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AIRLINE MANAGEMENT

Airline Management Letter

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President Nominates Highly Regarded Mediator for NMB Seat

President Obama has selected Linda A. Puchala, a highly respected mediator with the National Mediation Board (NMB), to fill a Board Member seat on the NMB. That seat currently is held by NMB Chair Read Van de Water, a Republican first appointed by President Bush in 2003, whose term was not renewed by the Senate last year. Ms. Van de Water will continue to serve on the board until her successor is confirmed by the Senate. She began serving a one-year term as NMB chairman of the three-member panel in July 2008.

If confirmed, Ms. Puchala would become the second Democrat on the three-member panel, along with Harry Hoglander. The other seat is held by Republican Elizabeth Dougherty.

Ms. Puchala is NMB's associate director of alternative dispute resolution services, where she has worked as a mediator on both airline and railroad cases since 1999, according to a White House statement.

Prior to joining the NMB's staff, she worked for more than 30 years in labor relations, including terms as president of AFA, from 1979 to 1986.

Supreme Court will not Review ADA Claim of Sleeping Pilot

The U.S. Supreme Court has refused to review a federal appeals court decision holding that Southwest Airlines did not violate the Americans with Disabilities Act (ADA) when it discharged an airline instructor pilot with sleep apnea who repeatedly fell asleep while on duty. *See Grubb v. Southwest Airlines, cert. denied* 4/20/09. As discussed in the November 2008 edition of *Airline Management Letter*, the plaintiff flight instructor claimed Southwest violated the ADA by firing him rather than accommodating his sleep apnea – which caused him to "nod off" at work – and the FMLA by firing him rather than granting his request for leave. The plaintiff was counseled repeatedly for falling asleep at work, including while training pilots on simulators. The plaintiff told Southwest he was being treated for a sleep problem; however, he failed to submit a diagnosis and prognosis from a doctor as requested by Southwest. Instead, the plaintiff submitted only a conclusory note that "he was being seen for sleep apnea."

After the plaintiff was discharged, he sued Southwest claiming his discharge violated the ADA and the FMLA. The Fifth Circuit affirmed the trial court's decision granting summary judgment in favor of the airline, holding that the plaintiff was unable to

perform his job in a manner that Southwest could reasonably accommodate. The court also affirmed summary judgment on the plaintiff's FMLA claims because he could not show that leave was the reason he was discharged. The court found that Southwest articulated a legitimate, nondiscriminatory reason for the plaintiff's discharge – his performance.

In seeking review of the Fifth Circuit's decision, the plaintiff urged the Supreme Court to resolve a conflict among the federal appeals courts regarding whether the *McDonnell Douglas* burden-shifting scheme is appropriate for FMLA and ADA cases. The plaintiff argued that the Fifth Circuit wrongly allowed the airline to defeat his FMLA claim by merely stating – not proving – that he would have been fired even if he had not taken the leave. The plaintiff argued that the airline should have been required to prove – not just articulate – that he would have been discharged regardless of requesting or taking FMLA leave.

Southwest argued that the case was inappropriate for resolving the appeals court split on burden allocation in FMLA cases because the plaintiff never proved he was entitled to the leave or that company decision-makers knew he had applied for the leave. In addition, Southwest argued that granting the plaintiff's petition would not resolve an appeals court split because the Fifth Circuit applied the law most favorable to the plaintiff by placing the burden on Southwest to prove that the plaintiff would have been terminated regardless of his leave request. The airline also disagreed with the plaintiff's claim that the federal appeals courts are split on the issue of whether *McDonnell Douglas* burden shifting applies to ADA reasonable accommodation claims.

Because the Supreme Court refused to review the case, the Fifth Circuit's decision remains in place.

Federal Airline Deregulation Act Does not Pre-empt Aircraft Mechanic's Retaliation Claim

A federal court in Illinois has held that an aircraft mechanic's state law retaliation claim is not pre-empted by the whistleblower protection provision (WPP) of the Federal Airline Deregulation Act (FADA). *See Meyer v. United Airlines* (N.D. Ill. Feb. 15, 2009). In *Meyer*, the plaintiff claimed he was discharged in retaliation for his complaints to supervisors that the airline's maintenance procedures violated FAA safety regulations. The airline moved to dismiss the plaintiff's state law retaliation claim on the ground that the FADA's WPP pre-empts the claim.

