



Issue Date: 31 October 2019

Case No.: 2019-AIR-00024

In the Matter of

JIRI CERNY

Complainant

v.

MOONEY INTERNATIONAL

Respondent

ORDER DISMISSING COMPLAINT

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”), which was signed into law on April 5, 2000. The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure.¹ Implementing regulations are at 29 C.F.R. Part 1979, published at 68 Fed. Reg. 14,107 (Mar. 1, 2003). Per 49 U.S.C. § 42121(b)(2)(A), and implemented by 29 C.F.R. § 1979.100(b), the hearing in this matter is to commence expeditiously, except upon a showing of good cause or otherwise agreed to by the parties.

On April 24, 2019, Complainant filed his OSHA complaint alleging his termination of employment on or about March 8, 2019 violated the Act. On June 6, 2019, OSHA, acting on behalf of the Secretary dismissed the complaint, finding that the parties are not covered under the Act because Respondent is neither an air carrier nor a contractor or subcontractor of an air carrier.

On August 25, 2019, OSHA received Complainant’s response to the Secretary’s findings.² Complainant requested that OSHA reconsider its findings, asserting that Respondent was an “air carrier” under AIR 21.

On September 27, 2019, the undersigned received assignment of this matter. On October 2, 2019, the Tribunal issued a Notice of Assignment, Conference Call, and Initial Pre-hearing Order.

¹ Pub. L. 106-181, tit. V, § 519(a), Apr. 5, 2000, 114 Stat. 145. See 49 U.S.C. § 42121.

² In his letter to the Regional Administrator in Dallas, Texas, Complainant avers that, on June 12, 2019, he mailed a certified letter to him and that it was picked up at the postal facility on June 17, 2019. Complainant attached proof of the mailing and a copy of the letter.

On October 15, 2019, the Tribunal received a letter dated October 11, 2019³ from Complainant. In his letter, Complainant asserted that the Tribunal issued its Notice of Assignment, Conference Call, and Initial Pre-hearing Order in error, claiming that “he never appealed to [sic] the initial OSHA decision to the Office of Administrative Law Judges.” Complainant represented that he is not interested in filing an appeal because he has been unable to find counsel willing to accept his case and he cannot meet the deadlines set forth in the Tribunal’s October 2, 2019 Order. Under his “Statement of Facts,” he contended that OSHA’s dismissal was in error because the term “air carrier” includes carriers owned by foreign persons and this was the basis upon which OSHA dismissed his claim. It is Complainant’s position that OSHA failed to follow its own procedures by finding that the statute does not apply in his case. Finally, because Complainant asserts there was error below, and he indicated that he does not wish to appeal. He requested that the matter be returned to OSHA so that they may follow the proper procedures.

On October 16, 2019, the Tribunal issued a Notice of Requirement for Withdrawal of Complaint, Order to Show Cause why this matter should not be dismissed and Order Canceling Scheduled Telephonic Conference. In this Order the Tribunal explained Complainant’s rights withdraw his complainant, but separately ordered Complainant to explain to the Tribunal how he is a covered employee when the administrative record indicates that his employer is a foreign corporation⁴ and manufactures parts for general aviation aircraft only.⁵

On October 27, 2019, the Tribunal received a response from Complainant concerning its October 16, 2019 Order. Complainant represents that he does not understand the purpose of the Notice because it discusses issues that he did not raise to the Office of Administrative Law Judges attention. He reaffirmed his position: “I did not file a request for a hearing before the Office of Administrative Law Judges” Compl. Ltr at 1. He asserts that he filed his matter with OSHA and they elevated it to this office “without his consent.” *Id.* at 2. Complainant acknowledges receipt of the Tribunal’s form to withdraw his complaint, but opts not to sign it because he did not request a hearing and therefore does not believe that he is in a position to withdraw his complaint forwarded to this Tribunal. Complainant then includes excerpts from the OSHA manual to support his contention that Respondent is subject to the Act. Complainant also attached information from Wikipedia and from the website www.pilotsofamerican.com about

³ In Complainant’s response to the Tribunal’s Order to Show Cause, Complainant correctly noted this document was dated rather than undated, as indicated in the Order to Show Cause.

⁴ OSHA found that Respondent is owned by a Chinese owned aircraft manufacturer.

⁵ Title 29 C.F.R. § 18.12, Proceedings before administrative law judge, sets forth in part:

(b) Authority. In all proceedings under this part, the judge has all powers necessary to conduct fair and impartial proceedings, including those described in the Administrative Procedure Act, 5 U.S.C. 556. Among them is the power to:

(7) Terminate proceedings through dismissal or remand when not inconsistent with statute, regulation, or executive order.

See also Udvari v. US Airways, Inc., ALJ No. 2014-AIR-9 (Jan. 17, 2014) (An Administrative Law Judge, on his own motion, may raise issues especially where the finding can result in a ruling against a party as a matter of law.

