AIRLINE MANAGEMENT LETTER

# NLRB Finds ALPA Guilty of ULP

In a case that has stunned many people in the airline industry, an Administrative Law Judge (ALJ) for the National Labor Relations Board (NLRB) recently ruled that the Air Line Pilots Association, International (ALPA) committed an unfair labor practice (ULP) in violation of the National Labor Relations Act (NLRA) by attempting to enforce a scope provision against the former parent of an airline. The ALJ issued a decision on July 2, 2004, finding that ALPA violated the secondary boycott provisions of the NLRA, specifically Sections 8(b)(4)(ii)(A) and (B), by pursuing a grievance against DHL Holdings (USA), Inc., seeking to compel this NLRA-covered company to cease using ABX Air, Inc. (an RLA-covered airline) to haul its overnight air freight. The ALJ ordered ALPA to dismiss its grievance as well as a related counterclaim it had filed in federal court to compel arbitration and to refrain from taking *any* action designed to pressure DHL to cease doing business with ABX. He also ordered ALPA to reimburse DHL for its costs and attorney's fees incurred in defending ALPA's grievance and lawsuit.

The heart of this complex dispute is a scope clause that ALPA negotiated with the former DHL Airways in 1998 specifying that all future flying on behalf of DHL Airways would be performed exclusively by pilots on ALPA/DHL Airways' seniority list. DHL Worldwide, which at the time owned DHL Airways, signed a

▸ *Continued on page 2*

# Casualties of War – The Rights of Disabled Service Members Under USERRA

One of the lesser reported aspects of the on-going wars in Iraq and Afghanistan is the number of U.S. service members who have been seriously injured or wounded in fighting. According to the Pentagon, over 6,200 U.S. service members have been injured since the start of the Iraqi war alone. Fortunately, advances in body armor, coupled with rapid medical evacuations, have allowed service members to survive wounds that would have been fatal in previous wars. Many of these individuals have now been added to the rolls of the working disabled.

Employers' knowledge of the rights of disabled returning service members under the Uniformed Services Employment and Reemployment Rights Act (USERRA) is generally not as well developed as the knowledge of the standard reemployment issues for uninjured military service members. USERRA provides broad protections for disabled service members. As most employers know, returning service

▸ *Continued on page 5*

## IN THIS ISSUE

# Board Upholds Furlough of Most, But Not All, Northwest Mechanics

The RLA Board of Adjustment recently upheld the furlough of approximately 1,850 Northwest Airlines mechanics; however, it ordered the company to return about 150 mechanics to their jobs, finding that their furloughs were not caused by the Iraq war or the 2003 outbreak of Severe Acute Respiratory Syndrome (SARS).

In the year following the Iraq war, Northwest furloughed approximately 2,000 mechanics pursuant to a "force majeure" clause in its CBA that allowed layoffs in the case of certain emergencies, such as war. The Aircraft Mechanics Fraternal Association (AMFA) filed a grievance claiming that all of these layoffs violated the CBA. The Board held that the Iraq conflict was a "war emergency" or at the very least, "a condition over which Northwest had no control that had an immediate and devastating effect on domestic and foreign travel." Thus, it upheld the layoffs that occurred as a result of the war.

However, the Board also found that neither the war nor the SARS outbreak caused the grounding of eleven 747's and that the company was at least as motivated by its goal of "shedding older airplanes" as it was by the SARS outbreak when it grounded these planes. Accordingly, the Board held that the approximately 150 employees who were furloughed because of the grounding of these planes were entitled to be reinstated. ■

## NLRB *Continued from page 1*

side letter in 1998, which ALPA contends bound it and all of its affiliates to this scope clause. ALPA contends this scope clause survived DHL Airways' sale of DHL Airways (now known as ASTAR Air Cargo, Inc.) in July 2003. The issue came to a head in August 2003 after DHL Worldwide (renamed DHL Holdings (USA), Inc.) acquired Airborne Inc. Due to foreign ownership restrictions, ABX, which had formerly been owned by Airborne Inc., was spun off as an independent, publicly traded airline at the time DHL acquired Airborne. ABX, however, continued to perform its historical work carrying express freight on behalf of the now DHL-owned Airborne, Inc. after the DHL/Airborne merger.