The court rejected the airline's motion. The court noted that the WPP pre-empts a state retaliatory discharge claim only when the claim relates to airline prices, routes or services. According the court, for Meyer's employment claim to have an impact on the airline's services, he would need to assert that the result of his case would have more than a tenuous impact on the airline.

The court found that even if Meyer prevailed on his retaliation claim, the results – such as an award of back pay, wages, and damages – would have only a minimal impact on the airline. Similarly a determination that Meyer was subjected to retaliation would not automatically require the airline to change its practices in any manner regarding the amount of time that a particular employee spends on a particular aircraft. According to the court, without injunctive relief being sought (which Meyer did not seek here) the case would have no impact on the airline's practices because no finding would be made regarding the way in which an aircraft should be maintained and serviced. Thus, the court held, "the result that he is seeking, re-employment or damages for his discharge, do not directly relate to the manner in which the airline services its planes

nor would that result have an impact on the airline other than in a remote and peripheral way."

Because of this tenuous connection, the court held that the FADA does not pre-empt Meyer's state common law retaliatory discharge claim. The court's decision merely permits Meyer to continue with his state law claim; it is not a determination on the merits of his case.

OSHA Orders Southern Air to Compensate Former Employees who filed AIR21 Claims

OSHA has ordered Southern Air to withdraw defamation lawsuits filed against several former employees and pay them more than $7.9 million in wages, damages and legal fees. According to OSHA, Southern Air filed the lawsuits in retaliation for the employees' protected activities under the whistleblower protection provisions of AIR21.

In this case, Southern Air sued the former employees for defamation, claiming they filed false and disparaging complaints about the company's staffing and safety inadequacies, including false complaints with the FAA and OSHA. After the airline filed these lawsuits, the former employees filed a whistleblower complaint with OSHA. Subsequently, OSHA determined that the lawsuits were filed in retaliation for the workers' OSHA and FAA complaints.

In addition to the monetary award, OSHA directed the airline to purge the former employees' personnel files and other records of all warnings, reprimands or derogatory references resulting from protected whistleblower activity; refrain from mentioning the complainants' protected whistleblower activity or conveying any damaging information in response to third party inquiries; and provide all Southern Air crew members with copies of the FAA Whistleblower Protection Program poster and OSHA's notice to employees, and post these in each Southern Air facility.

The airline has stated that it will appeal OSHA's order. Southern Air President Brian Neff stated that he was "disappointed that OSHA's investigators chose to release these findings without first performing a thorough investigation into the matter, including notifying Southern Air of any facts upon which they were relying to support their findings and providing Southern Air with a full opportunity to respond."

Earlier this year, a state court denied a motion to dismiss the airline's lawsuit against one of the former employees, permitting that case to proceed.

Federal Court Finds RLA does not Preclude Discharged Pilot's ERISA Claim

A federal court in Minnesota has held that the Railway Labor Act (RLA) does not preclude a pilot's claim that he was discharged in violation of ERISA, because he applied for disability benefits and to prevent him from obtaining further benefits. *See Sturge v. Northwest Airlines* (March 2, 2009). In this case, the pilot took a paid leave of absence because of a back injury and subsequently applied for disability benefits under the Pension Plan for Pilot Employees (the "Plan"). The Plan is an ERISA-governed benefits plan that was adopted as part of the collective bargaining agreement (CBA) between the ALPA (the union that represented the plaintiff during his employment) and Northwest.

Before a determination was made on the plaintiff's request for benefits, he was

discharged for possessing and using marijuana. He grieved his discharge, which was upheld by the System Board. Subsequently, Northwest granted the pilot partial disability benefits; however, because he was discharged for cause, these benefits did not include full retirement income, certain flight pass privileges, full health insurance, maintenance of seniority or the right to return to work if his medical condition improved.

The pilot sued in federal court, claiming his discharge violated ERSIA. Northwest sought to dismiss the lawsuit on the ground that is precluded by the RLA. The RLA requires airlines to establish a system for arbitrating minor disputes before an adjustment board. Minor disputes grow out of the interpretation or application of CBAs concerning rates of pay, rules, or working conditions, and are subject to the exclusive jurisdiction of the adjustment board. The adjustment board's jurisdiction applies to disputes arising out of a pension plan if the plan is maintained by a CBA. If the ERISA claim is independent of an interpretation or application of a CBA, a court retains jurisdiction over the ERISA claim.

