U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 August 2004

CASE NO. 2004-AIR-00020

In the Matter of:

ROBIN BROOMFIELD,
Complainant,

vs.

SHARED SERVICES AVIATION and
CONOCOPHILLIPS ALASKA, INC.,
Respondents.

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AND DISMISSING COMPLAINANT'S COMPLAINT

This proceeding arises under the employee protection provisions of the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century ("AIR 21" or "the Act"), 49 U.S.C. § 42121 *et seq*.

Complainant Robin Broomfield ("Complainant") filed a complaint against Shared Services Aviation, ConocoPhillips Alaska, Inc. ("Respondent") on January 12, 2004. On February 11, 2004, the Regional Administrator issued a determination that Respondent is not covered under the provisions of the Act, reasoning that because Respondent does not provide air transportation to the public, it is not an air carrier within the meaning of the Act. On March 9, 2004, Complainant filed a request for hearing. On March 18, 2004, I held a conference call with the parties and set forth a discovery and motion schedule on the issue of jurisdiction. On May 28, 2004, Respondent filed a Motion for Summary Decision.[1] On June 18, 2004, Complainant requested a one-day extension to respond to the Motion for Summary Decision. On June 18, 2004, Respondent filed a response to Complainant's request for an extension, stating that it had no objection and requesting that it also be granted an additional day to file its reply brief. I granted both requests on June 21, 2004. On June 21, 2004, Complainant filed her opposition to Respondent's Motion for Summary Decision. On June 28, 2004, Respondent filed its Reply to Complainant's Opposition.

[1] Respondent's motion for Summary Decision included several exhibits, hereinafter referred to as RX.

Issue:

1. Is Respondent an air carrier covered by the provisions of AIR 21?

SUMMARY OF DECISION

Respondent is not an air carrier within the meaning of AIR 21 because Respondent does not provide the transportation of mail by aircraft.

FACTUAL BACKGROUND

Respondent partially funds and manages the Shared Services Aviation Department ("SSAD") to transport workers by aircraft to its oilfields in the North Slope of Alaska. RX-B, p. 2; RX-C, p. 3. The SSAD is not engaged in selling transportation services for compensation. RX-C, p. 1. The airplanes are owned or leased by Respondent. RX-C, p. 1-2. In addition to transporting Respondent's employees, the aircraft often carry postmarked mail, initially delivered by the United States Postal Service ("USPS") to company addresses or post office boxes in Anchorage. RX-B, p. 4. Respondent has published procedures for handling U.S. mail, Federal Express deliveries, and inter-company mail. RX-B, p. 12-28. Respondent's employees' personal mail (that is, mail addressed to the employees from senders other than Respondent) is generally routed to three post office boxes held in Respondent's name. RX-B, p.4. The mail is addressed as follows:

ConocoPhillips Alaska
Attn: Employee name or room number
PO Box Number
Anchorage, AK 99519

RX-B, p. 21. The three PO Box numbers correspond to Respondent's three facilities in Anchorage, Alpine, and Kuparuk. RX-B, p. 21. The mail is retrieved from the post office by couriers, placed in mail bags provided by USPS, and taken to Respondent's mailrooms in Anchorage. RX-B, p. 4. The mail is then delivered to the SSAD desk at the airport and taken to Respondent's North Slope facilities in Respondent's aircraft. RX-B, p. 4-5. Finally, the mail is taken to Respondent's mailroom and distributed into designated boxes. RX-B, p. 5.

Respondent's aircraft also carry stamped mail, not yet postmarked by the USPS. RX-B, p. 6. This mail is collected at Respondent's North Slope facility, placed in mail bags provided by USPS, and flown to Anchorage, where it is picked up by a courier and taken to Respondent's mailroom. RX-B, p. 6. The stamped mail is then sorted and delivered to the post office. RX-B, p. 6.

ANALYSIS

Respondent moves for summary decision, arguing that this matter must be dismissed for lack of jurisdiction. Respondent contends that it does not provide air transportation services to the public, nor does it engage in transportation of United States mail by aircraft. Complainant

opposes Respondent's motion, asserting that Respondent is an air carrier within the meaning of the Act because Respondent transports United States mail. Complainant concludes that this Office has jurisdiction over her complaint.

Although both Respondent and Complainant have framed the issue in dispute as jurisdictional in nature, the issue is properly understood as one of coverage under the Act, rather than jurisdiction. This Office clearly has jurisdiction to hear the complaint because the parties are properly before it, the proceeding is of a kind or class which this office is authorized to adjudicate, and the claim is not obviously frivolous. *See Bell v. Hood*, 327 U.S. 678, 682-83 (1946); *Sasse v. U.S. Dept. of Justice*, ARB No. 99-053 (Aug. 31, 2000). The question of whether Respondent is an air carrier and thus covered under the Act does not affect jurisdiction. *See E.E.O.C. v. St. Francis Xavier Parochial School*, 117 F.3d 621, 624 (D.C. Cir. 1997). However, a finding that Respondent is not an air carrier would be fatal to the complaint on the merits. *Id.*

A party is entitled to summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c); C.F.R. 18.40(d). The moving party bears the initial burden of showing the absence of a genuine issue as to any fact which may affect the outcome of the litigation. *Commodity Futures Trading Commission v. Savage*, 611 F.2d 270 (9th Cir. 1979). Once this burden has been met, the "adverse party 'must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson v. Liberty Lobby*, 447 U.S. 242, 250 (1986). In doing so, "a party opposing the motion may not rest upon the mere allegations or denials [in its] pleading." 29 C.F.R. 18.40(c).

AIR 21 proscribes retaliation by an "air carrier" against an employee when the employee provides information to his employer or to the government concerning any "violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety . . . ." 49 U.S.C. § 42121(a). An employee seeking relief under AIR 21 must show that his employer is an "air carrier" under AIR 21. The regulations implementing AIR 21 state that the definition of "air carrier" under the Federal Aviation Act, 49 U.S.C. § 40101, *et. seq.* ("FAA"), is applicable to AIR 21.[2] The FAA defines "air carrier" as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." 49 U.S.C. 40102(a)(2). Air transportation is further defined as "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft." 49 U.S.C. § 40102(a)(5). The FAA defines mail, in relevant part, as "United States mail." 49 U.S.C. § 40201(a)(30). The meaning of "United States mail" receives no elaboration in the statute, nor is the term further defined by judicial construction.[3]

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[2] Procedures for Handling of Discrimination Complaints under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 68 Fed. Reg. 55, 14101 (March 21, 2003).

[3] The Sixth Circuit briefly discusses of the meaning of "United States mail" in *Bower v. Federal Express Corporation*, 96 F.3d 200, 204 n.8, (6th Cir. 1996). At issue was whether Federal Express was covered by the Air Carriers Access Act ("ACAA"). The court noted that "[a]lthough FedEx is generally thought of as an alternative carrier of mail, it might not be a carrier of 'mail' within the meaning of the ACAA because this term is defined to include only the carriage of 'United States mail and foreign transit mail.' 49 U.S.C.

Citing the FAA, Respondent argues that "United States mail" should be defined as that mail which is transported by aircraft pursuant to an agreement with and on behalf of the USPS. Thus, because Respondent has no contractual relationship with the USPS, it asserts that it is not an air carrier within the meaning of AIR 21. Complainant contends that United States mail is "any item Congress intends to be controlled by the USPS so that it reaches its intended address."

Respondent is not Carrying Letters in the Postal System

According to Black's Law Dictionary, mail is defined as "one or more items that have been properly addressed, stamped with postage, and deposited for delivery in the postal system . . . An official system for delivering such items; the postal system."[4] Thus, the letters and packages carried by Respondent in its aircraft are mail if they are part of the postal system.

The USPS is authorized to enter into contracts with certified air carriers for "the transportation of mail by aircraft between any two points both of which are within the state of Alaska." 39 U.S.C. § 5402(f). The letters and packages Respondent transports would be part of the postal system if it carried them pursuant to a contract with the USPS.[5] Because it is undisputed that there is no actual contract between USPS and Respondent, a contract or agency relationship would exist between the two entities only if it were implied. The requirements for a finding that an implied contract exists between a private party and the United States are: "(1) mutuality of intent to contract; (2) consideration; (3) lack of ambiguity in offer and acceptance; and (4) actual authority of the Government representative whose conduct is relied upon to bind the Government in contract." *Alaska Central Express, Inc. v. U.S.*, 50 Fed.Cl. 510, 514 (2001). Clearly, these requirements are not met in the instant case.

Moreover, the Ninth Circuit has refused to create an involuntary agency relationship between a private party and the USPS where neither contract nor regulation specifically created such a relationship. *United States v. Patterson*, 664 F.2d 1346, 1348 (9th Cir. 1982). In *Patterson*, the defendant was indicted for possession of stolen mail in violation of 18 U.S.C. § 1708. *Id.* at 1347. He had taken letters from boxes at the YMCA front desk, where mail for non-guests was routinely held. *Id.* To convict the defendant, the government had to show that he had stolen the letters from the mail. *Id.* The defendant argued that the letters were no longer in the mail once they were delivered to the front desk and placed under the control of the YMCA's employees. *Id.* The Ninth Circuit agreed. *Id.* The court reasoned that there was nothing to indicate that the YMCA or its employees were authorized by postal regulation or otherwise as custodians of the mail. *Id.* at 1347-48. In the absence of an agency relationship, the court determined that the letters were not "in the mail" when they were stolen. *Id.*

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§ 40102(29). The record does not reflect whether the United States Post Office ever rents cargo space on FedEx's aircraft for the purposes of transporting United States mail . . . ." Basing its decision on other grounds, the court declined to decide whether FedEx carries mail within the meaning of the ACAA.

4 BLACK'S LAW DICTIONARY (8th ed. 2004).

5 The Sixth Circuit's discussion in *Bower*, *supra*, supports the conclusion items constituting United States mail are those items carried pursuant to an agreement with the USPS.