Respondent. Complainant notes that “Mooney aircraft is the ICON of true American general aviation . . . before the engagement of Chinese investors in 2013” Compl. Ltr at 7.

DISCUSSION

As an initial matter, it is a well-established principle that the complaints and papers filed by *pro se* litigants must be liberally construed “in deference to their lack of training in the law and with a degree of adjudicative latitude.” *Jenkins v. CSX Transp., Inc.*, ARB No. 13-029, slip op. at 10-11 (May 15, 2014) (internal quotation marks omitted); *see also Wyatt v. Hunt Transp.*, ARB No. 11-039, slip op. at 2 (Sept. 21, 2012); *Williams v. Nat’l R.R. Passenger Corp.*, ARB No. 12-068, slip op. at 3 (Dec. 19, 2013). However, ALJs are entitled to manage their caseloads and decide whether a particular case is so meritless on its face that it should be dismissed in the interest of justice. *Sylvester v. Parexel Int’l LLC*, ARB Case No. 070123, ALJ Case Nos. 2007-SOX-039, -042, slip op. at 13 (May 25, 2011).

To survive a motion to dismiss, a complainant must show the following: “(1) some facts about the protected activity, showing some ‘relatedness’ to the laws and regulations of one of the statutes in [the DOL’s] jurisdiction; (2) some facts about the adverse action; (3) a general assertion of causation; and (4) a description of the relief that is sought.” *Evans v. U.S. Environmental Protection Agency*, ARB No. 08-059, ALJ Case No. 2008-CAA-003, slip op. at 9 (July 31, 2012); *see also Johnson v. The Wellpoint Companies, Inc.*, ARB No. 11-035, slip op. at 6 (Feb. 25, 2013). “By definition, a facial challenge to a complaint focuses *solely* on the allegations in the complaint, its amendments, and the legal arguments the parties raised—not whether evidence exists to support such allegations. Second, the ALJ must assume the truth of the facts asserted in the complaint and draw all reasonable inferences in favor of the non-moving party.” *Evans*, ARB No. 08-059, at 10.

As an initial matter, Complainant denies that he ever appealed OSHA’s decision to this Tribunal, asserting instead that he only requested reconsideration of their ruling. Complainant is broadly correct, as his August 25, 2019 letter requested reconsideration of OSHA’s dismissal of his complaint. However, OSHA’s interpretation of Complainant’s request for reconsideration as a request for a hearing was procedurally correct, as the rules applicable in this process do not provide for reconsideration of OSHA’s decision.⁶ *See* 29 C.F.R. §§ 1979.105(c), 1979.106(a). Therefore, Complainant’s request for reconsideration was properly considered an appeal. However, after being informed that this matter has been forwarded to this Tribunal, and after being informed of the manner that a Complainant can withdraw a complaint, Complainant opts not to do so. He has every right to do this. But then the Tribunal must proceed as though Complainant continues to pursue his complaint, unless otherwise abandoned. Therefore, the Tribunal will turn to its Order to Show Cause why this matter should not be dismissed.

Complainant’s correspondence asserts that he is covered under the Act despite the information he himself has presented indicating that Respondent is a foreign corporation. To be subject to the Act, a complainant must be a covered employee. 49 U.S.C. § 42121(a), (e). A

⁶ Further, even if one was to find that OSHA could reconsider the matter, the Tribunal finds the fact that they forwarded this matter to the Office of Administrative Law Judges implicitly indicated that it denied Complainant’s request for reconsideration.

covered 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.” 29 C.F.R. § 1979.101 (definitions). “Air carrier” is defined in 49 U.S.C. § 40102(a)⁷ as “a citizen of the United States undertaking by any means, directly or indirectly, to provide **air transportation**.” (Emphasis added.). Therefore, a complaint must set forth allegations that address two prongs: a citizen prong and an air transportation prong.

To be a covered employer under the Act, the “air carrier” must be a citizen of the United States. 49 U.S.C. § 40102(a). Whether Complainant can establish this by evidence is another matter. The focus at this stage is what is alleged, not what evidence exists to support the allegation. Here, in taking every inference in favor of the Complainant, he appears to allege that Respondent is a U.S.-based company, not a Chinese company as OSHA suggests. For purposes of surviving a motion to dismiss, Complainant’s allegation is adequate to address the “citizen of the United States” prong of what constitutes an air carrier under the Act.

The second prong that a complainant must assert is whether a respondent is involved, directly or indirectly, in air transportation. “Air transportation” is defined as “foreign air transportation, **interstate air transportation**, or the transportation of mail by aircraft.” 49 U.S.C. § 40102(a)(5) (emphasis added). As Complainant’s documents make no reference to Respondent performing foreign air transportation or transportation of mail by aircraft, the Tribunal will turn to the remaining option—interstate air transportation. Interstate air transportation is defined as:

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 of 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.