To determine whether an ERISA claim is independent of a CBA, the court must determine whether the alleged right derives from a source extrinsic to the CBA. If so, the claim is not precluded unless enforcement of that right is "inextricably intertwined" with the consideration of the CBA. Here, the court held that the pilot did not challenge the Board's conclusion that he was terminated for just cause, but instead claimed that even if his termination was proper under the CBA, it still violated ERISA. Thus, the court held that the source of the right claimed by the pilot was extrinsic to the CBA.

The court further held that determination of whether the pilot was discharged in violation of ERISA was not inextricably intertwined with the CBA. ERISA forbids an employer from discharging a participant in an employee benefits plan for exercising a right under the plan or "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." To establish a prima facie case of retaliation or interference with rights under ERISA, a plaintiff must show that: (1) he participated in a protected activity or was likely to receive future benefits, (2) he suffered an adverse employment action, and (3) there is a causal connection between the two events. In addition, a plaintiff must establish that a "motivating factor" in his discharge was his employer's specific intent to interfere with his plan benefits.

Here, the pilot claimed he could establish the employer's specific intent to interfere with his plan benefits by showing that other pilots who were similarly situated were permitted to use a "safe harbor" in Northwest's Pilot Assistance Program (NAPAP) and were not discharged. The court held that determining whether the plaintiff was similar to these other pilots will require reference to the CBA and the Plan, but will not require resolution of disputed CBA and Plan provisions. Instead "the disputed issues will require fact-based inquiries into other chemically dependent pilots, reports of their dependency and Northwest's response. Such inquiries are not inextricably intertwined with consideration of the CBA and Plan, and the RLA does not preclude [the pilot's ERISA] claim."

In a separate proceeding, a different federal court judge held that this pilot had no contractual right to compel arbitration of his post-dismissal claims without ALPA's consent. *See Sturge v. Northwest Airlines, Inc.* (March 30, 2009). In that case, the court also noted that it has previously ruled that the RLA does not grant individual pilots a statutory right to compel arbitration.

AirTran Pilot's Union Approves Merger with ALPA

Members of the National Pilots Association, which represents pilots at AirTran Airways, have voted to merge the independent union with the Air Line Pilots Association,

according to reports released by the two unions. Eighty-eight percent of the pilots voting approved the merger. If ratified by ALPA's executive board at its next meeting April 28-29, the merger will take effect May 1.

Recent Election Results: May 2009

Horizon Air Industries, Inc.
IBT won an election to represent Mechanics and Related Employees. Out of 484 eligible employees, there were 187 votes for AMFA, 245 votes for IBT and 1 vote for other. Certification April 21, 2009. **Aloha Air Cargo**
IBT lost an election to represent Stock Clerks. Out of 5 eligible employees, there were 0 votes for IBT and 0 votes for IAM. Dismissal April 17, 2009. **Aloha Air Cargo**
IBT won an election to represent Fleet Service Employees. Out of 210 eligible employees, there were 42 votes for IAM and 83 votes for IBT. Certification April 17, 2009. **Great Lakes Aviation**
TU won an election to represent Flight Attendants. Out of 19 eligible employees, there were 2 votes for IBT and 16 votes for UTU. Certification April 9, 2009. **Great Lakes Aviation**
UTU won an election to represent Pilots. Out of 273 eligible employees, there were 0 votes for IBT, 209 votes for UTU and 3 votes for other. Certification April 9, 2009.
Delta Air Lines/Northwest Airlines, Inc.
PAFCA won an election to represent Flight Dispatchers. Out of 335 eligible employees, there were 101 votes for TWU and 205 votes for PAFCA. Certification March 25, 2009.
Delta Air Lines/Northwest Airlines, Inc.
NAMA lost an election to represent meteorologists. Out of 32 eligible employees, there were 6 votes for NAMA. Dismissal March 20, 2009. **US Airways, Inc.**
TWU lost an election to represent Airport Services Training Instructors. Out of 38 eligible employees, there were 12 votes for TWU. Dismissal February 23, 2009.