Although *Patterson* is a criminal case, its analysis of the relationship between the USPS and a private entity is applicable to the instant case. Here, as in *Patterson*, there is nothing to indicate that Respondent or its employees were authorized by postal regulation or contract to transport United States mail between two points in Alaska. In the absence of such a contractual relationship, the letters carried by Respondent are not part of the postal system and hence are not mail.

Respondent is not Transporting Letters Congress Intended to be Mail

Complainant argues that the North Slope letters and packages are mail because they are items Congress intended to be controlled by the USPS. Even assuming that Complainant's proffered definition is correct, I conclude that the letters and packages delivered by Respondent to the North Slope are not items Congress intended to be controlled by the USPS. Thus, even under Complainant's definition of "mail," Respondent is not an air carrier under the Act.

In support of its proffered definition of "mail," Complainant cites to *Regents of the University of California v. PERB*, 485 U.S. 589 (1988) (*Regents*). In *Regents*, the union requested that the University deliver letters addressed to University employees through its inter-office mail system. *Id.* at 589. The union asserted that the University was obliged to do so under the applicable state employer-employee relations statute. *Id.* The University refused to deliver the letters, arguing that to do so would violate the Private Express Statutes. *Id.* at 592. Those statutes generally make it unlawful for any entity other than the USPS to send or carry letters over postal routes for compensation.[6] 18 U.S.C. 1693, *et seq*.; 39 U.S.C. 601 *et seq*. The Public Employment Relations Board ("PERB") found that the University was not violating the Private Express Statutes because the delivery of the union letters fell within an exception to the general prohibition on private carriage of mail. *Regents*, 485 U.S. at 593. The Court disagreed. As an initial matter, the Court determined that the general prohibition against private carriage would be applicable to the University's carriage of the union letters. *Id.* at 594. The Court then held that the union letters did not fit within any exception to the Private Express Statutes. *Id.* at 603. The Court concluded that the University could not have delivered letters without violating federal law and thus was not obligated to deliver them under the applicable state employer-employee relations statute. *Id.*

Complainant asserts that in the instant matter, as in *Regents*, the exceptions to the Private Express Statute do not permit Respondent to carry letters outside the mail system. Thus, Complainant concludes, Respondent is violating the Private Express Statutes. Since the Private Express Statutes were enacted in order to create a postal monopoly, Complainant concludes that Respondent is infringing on the monopoly and is therefore engaged in what is tantamount to the transportation of United States mail. Complainant urges the Court to look beyond the legality of carriage at issue and "focus on whether the [Respondent's carriage of mail] could be regulated under the law. If Respondent is privately transporting what Congress intended to be U.S. mail it is an air carrier." However, Complainant's analysis misses a crucial first step: Before determining whether Respondent's carriage falls within an exception to the general prohibition

[6] In *Regents*, the Court noted that "'compensation' has been read to encompass the nonmonetary consideration that is implicit in a business relationship." *Regents* at 599-600. Thus, the fact that Respondent receives no monetary compensation for its carriage of letters in not necessarily fatal.

against private carriage of mail contained in the Private Express Statutes, it is necessary to determine whether Respondent's carriage is subject to the general prohibition in the first place.

The "general prohibition" is stated in §§ 18 U.S.C. 1693, 1694. Section 1693 proscribes carriage of letters or packets in a manner contrary to law. Section 1694 states:

> Whoever, having charge or control of any conveyance operating by land, air, or water, which regularly performs trips at stated periods on any post route, or from one place to another between which the mail is regularly carried, carries, otherwise than in the mail, any letters or packets . . . shall . . . be fined under this title.

Together, these sections prohibit carriage of certain letters or packets outside of the United States postal system. Importantly, however, Section 1694 specifies that such carriage must either be on a post route or from one place to another between which mail is regularly carried. Complainant has presented no evidence that mail is carried to the North Slope by the post office and therefore no evidence that the route between Anchorage and the North Slope facilities is a postal route. Accordingly, Complainant has not shown that carriage of letters between Anchorage and the North Slope is prohibited by the Private Express Statutes. If such carriage is not prohibited by the Private Express Statutes, following Complainant's reasoning, the letters are not items intended by Congress to be mail.

Finally, as Respondent asserts, the regulations implementing the Private Express Statutes also support a finding that Respondent's carriage of letters and packages is lawful. 39 C.F.R. § 310.3 provides that the private carriage of letters which enter the mail stream at some point between their origin and destination is permissible. Section 310.3 further states that the pickup and carriage of letters which are delivered to post offices for mailing and the pickup and carriage of letters at post offices for delivery to addresses are examples of permitted activities. Thus, Respondent's activities are permissible under the regulations. Again, Respondent's transportation of letters is permissible because Respondent is not infringing on the USPS's monopoly on the carriage of mail. Therefore, Respondent is not transporting items Congress intended to be mail.

CONCLUSION

Respondent is not an air carrier within the meaning of AIR 21 because Respondent does not provide the transportation of mail by aircraft.

RECOMMENDED ORDER

Based on the foregoing, I recommend that the following order issue:

1. Respondent's motion for summary decision is GRANTED.

2. Complainant's complaint in this matter is DISMISSED.

A

ANNE BEYTIN TORKINGTON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).