



Issue Date: 14 May 2014

CASE NO: 2012-AIR-00017

*In the Matter of:*

ROBERT STEVEN MAWHINNEY,  
*Complainant,*

v.

AMERICAN AIRLINES,  
*Respondent.*

### ORDER DISMISSING COMPLAINT

A hearing in the above-captioned matter is scheduled for August 4, 2014 in San Diego, California. On April 8, 2014, Respondent filed a Motion to Compel Arbitration and to Dismiss Action. Complainant was granted extra time to respond to the motion, and his opposition was timely filed. Because Mr. Mawhinney agreed to arbitrate all claims arising from his employment relationship with Respondent, the motion will be granted.

#### Background

Mr. Mawhinney was first employed by Respondent American Airlines in 1989. In 2001, he was terminated from his employment with Respondent. He filed a complaint 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, and at the same time filed a civil action against Respondent. Both the administrative complaint and the civil action were resolved and a settlement agreement was signed in December of 2002. Under the terms of the settlement agreement, Mr. Mawhinney was restored to his employment with Respondent. In addition, the settlement agreement contained the following provision pertaining to future disputes arising out of Mr. Mawhinney's employment with Respondent:

In the event of any dispute ... arising at any time in the future between the Parties ... involving [Complainant]'s employment which may lawfully be the subject of pre-dispute arbitration agreements, and which Plaintiff chooses not to grieve under any Collective Bargaining Agreement governing his employment, [Complainant and Respondent] agree to submit such dispute to final and binding arbitration ("Private Arbitration") for resolution. Private Arbitration shall be the exclusive means for resolving any such disputes and no other action will be brought in any other forum or court....

In September of 2011, Mr. Mawhinney was again terminated from employment with American Airlines. In October of 2011, he filed a complaint with OSHA under AIR21, alleging that his termination was in retaliation for his having made safety complaints against Respondent. After conducting an investigation, the Secretary dismissed Mr. Mawhinney's complaint, finding that his termination did not violate AIR21's employee protection provisions. Mr. Mawhinney objected to the Secretary's findings and requested a hearing before an administrative law judge.

During the pendency of OSHA's investigation into Mr. Mawhinney's complaint, Respondent filed for bankruptcy protection. Proceedings in the instant administrative complaint were stayed pending a resolution of the bankruptcy case. After conclusion of the bankruptcy case, this matter was revived. On March 12, 2014, I held a conference call with the parties in which Complainant confirmed that he had filed an arbitration proceeding and had shortly before the conference call filed a written specification of the claims he wished the arbitrator to address. The written specification included a recitation of many years' worth of complaints by Complainant to Respondent and to the FAA regarding its alleged violation of FAA regulations and company policy, and many years' worth of raising safety concerns to Respondent. Mr. Mawhinney specifically made a claim for retaliatory termination as a result of his expression of safety concerns and regulatory violations.

### **Discussion**

Under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, Congress has expressed a strong policy in favor of arbitration. Any doubts as to whether arbitration is required under an arbitration agreement should be resolved in favor of arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Arbitration must be compelled when (1) an arbitration agreement exists under the FAA, and (2) the claims at issue fall within the scope of the arbitration agreement. *Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470, 473 (5th Cir. 2002). There is no dispute whether an arbitration agreement exists; the dispute is whether the AIR21 claim at issue here falls within its scope.

The arbitration clause in the 2002 settlement agreement applies to (1) any dispute between Mr. Mawhinney and American Airlines arising out of the employment relationship which (2) may lawfully be the subject of a pre-dispute arbitration agreement and (3) which Mr. Mawhinney chooses not to grieve under a collective bargaining agreement. It is clear that the current dispute, in which Mr. Mawhinney alleges that Respondent violated AIR21 when it terminated his employment, arises out of his employment with American Airlines. It is also clear that Mr. Mawhinney chose not to grieve this matter under a collective bargaining agreement, as he filed both a complaint with OSHA and a request for arbitration. The only issue meriting discussion is whether his complaint under AIR21 may lawfully be the subject of a pre-dispute arbitration agreement.

A review of the employee protection provisions of AIR21 shows that Congress did not invalidate any agreements to arbitrate claims arising under that statute. When Congress wishes to do so, it has done so explicitly; for example, under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress expressly declared that pre-dispute arbitration agreements that would preclude a complaint under that statute were unenforceable. 12 U.S.C.

§ 5667(d)(2). No similar provision appears in AIR21, and I conclude, therefore, that the statute allows for pre-dispute arbitration agreements.

Mr. Mawhinney cites *Trans World Airlines, Inc. v. Sinicropi*, 887 F.Supp. 595 (S.D.N.Y. 1995) for the proposition that contracts of airline employees are exempted from the FAA. That case, however, merely stated that proposition in passing, and involved statutory arbitration of “minor” claims under the Railway Labor Act. It did not involve a specific pre-dispute arbitration agreement between an employer and an individual employee, as this case does.

Mr. Mawhinney argues that the 2002 arbitration agreement is not enforceable, based on certain Supreme Court case law holding that pre-dispute arbitration agreements in Title VII cases are invalid. He did not identify that case law and, in the Ninth Circuit, where this case arises, that is not the law. See *E.E.O.C. v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 749-753 (9th Cir. 2005) (en banc) (pre-dispute agreement to arbitrate Title VII claims, as a condition of employment, is enforceable). The language quoted in his opposition to Respondent’s motion, as well as his citation of *Lucia v. American Airlines, Inc.*, ARB Nos. 10-014, -015, -016, ALJ Nos. 2009-AIR-15, -16, -17 (ARB Sept. 16, 2011) suggest that he is referring to *Alexander v. Gardner*, 415 U.S. 36 (1974). That case, however, did not involve an express agreement between an employer and an individual employee, as this case does. In *Alexander*, the Supreme Court held that pursuing arbitration of a grievance under a collective bargaining agreement did not preclude a separate action based on Title VII. This case, however, is more analogous to the *Luce, Forward* case, in which the employer required an agreement to arbitrate as a condition of employment. Here, Mr. Mawhinney was required to agree to arbitrate all claims arising out of his employment with Respondent as part of a settlement agreement restoring him to employment, and is therefore a “condition of employment” under *Luce, Forward*.

Mr. Mawhinney also argues that the arbitration clause in the 2002 settlement agreement is unconscionable under California law, and therefore is void as against public policy. His argument is unavailing, however: The FAA applies to state law proceedings and preempts state laws that restrict or limit parties to a contract from entering into arbitration agreements. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001) (citing *Southland Corp. v. Keating*, 465 U.S. 1 (1984)).<sup>1</sup>

Finally, Mr. Mawhinney bases his opposition in part on Respondent’s disclosure of the settlement agreement, which he apparently believes violates a confidentiality agreement. That argument does not relate to whether the arbitration agreement is enforceable. Likewise, that Respondent quoted only part of the settlement agreement in its motion does not bear on the issue of the arbitration agreement; Complainant does not allege that Respondent omitted any portion of the arbitration agreement.

I note that Mr. Mawhinney apparently agrees that his AIR21 complaint is subject to arbitration. He has in fact invoked arbitration for the precise claim at issue here.

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<sup>1</sup> Mr. Mawhinney did not specify how the arbitration would be unconscionable under California law, but merely stated that it would be; regardless whether he is correct, the FAA preempts California law.

In light of the foregoing, I conclude that an arbitration agreement existed between Complainant and Respondent, and that the current dispute falls within its scope. Under that agreement, Mr. Mawhinney must pursue his AIR21 claim in arbitration.

**ORDER**

For the reasons set forth above, IT IS ORDERED:

1. Respondent's Motion to Compel Arbitration and to Dismiss is GRANTED;
2. Respondent must pursue his AIR21 claim in arbitration;
3. This matter is DISMISSED; and
4. The hearing scheduled to begin on August 4, 2014 is CANCELED.

**SO ORDERED.**

PAUL C. JOHNSON, JR.  
District 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).