⁷ See also 20 C.F.R. § 1979.101 (definitions). The issue of what constitutes an “air carrier” was specifically addressed during promulgation of the Agency’s regulations for handling AIR 21 cases. The National Whistleblower Center (“NWC”) proposed extending the protections to air carriers owned or controlled by foreign corporations or person. 68 Fed. Reg. 14100, 14101 (Mar. 21, 2003). However, OSHA rejected this recommendation, explaining:

The terms “air carrier” and “foreign air carrier” are separately defined by statute at 49 U.S.C. 40102(a)(2) (“air carrier”) and 49 U.S.C. 40102(a)(21) (“foreign air carrier”), and the general definition of air carrier is set forth in the AIR21 rule. OSHA has no authority to define the terms otherwise.

68 Fed. Reg. at 14101.

49 U.S.C. § 40102(a)(25).

All that Complainant has alleged is that Respondent manufactures *general aviation* 4-seat aircraft,⁸ its associate parts, and it has done so in a deficient fashion. His allegations center on the manufacturing of a *general aviation* aircraft. There are no facts alleged in his OSHA complaint, or in the documents Complainant filed with this Tribunal, that he alleges that Respondent, directly or indirectly, conducts “air transportation”; that it transports passengers or property by aircraft *as a common carrier*⁹ for compensation or hire. Entities that perform these types of operations are almost always required to hold an air carrier certificate of some kind from the FAA, under 14 C.F.R. Parts 121, 129 or 135.¹⁰ And Complainant has not even alleged that Respondent is a contractor for such entities. Taking all reasonable inferences in favor of Complainant, he has not alleged any facts that support a finding that Respondent is an air carrier, or a contractor or subcontractor that performs a safety sensitive function for an air carrier.¹¹ *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (Jan. 30, 2004). Therefore, even after giving Complainant an opportunity to explain the basis for his complaint,¹² it is facially deficient.

For all of the above reasons, the complaint in this matter is hereby **DISMISSED** with prejudice.

⁸ Because of the additional regulatory requirements imposed upon air carriers, it would be uncommon for any air carrier to use a single engine piston aircraft, let alone a 4 place single engine aircraft, for commercial operations of any sort. Such a small plane simply has too small of a useful load for most commercial operations. Small single engine commercial operations can occur in such activities as skydiving operations, agricultural spraying or banner towing, for example, but the M20 aircraft being a low wing, retractable tri-cycle landing gear aircraft with only one exit door is not designed for, suited for, or marketed for these activities. See www.mooney.com; FAA Type Certificate Data Sheet 2A3, rev. 58.

⁹ Neither the FAA Act of 1958 nor AIR 21 define “common carrier” or “compensation.” See 49 U.S.C. § 40102(a). Instead, the FAA has relied for over thirty years on a definition of common carriage it announced in an advisory circular. See FAA Advisory Circular 120-12A (April 24, 1986). A key element to be a common carrier is the entity holding themselves out as willing to transport person or property from place to place for compensation.

¹⁰ Anyone piloting as an air carrier must have “an air carrier operating certificate” and operate only in compliance with its terms. 49 U.S.C. § 44711(a)(4). As a general proposition, an air carrier is a company that has been issued an air carrier certificate by the FAA under 14 C.F.R. Parts 135 or 121, but the presence or absence of an FAA issued air carrier certificate is only a factor, not a dispositive factor, on whether a company is an air carrier. Additionally, the Act’s protections extend beyond just air carriers, for example manufacturers of transport category aircraft and parts. However, Respondent only manufactures small 4-place general aviation aircraft. Furthermore, there is no indication that Respondent is an air carrier or has contracts with an air carrier.

¹¹ The only information this Tribunal has concerning this matter is Complainant’s representation that his complaint pertains to the external part of the cabin (i.e. the fiberglass shell) of a Mooney M20V general aviation aircraft during its production. The Mooney M20V is a 4-seat general aviation aircraft. See <http://www.money.com>; FAA Type Certificate Data Sheet 2A3, rev. 58 (Aug. 20, 2018), available at [https://rgl.faa.gov/Regulatory_and_Guidance_Library/rgMakeModel.nsf/0/6ea0f05ecca8304486258305006833cf/\\$FILE/2A3_Rev_58.pdf](https://rgl.faa.gov/Regulatory_and_Guidance_Library/rgMakeModel.nsf/0/6ea0f05ecca8304486258305006833cf/$FILE/2A3_Rev_58.pdf).

¹² As Complainant never filed a Pleading Complaint as directed by the Tribunal, when the Tribunal references Complainant’s complaint, it considered all the documentation sent to it by Complainant.

SO ORDERED.

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey