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**Issue Date: 13 December 2005**

**Case No.: 2005-AIR-32**

**In the Matter of**

**Darryl Thompson,**
**Complainant**

**v.**

**BAA Indianapolis LLC,**
**Respondent**

## ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND SCHEDULING HEARING

This case arises under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR 21"). The proceedings before the Office of Administrative Law Judges ("OALJ") were initiated on September 30, 2005, when the Complainant, Darryl Thompson, requested a hearing before the OALJ on his whistleblowing complaint. On November 16, 2005, the Respondent filed its Motion for Summary Decision; the Complainant filed his response on November 30, 2005. On December 6, 2005, I conducted a hearing in Indianapolis, Indiana on the issue of whether the Complainant's claim falls under the AIR 21 Act, and thus whether this Court has jurisdiction to consider the merits of the claim.

## DISCUSSION

The Respondent argues that it is not subject to the whistleblower protection provisions of AIR 21, because it is not included in the definition of the entities covered by the statute. The Respondent, BAA Indianapolis, L.L.C. (BAA), is a contractor of the Indianapolis Airport Authority, whose primary functions are to maintain required FAA certifications for the six airport facilities owned by the Indianapolis Airport Authority, to increase terminal revenue through management of the airport's parking and concessions, and to provide administrative support. As the Respondent succinctly puts it, BAA manages the Indianapolis area airports.

Thus, Respondent argues, it is not an air carrier, and does not contract or subcontract with any air carrier to provide safety sensitive functions. The Respondent points to the definition of "air carrier," which is distinct from the definition of "airport," contending that if Congress wished to include airport employees and their contractors under the whistleblower provisions of the statute, it would have done so explicitly. According to the Respondent, the legislative history

surrounding the Act makes it clear that the intent of the statute is to add whistleblower protection for airline employees; but no mention is made of airport employees.

The Respondent attached to its Motion for Summary Judgment a lengthy document entitled "Amended and Restated Agreement for the Operation and Maintenance of the Indianapolis International Airport Facilities" (Respondent Exhibit 1). This document sets out the terms of the agreement between Respondent and the Indianapolis Airport Authority for the operation and maintenance of the Indianapolis International Airport Facilities. It reflects, *inter alia,* that the Indianapolis Airport Authority owns and is responsible for the operation and maintenance of the airport facilities, and that it has contracted for the operation and maintenance of these facilities with the Respondent, which has the specialized professional skills and experience to supply operation, maintenance, and management services.

The services provided by the Respondent are in three "components." The "Terminal Services Component" includes services related to operation of the terminal, including maintenance and janitorial, operation, concessions, parking and rental car, advertising, grounds maintenance, security, planning and engineering, and land development. The "Airfield Support Services Component" includes airfield maintenance and snow removal, ramp operations, airfield signage and navigation, fire and rescue, reliever and general aviation airports and heliport, non-terminal buildings maintenance, FBO and GA facilities maintenance, vehicle maintenance, intermodal and cargo support, planning and engineering for airfield, de-icing, airside land development, airside security, and fuel farms and fill stands. Finally, the "Administrative Services Component" includes finance and accounting, grant management, management information systems, public relations, human resources management, purchasing and contracts management, administration of bond issuance and PFC collection and accounting, land acquisition and relocation implementation, legal, and marketing. Under the agreement, the Airport Authority retains the right to negotiation, execution, and administration of airline use agreements (4.01(a).

Title 29 C.F.R. Part 1979 sets out the implementing procedures for the whistleblower provisions under section 519 of the Act. The pertinent definitions, found at Section 1979.101, provide as follows:

> *Air carrier* means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.
>
> . . . . .
>
> *Contractor* means a company that performs safety-sensitive functions by contract for an air carrier.
>
> *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.

Section 1979.102(a) further provides that:

> No air carrier or contractor or subcontractor of an air carrier may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, engaged in any of the activities specified in paragraphs (b)(1) through (4) of this section.

For purposes of my determination on the question of whether the Complainant's claim is covered under the AIR 21 Act, there is no material dispute of fact. Thus, there is no dispute that Respondent BAA does not **directly** provide air transportation: it does not own or operate the planes that come in and out of the Indianapolis area airports, nor does it employ the pilots or flight attendants who fly the planes, or the mechanics who service them. Nor is it a contractor or subcontractor for an air carrier: its contract is with the Indianapolis Airport Authority. There is no dispute that BAA's contractual responsibilities are correctly set out in the contract provided by the Respondent as Exhibit 1.

However, I find that BAA, as an entity charged with maintaining the safety and security of the landing areas, indirectly provides air transportation, and thus falls squarely within the definition of "air carrier" in AIR 21. As the Respondent points out, the legislative history underlying the passage of AIR 21 is sparse, at best. But what history there is clearly evinces the intent of Congress to insure that persons who are in a position to observe safety violations or concerns are free to report those concerns to the appropriate authorities without fear of jeopardizing their livelihood.

The Respondent cites to the House Report, stressing that it notes that although there are over a dozen federal laws that protect whistleblowers, there are none that specifically protect *airline* employee whistleblowers, and states that this Act will provide protection for *airline* employee whistleblowers who provide information to their employer or the Federal government about air safety. H.R.REP. NO. 106-167 (1999)(emphasis added by Respondent). The Respondent also argues that "as generally understood," "air carrier" refers to "airlines," citing to Administrative Law Judge Miller's decision in *Fader v. Transp. Security Admin.,* 2004 AIR 27 (June 17, 2004).

