuit stated in a footnote:

It may well be that the Union is no more a “contractor” under AIR21 than it is an “agent” under the Agreement. The ARB’s view, under which any party to a contract is a “contractor,” is strangely literal, and seems to confuse contracting *out* or *for* something with simply being a party to any contract. *Cf. Contractor, Webster’s Third New International Dictionary* (2002) (“[O]ne that formally undertakes to do something for another...; one that performs work...or provides supplies on a large scale...according to a contractual agreement...”). In any event, AIR21 itself defines “contractor” narrowly, as “a company that performs safety-sensitive functions by contract for an air carrier.” 49 U.S.C. § 42121(e). There is little reason to believe the Union meets that definition – that is, that the Union, which is a representative for the workers in collective bargaining and in the grievance process, “performs safety-sensitive functions” *for* the Airline.

Id. at 21-22 n. 10.

In its Motion for Dispositive Action, TWU asserts that Local 591 is not a company, it has not been incorporated in any jurisdiction; it is a certified labor union under the Railway Labor Act. TWU asserts that Local 591’s contracts with American Airlines regulate “rates of pay, rules, and working conditions of its members who are in the employ of American Airlines.”

TWU asserts that “previous ALJ decisions in analogous whistleblower contexts support the conclusion that Local 591 is not a contractor or subcontractor as those terms are intended under AIR21.”⁹ TWU cites to *Dumaw v. International Bhd. Of Teamsters, Local 690*, ALJ No.

⁶ *Id.*

⁷ *Mawhinney v. Transportation Workers Union, Chris Oriyano, John Ruiz, Robert Norris, Aaron Klippel, Aaron Mattox, Frank Krznic, Jose Montes, Larry Costanza, and Ken MacTiernan*, ARB No. 12-108, ALJ No. 2012-AIR-00014 (ARB Sept. 18, 2014).

⁸ *Mawhinney*, ARB No. 12-108.

⁹ TWU Brief in Support of Summary Decision at 16.

2001-ERA-00006 at 20 (ALJ June 4, 2002) (“The fact that a union enters into a collective bargaining agreement...does not make it a ‘contractor’ or ‘subcontractor’ in the sense of the words as they are used in [the Energy Reorganization Act]”); *Vincent v. Laborers’ International Union Local 348*, ALJ No. 2000-ERA-00024 at 6 (ALJ April 2, 2002) (“a labor organization such as Respondent is not a covered respondent in a whistleblower discrimination case unless the union is acting as an employer in relations to the complaining employee.”).

The evidence establishes that TWU is a labor union which acts as a representative for its members in collective bargaining with their employer. In this instance, TWU represents the interests of union members in creating collective bargaining agreements between American Airlines and union members.

a. TWU Does Not Perform Safety-Sensitive Functions by Contract for American Airlines

AIR 21 does not define “safety-sensitive functions.” It does, however, include in “Title V – Safety” a variety of airline safety provisions. *See* AIR21 §§ 501-520, Pub. L. No. 106-181. These provisions address airplane emergency locators, cargo collision avoidance systems deadlines, landfills interfering with air commerce, life-limited aircraft parts, counterfeit aircraft parts, prevention of frauds involving aircraft or space vehicle parts in interstate or foreign air commerce, transporting of hazardous material, employment investigations and restrictions, criminal penalty for pilots operating in air transportation without an airman’s certificate, flight operations quality assurance rules, penalties for unruly passengers, deputizing of state and local law enforcement officers, air transportation oversight system, runway safety areas, precision approach path indicators, aircraft dispatchers, improved training for airframe and powerplant mechanics, small airport certification, protection of employees providing air safety information, and occupational injuries of airport workers.

In *Dos Santos v. Delta Airlines, Inc.*, Chief Administrative Law Judge Purcell discussed the focus of AIR21. *Dos Santos v. Delta Airlines, Inc.*, 2012-AIR-00020 (January 11, 2013). He held, “the predominant purpose of Section 42121 is detection of aviation safety hazards and airline non-compliance with FAA safety laws, rules and regulations.” *Dos Santos* at 24.