ALPA filed a grievance shortly after the merger contending that DHL was bound by the 1998 scope clause and all of the flying being performed by ABX now belonged to the ALPA-represented ASTAR pilots. ALPA subsequently filed a lawsuit (counterclaim) in federal court in New York seeking to enjoin DHL from continuing to utilize ABX to carry its freight pending arbitration of this scope grievance.

ABX intervened in the New York lawsuit and persuaded the court to stay the case pending the outcome of an unfair labor practice charge that ABX filed against ALPA in which it contended that ALPA's scope clause was an illegal "hot cargo" provision in violation of Section 8(e) of the NLRA and that its grievance and lawsuit constituted unlawful coercion against a neutral employer (DHL) to force it to cease doing business with another person (ABX) in violation of Sections 8(b)(4)(ii)(A) and (B) of the NLRA. The ALJ's recent decision validates ABX's contention.

This decision is a tremendous victory for ABX as currently virtually all of its business is tied to carrying express freight on behalf of DHL. Thus, ABX's very existence was put at risk by ALPA's grievance and lawsuit. This is also an important victory for DHL. ABX's aircraft carry approximately three times the freight ASTAR is currently capable of carrying every night. DHL would clearly have been faced with enormous service problems if it were required to utilize ASTAR exclusively to carry its freight.

ALPA was stunned by the ALJ's decision and has announced that it will appeal the decision to the full NLRB. Whether ALPA will be successful in its appeal is doubtful. Norman Quandt, the Ford & Harrison partner who devised and implemented the strategy of suing ALPA under the NLRA, points out that ALPA conceded in this case that it was a "labor organization" within the meaning of Section

*Continued on page 3*

# Federal Court Enjoins Proposed Strike Against Amtrak

The U.S. Circuit Court of Appeals for the District of Columbia has enjoined five unions from striking against Amtrak, holding that the proposed strikes would violate the Railway Labor Act (RLA). The court rejected the unions' argument that the RLA does not apply because the proposed strikes would be directed against the government and would not concern matters at issue between the unions and Amtrak. *See National Railroad Passenger Corporation v. Transport Workers Union of America*.

In *National Railroad*, Amtrak announced it would be forced to shut down if it received a congressional subsidy of less than $1.8 million. After this announcement, five unions representing Amtrak employees announced they would conduct a one-day strike to protest the government's refusal to "properly fund Amtrak." When the unions announced the planned strikes, they were engaged in negotiation or mediation with Amtrak over the terms of new collective bargaining agreements.

Amtrak filed a motion to enjoin the proposed strikes on the grounds that the RLA prohibits self-help during the negotiation of a collective bargaining agreement. The trial court denied Amtrak's motion and Amtrak appealed to the D.C. Circuit Court of Appeals.

The appeals court reversed the trial court and held that to the extent the subject of the unions' proposed strike was the level of congressional appropriations for Amtrak, the strike grew out of a major dispute between Amtrak and the unions over the formation of new collective bargaining agreements. The court noted that the amount Congress appropriated for Amtrak's operations determined both the number of employees Amtrak could retain and any increases in the level of pay and benefits those employees might receive. Thus, the court held that the planned strike over the level of congressional appropriations grew out of a dispute over pay and working conditions being negotiated between Amtrak and the unions and that the parties were required to exhaust RLA procedures before resorting to self-help, such as a strike.

Additionally, the court held that the proposed strike was partly directed to a non-mandatory subject of bargaining, the curtailment or discontinuance of Amtrak's operations. The court relied on cases under the National Labor Relations Act (NLRA) in making this determination, finding that the use of the mandatory-permissive distinction under the RLA is entirely consistent with its statutory framework. Thus, to the extent the unions wanted to strike merely to protest a transaction that did not violate their statutory or contractual rights, they were using unauthorized self-help, which violated the RLA.