I find that, considering both the language of the Act as well as its underlying purpose, the whistleblower protections are not limited to employees of airlines. It is clear that BAA provides necessary services for the airport, that have a direct impact on the safety and well-being of the airlines and the passengers they carry. Thus, BAA has contracted, as the Respondent puts it, to manage the airport, which includes maintenance of the airfield and snow removal, ramp operations, airfield signage and navigation, fire and rescue services, and de-icing, as well as the other maintenance, operational, and administrative services required to run an airport. I find that it is a reasonable, indeed compelling inference, that the maintenance of safe and secure runways on which airplanes can take off at one end of a flight, and land at the other end, is just as crucial to airline safety as the services provided by the airline employees, such as the mechanical

maintenance of the airplane, the proper loading of baggage, or the actual inflight operations.

Contrary to the Respondent's strained interpretation of the minimal legislative history on this Act, I view the cited portions of the House Report as reflecting the desire of Congress to *broaden* the protection of whistleblower laws, not to restrict it solely to airline employees. Indeed, the only way to give meaning to the expansive definition of "air carrier" in the Act is to conclude that it is not limited strictly to airline employees, or those in contractual privity with airlines. Nor does the decision in *Fader, supra,* support the conclusion that "air carrier" refers only to "airlines." In that case, the Administrative Law Judge found that the Complainant's position as an employee of TSA, and thus as a federal employee, did not confer upon him the status of an employee or contractual employee of an air carrier. The Administrative Law Judge stated:

> A reasonable reading of the statutory provisions and language of AIR21 and its implanting regulations convinces this tribunal that the protections are extended to civilian employees of air carriers in the generic sense, basically meaning airlines and similar air carriers, and their contractors' and subcontractors' and employees engaged in similar employment activities. There is nothing discernable in the AIR21 statute that suggests that its protections were intended by Congress to extend to federal employees, such as a screener employed by TSA, who have a separate statutory and regulatory recourse for whistleblower protection against prohibited personnel practices under 5 U.S.C. §2302(b).

Thus, Judge Miller concluded that the complainant was not covered under the whistleblower protections of AIR 21. But that is not the case here. The Complainant is not a Federal employee – he is an employee of a private company whose function is to ensure, among other things, the safety and security of the runways where the airlines take off and land. As Judge Miller observed, "It is settled that whistleblower laws are to be given a broad interpretation consistent with their purpose. *See Weil v. Planet Airways, Inc*., 2003 AIR 18 (ALJ Mar. 16, 2004)." A reading of the Act and regulations as a whole, including the definitions, does not suggest that Congress intended to limit the whistleblower protections of AIR 21 to those persons in contractual privity with an airline.[1] To the contrary, the definition of "air carrier" suggests just the opposite – that Congress intended to extend these protections to an employee of a citizen of the United States undertaking to provide air transportation ***by any means,*** directly ***or indirectly.***

The maintenance of safe and secure landing areas is an essential, albeit indirect, component of the provision of air transportation. Thus, I find that BAA, which is charged with maintaining the Indianapolis area airports, falls squarely under the definition of "air carrier" in the AIR 21 implementing regulations. As the Complainant was an employee of BAA, his complaint falls within the jurisdiction of the whistleblower provisions of AIR 21.

Accordingly, based on the foregoing, the Respondent's Motion for Summary Judgment is denied. As discussed with the parties, the hearing in this matter will take place on April 11 and 12, 2006, in Indianapolis, Indiana, at a location to be announced. The parties are directed to

[1] Under the terms of its contract, the Airport Authority maintains the right to negotiation of the airline use agreements with the airlines.

comply with the following prehearing procedures:

1. Discovery will commence immediately and end fourteen days prior to the hearing (the Rules of Practice and Procedure for Administrative Hearings Before Administrative Law Judges, 29 C.F.R. Part 18 shall apply);

2. The parties shall exchange, by mail, a pre-hearing submission containing the following information, on or before the twenty-first day prior to the scheduled hearing:

a) A simple statement of the issues of fact or law to be decided and the relief or remedy sought;

b) A list of the names and addresses of each witness the party expects to call and a brief summary of the testimony the witness is expected to furnish;

c) Copies of documents that the party expects to offer into evidence marked with sequential exhibit numbers, together with an index of such documents;

d) A single "stipulated" glossary of any acronyms and airline terms expected to be referred to in the case, prepared by the Respondent;

e) A single "stipulated" organizational chart, prepared by the Respondent, depicting the status or position (or former position) of the complainant, witnesses, and others expected to be referred to in testimony or documentary evidence;

e) Any revised estimate of the approximate number of days required for the hearing.

3. Copies of the aforesaid submissions shall be served upon each other party and furnished to the undersigned, except that the parties shall only identify rather than submit copies of those documents to be entered into evidence to the administrative law judge.

4. Failure to timely comply with this order may result in the exclusion of the testimony of witnesses not identified, the exclusion of documents not served, or other appropriate sanctions.

Further, the parties are requested to take prompt action with a view to stipulating facts and documents that are not in dispute, and to confer with respect to possible compromise of the issues in controversy. Settlement or Consent Findings procedures, available under 29 C.F.R. § 18.9, should be reviewed.

SO ORDERED.

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LINDA S. CHAPMAN
Administrative Law Judge