[T]he Congress that passed AIR21 recognized that the FAA’s regulation of airline activities is essential to the mission of safeguarding the Nation’s aviation system. *See* 146 Cong. Rec. H1002-01 at H1012 (statement of Rep. Oberstar) (the United States maintains safe airspace “because year after year the FAA does its job overseeing the airlines, the airlines do their part, and our air traffic control system maintains safety in the air and on the ground.”). So while the legislative history supports that the general focus of AIR21 is to bring about fundamental improvements in air safety, it also suggests that Congress intended to achieve that goal *by regulating the air carriers that operate within the domestic aviation system and under the purview of FAA regulations.*

Id. at 22 (emphasis added)

Turning then to the Federal Aviation Act (FAA), the FAA does define safety-sensitive functions. The FAA has established an aviation industry alcohol misuse prevention program, which includes requirements for an alcohol testing program for air carrier employees who perform safety-sensitive duties, either directly or by contract for aviation FAA-certificated employers. The regulations state:

Safety-sensitive function means a function listed in section II of this appendix.

....

II. Covered Employees Each employee who performs a function listed in this section directly or by contract for an employer as defined in this appendix must be subject to alcohol testing under an FAA-approved alcohol misuse prevention program implemented in accordance with this appendix. The covered safety-sensitive functions are:

1. Flight crewmember duties.
2. Flight attendant duties.
3. Flight instruction duties.
4. Aircraft dispatcher duties.
5. Aircraft maintenance or preventive maintenance duties.
6. Ground security coordinator duties.
7. Aviation screening duties.
8. Air traffic control duties.

59 FR 7380, 14 CFR §120.105.

The evidence does not show that TWU performed safety-sensitive functions by contract for American Airlines.

Collective Bargaining Agreement (CBA)

The Preamble to the collective bargaining agreement between American Airlines and TWU, as representative of the aviation maintenance technicians and plant maintenance employees of American Airlines, states that the agreement is

in the mutual interests *of the employees and of the Company [American Airlines]* to promote the safety and continuity of air transportation, to further the efficiency and economy of operations, and to provide orderly collective bargaining relations between the Company and its employees, a method for the prompt and equitable disposition of grievances, and for the establishment of fair wages, hours and working conditions for the employees covered hereunder. In making this Agreement, *both the Company and the employees* hereunder recognize their duty to comply with the terms hereof and to cooperate fully, both individually and collectively, for the accomplishment of the intent and purpose of this Agreement.¹⁰

¹⁰ Respondent Transport Workers Union, Local 591's Combined Motion for Summary Decision on All Claims Against Transport Workers Union, Local 591 & Memorandum of Law in Support of Its Motion, Attachment AA.

In Article 28(b), the CBA states:

The Union recognizes that the Company will have sole jurisdiction of the management and operation of its business, the direction of its working force, the right to maintain discipline and efficiency in its hangars, stations, shops, or other places of employment, and the right of the Company to hire, discipline, and discharge employees for just cause, subject to the provisions of this Agreement. It is agreed that the rights enumerated in the Article will not be deemed to exclude other preexisting rights of management not enumerated which do not conflict with other provisions of this Agreement.¹¹

The collective bargaining agreement between TWU and American Airlines establishes that it is an agreement made in the mutual interests of the employees represented by TWU and American Airlines. The CBA reserves sole jurisdiction over management, hiring, discipline, and discharge to American Airlines. The relationship that is created by the CBA between TWU and American Airlines is for the sole purpose of collective bargaining between American Airlines and TWU, on behalf of its members, regarding the members' employment with American Airlines. The CBA does not create a relationship in which TWU performs any safety-sensitive functions for American Airlines.