Finally, the court held that when the RLA prohibits a strike, it also prohibits any union tactic that has the consequences of a strike – regardless of whether the purpose of the strike is politically motivated. Because the proposed strike would put severe economic pressures on Amtrak during the period of negotiations and mediation, it "is precisely the kind of action the RLA status quo provisions seek to prevent." ■

## NLRB *Continued from page 2*

2(5) of the NLRA. According to Quandt, once ALPA's NLRA "labor organization" status was established, ALPA's actions constituted a textbook 8(b)(4)(ii)(A) and (B) violation. Quandt notes that the ALJ's decision is well-written and fully supported by well-established NLRB and Supreme Court precedents. He is confident that the NLRB will affirm the ALJ's decision.

Apart from its obvious significance to ABX and DHL, this recent NLRB ruling potentially has great significance to other airlines and railroads faced with various pressure tactics by their unions. Based on this precedent, employers who are subject to the RLA may find opportunities to sue their unions for secondary activity that may be illegal under the NLRA. ■

# National Mediation Board Matters

## Recent Election Results

By Tammie M. Inman

***CJ Systems Aviation Group***
The Office and Professional Employees International Union (OPEIU) lost an election to represent the flight deck crew members. Out of 347 eligible voters, OPEIU received 134 votes. (Dismissal, August 17, 2004).

***Jet Linx Aviation***
The Jet Linx Pilot Group (JLPG) won an election to represent the pilots. Out of 14 eligible employees, JLPG 12 votes. (Certification, July 28, 2004).

***Frontier Airlines***
The International Brotherhood of Teamsters (IBT) lost an election to represent the stock clerks. Out of 20 eligible employees, IBT received 10 votes. (Dismissal, July 22, 2004).

***AmeriJet International***
The International Brotherhood of Teamsters (IBT) won an election to represent the flight engineers. Out of 19 eligible voters, IBT received 17 votes. (Certification, June 10, 2004).

***AmeriJet International***
The International Brotherhood of Teamsters (IBT) won an election to represent the pilots. Out of 40 eligible voters, IBT received 32 votes. (Certification, June 10, 2004).

***Midwest Airlines***
The International Brotherhood of Teamsters (IBT) lost an election to represent the stock clerks. Out of 16 eligible voters, IBT received 6 votes. (Dismissal, June 8, 2004).

***Midwest Airlines***
The International Brotherhood of Teamsters (IBT) lost an election to represent the mechanics and related employees. Out of 363 eligible voters, IBT received 163 votes and there were 14 votes for other. (Dismissal, May 28, 2004). ■

## Ford & Harrison Seminars & Breakfast Briefings

**Breakfast Briefings:**
Ford & Harrison conducts a variety of breakfast briefings in our 11 cities. To learn about upcoming breakfast briefings in your area, visit the "Seminars" section at www.fordharrison.com.

**Seminars Coming in 2005:**
*Late Winter/Early Spring* - "A Program for Remaining Union Free" - Atlanta, GA
*Spring* - Ford & Harrison's Annual Labor & Employment Law Conference - 2 locations in Atlanta and Orlando

Contact Lynne Wingate at 404-888-3858 or lwingate@fordharrison.com for more information.

have a set period of time in which to report back to work to preserve their USERRA reemployment rights. For example, service members called to active duty for more than 180 days must submit their application for reemployment within 90 days of the completion of their military service. Service members gone for 30 days or less are required to report back to work "not later than the beginning of the first full regularly scheduled work period" after a period of eight hours for safe transportation. 38 U.S.C. § 4312(e).

However, these reporting requirements are lengthened for service members who have been hospitalized or are convalescing from an illness or injury incurred or aggravated by military service. These individuals have up to an additional two years to recover from their injury or illness before they must apply for reemployment. 38 U.S.C. § 4312(e)(2). Additionally, the two-year period may be extended for circumstances beyond their control, for instance if reporting back is impossible or unreasonable.

Disabled service members also have special rights with respect to the position in which they are to be reemployed upon their return from service. Under USERRA there is an "escalator" provision that requires a returning service member to be placed in a position of employment as if he or she had never been called to active duty. Individuals who have incurred or aggravated a disability during their military service and cannot be reinstated into the position called for under USERRA, even after reasonable accommodation efforts, still have reinstatement rights under USERRA.
USERRA requires these individuals to be placed in "any other position which is equivalent in seniority, status and pay, the duties of which the person is qualified to perform or would be qualified to perform with reasonable efforts by the employer" or, if they cannot be placed in such a position because of their disability, "in a position which is the nearest approximation to such a position . . . in terms of seniority, status, and pay consistent with circumstances with such person's case." 38 U.S.C. § 4313(3). USERRA's reasonable accommodation requirement is similar to that found in the Americans with Disabilities Act (ADA); however, even employers who are too small to be covered by the ADA are still subject to USERRA.

*Disabled service members also have special rights with respect to the position in which they are to be reemployed upon their return from service.*

A final issue for an employer to consider with regard to disabled returning service members is health benefits. Under USERRA, any service member, regardless of disability status, who was enrolled in an employer-sponsored health plan when called to active duty, is entitled to reinstatement to the plan upon return from service. This reinstatement is required if the employee so chooses and no waiting period may be imposed. (In essence, a returning service member cannot be forced to wait for an open enrollment period before being reinstated into the health plan.)

Interestingly, illnesses and injuries incurred or aggravated by military service do not have to be covered by the employer's health plan. Presumably these illnesses and injuries will be covered by Veterans Affairs because the determination of what is an excludable illness or injury is determined by the Secretary of Veterans Affairs. 38 U.S.C. § 4317(b)(2).

With the advances in medicine and prosthetics, hopefully service members who have been seriously injured or wounded while serving their country will be able to return to work without terrible hardship to themselves or their civilian employers. However, employers are well served

# AIRLINE MANAGEMENT LETTER

FORD & HARRISON LLP
Creative Workplace Solutions

*1275 Peachtree Street, N.E. • Suite 600*
*Atlanta, Georgia 30309*

*Airline Management Letter* is a service to our clients, providing general information on selected legal topics. Clients are cautioned not to attempt to solve specific problems on the basis of information contained in an article. For more information, please call Colette Plourde at 404-888-3812 or write to the Atlanta office at the address below.

Editor: Amy W. Littrell
alittrell@fordharrison.com

FORD & HARRISON LLP
Creative Workplace Solutions

1275 Peachtree Street, N.E. Suite 600
Atlanta, Georgia 30309
404-888-3800 FAX 404-888-3863

2100 Third Avenue North Suite 400
Birmingham, Alabama 35203
205-244-5900 FAX 205-244-5901

1675 Broadway Suite 2150
Denver, Colorado 80202
303-592-8860 FAX 303-592-8861

225 Water Street Suite 710
Jacksonville, Florida 32202
904-357-2000 FAX 904-357-2001

350 South Grand Avenue Suite 2300
Los Angeles, California 90071
213-237-2400 FAX 213-237-2401

6750 Poplar Avenue Suite 600
Memphis, Tennessee 38138
901-291-1500 FAX 901-291-1501

100 S.E. 2nd Street Suite 4500
Miami, Florida 33131
305-808-2100 FAX 305-808-2101

100 Park Avenue Suite 2500
New York, New York 10017
212-453-5900 FAX 212-453-5959

300 South Orange Avenue Suite 1300
Orlando, Florida 32801
407-418-2300 FAX 407-418-2327

101 E. Kennedy Blvd. Suite 900
Tampa, Florida 33602-5133
813-261-7800 FAX 813-261-7899

1300 19th Street, N.W. Suite 700
Washington, DC 20036
202-719-2000 FAX 202-719-2077



Certification as a Labor and Employment Law Specialist is not currently available in Tennessee.

Visit our web site at www.fordharrison.com