Aviation Safety Action Program (ASAP)

Complainant asserts that TWU participates in an "Aviation Safety Action Partnership¹²" (ASAP) between American Airlines, the Federal Aviation Administration, and TWU. Complainant attached a Notice regarding the ASAP program as Exhibit LL to his October 13, 2016 Declaration in Support of his Response to TWU's Combined Motion for Summary Judgment. This Notice was issued by TWU and states that TWU strongly advises its members to contact a TWU "expert" prior to bringing any information that may be appropriate for ASAP. The notice indicates that TWU "is working diligently to ensure that the integrity of the ASAP program is restored." TWU's Memorandum in Support of its Motion for Summary Decision includes as Exhibit G a declaration by Gary Peterson, President of Local 591. Regarding the ASAP program, he states:

Mr. Mawhinney references the TWU's temporary policy of screening its members' submissions to the Aviation Safety Action Program (ASAP) as part of the grounds for his action against Local 564. The ASAP program is premised on the concept of encouraging Aviation Maintenance Technicians to volunteer information regarding potential safety violations in exchange for a measure of immunity from disciplinary and license action. The TWU's determination to screen its members' participation in the ASAP program was based on its concern that the FAA's commitment to AMT immunity was not being honored. Participation in the ASAP program is not a local union decision, but rather a decision by the Air Transport Division under the auspices of TWU International.

¹¹ Respondent Transport Workers Union, Local 591's Combined Motion for Summary Decision on All Claims Against Transport Workers Union, Local 591 & Memorandum of Law in Support of Its Motion, Attachment BB.

¹² The correct name is "Aviation Safety Action Program." <https://www.faa.gov/about/initiatives/asap/>

TWU's Combined Motion for Summary Decision on All Claims against Transport Workers Union, Local 591 & Memorandum of Law in Support of Its Motion, Exhibit G at 4.

While it appears that TWU participated in ASAP, there is no evidence of a contract related to ASAP which obligates TWU to perform safety-sensitive functions for American Airlines. Rather, ASAP is a voluntary reporting program, for which TWU was choosing to screen its members' participation based on a concern for their immunity.

iii. TWU Was Not Complainant's Employer

Complainant argues in his November 29, 2018 filings that he received compensation from TWU "to assist in the organization of Union meetings;" and therefore, TWU's assertion that Local 591 does not employ Complainant and never did is false. However, Complainant does not point to any evidence in the record in support of this assertion. In fact, as pointed out by TWU in its Memorandum of Law in Support of its Motion for Summary Decision on All Claims, TWU is prohibited from exercising employer-level control over Complainant, as "[t]he RLA requires that, on a continuing basis, the employees' collective representation be free from the employer's 'interference, influence, or coercion'."¹³ TWU notes that the National Mediation Board must ensure that unions participating in a representational dispute are independent of the carrier.¹⁴ The undisputed evidence shows that Complainant was employed by American Airlines¹⁵, not TWU; TWU was the union that represented Complainant and other members in collective bargaining for employment with American Airlines.

II. TWU, Local 591 is not an Air Carrier, Contractor, or Subcontractor Covered by AIR21

The evidence shows that TWU did not perform safety-sensitive functions within the meaning of the Act by contract with American Airlines or any other carrier. I find that TWU is not a contractor or subcontractor covered by AIR21. Nor was TWU Complainant's employer. As TWU is not a covered air carrier or contractor or subcontractor under AIR21, I find that Complainant has failed to state a claim upon which relief can be granted. Further, Complainant has failed to establish an essential element of his case; that the Respondent, TWU is an air carrier, contractor, or subcontractor to an air carrier, and thus a proper party to Complainant's AIR21 claim.

¹³ TWU's Combined Motion for Summary Decision on All Claims against TWU & Memorandum of Law in Support of Its Motion at 14, citing 45 U.S.C. § 152, Third; *NLRB v. Penn. Greyhound Lines, Inc.*, 303 U.S. 261, 266 (1938).

¹⁴ *Id.*; see *Orion Lift Service, Inc.*, 15 N.M.B. 358, 365 (1988); *Air Florida*, 9 N.M.B. 181 (1982).

¹⁵ See, e.g., TWU's Combined Motion for Summary Decision on All Claims against TWU & Memorandum of Law in Support of Its Motion, Exhibit C October 5, 2011 Complaint.

ORDER

Based on the foregoing, IT IS ORDERED:

The Respondent's Motions for Dispositive Action and Summary Decision on All Claims Against TWU are GRANTED and Complainant's case against TWU is DISMISSED.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ, Jr./ksw
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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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 filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).