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For Meeting of 1/19/12

January 13, 2012

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Kevin Deeley *KDE*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Joshua Blume *JB*
Attorney

Subject: Draft AO 2011-25 (Atlas Air)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the Open Session agenda for January 19, 2012.

Attachment

1 ADVISORY OPINION 2011-25

2

3 Mr. Stephen P. Roberts

4

K&L Gates LLP

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1601 K Street, NW

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Washington, DC 20006-1600

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DRAFT

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Dear Mr. Roberts:

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We are responding to your advisory opinion request on behalf of Atlas Air

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Worldwide Holdings, Inc. (“Atlas Worldwide”), concerning the application of the

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Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission

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regulations to the status of certain management employees of Atlas Worldwide’s two

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subsidiaries, Atlas Air, Inc. (“Atlas Air”) and Polar Air Cargo Worldwide, Inc. (“Polar

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Air”), as members of Atlas Worldwide’s restricted class.

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The Commission concludes that these management employees are members of

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Atlas Worldwide’s restricted class because they are part of Atlas Air and Polar Air’s

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“executive or administrative personnel.”

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Background

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The facts presented in this advisory opinion are based on your letter received on

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November 29, 2011 and your e-mail of January 13, 2012.

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Atlas Worldwide is a corporation organized under the laws of Delaware. Atlas

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Worldwide’s primary business is the worldwide operation of cargo flights through two

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subsidiary companies it holds: Atlas Air and Polar Air. Atlas Worldwide has a separate

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segregated fund – the Atlas Air Worldwide Holdings, Inc. Political Action Committee

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(“Atlas Worldwide PAC”) – to which employees may contribute.

1 Atlas Air is a wholly owned subsidiary of Atlas Worldwide. Atlas Worldwide
2 holds a 75 percent voting interest and 51 percent of the total equity in Polar Air. DHL
3 Network Operations (USA), Inc. holds the remaining 25 percent voting interest and 49
4 percent equity interest in Polar Air. DHL Network Operations (USA) is affiliated with
5 DHL, an international freight forwarder with German ownership.¹ Like Atlas
6 Worldwide, Atlas Air and Polar Air are organized under Delaware law.

7 Atlas Air and Polar Air employ a number of senior managers who support their
8 air carrier operations, including Chief Pilots and Directors of Training and Flight
9 Operations Administration.

10 These managers are former pilots. They are “inactive” members of the Airline
11 Professional Pilots Association Teamsters Union Local 1224 (“the union”), which is the
12 union that represents the active pilots at the companies. The managers remain members
13 of the union for the limited purpose of retaining their seniority rights should they wish to
14 resume being pilots. The managers do not pay union dues, and they do not have local or
15 national union voting rights. Further, the union does not represent the managers in
16 collective bargaining negotiations, they are not covered by the collective bargaining
17 agreement,² and the managers may not participate in strikes. The managers are not
18 subject to union disciplinary procedures and the union does not solicit them for
19 contributions to its SSF. The managers, however, do receive union newsletters and other
20 communications, are permitted to attend local or national union meetings (without voting

¹ None of the managers whom Atlas Worldwide intends to solicit is a foreign national. Corporations are prohibited from soliciting foreign nationals for contributions. 2 U.S.C. 441e(a)(2); 11 CFR 110.20(g).

² The collective bargaining agreement does not govern the terms and conditions of the managers' employment. *Collective Bargaining Agreement*, section 10.A.4 (cited in Advisory Opinion Request, at 2).

1 rights), and, if asked by the managers, the union may represent the managers in grievance
2 proceedings against their superiors.

3 The Chief Pilots and the Directors of Training and Flight Operations
4 Administration supervise both salaried and hourly employees, in an approximate ratio of
5 nine salaried employees to one hourly employee.

6 *Chief Pilots*

7 The Chief Pilots work in the Department of Flight Operations and report to the
8 Vice President of Flight Operations. The Chief Pilots are generally responsible for
9 checking and reviewing the performance and the qualifications of all crewmembers. The
10 Chief Pilots' principal duties include (1) selecting certain kinds of crewmembers; (2)
11 monitoring and maintaining crewmember certifications and qualifications; (3)
12 determining and making recommendations regarding the need for crewmember
13 discipline; and (4) evaluating procedural changes that would help aircraft to operate more
14 safely and efficiently.

15 *Directors of Training and Flight Operations Administration*

16 The Directors of Training and Flight Operations Administration also work in the
17 Department of Flight Operations. There are two types of Directors of Training and Flight
18 Operations Administration: the Director of Training and 400 Fleet Manager and the
19 Director of Training and 200 Fleet Manager. Although the fleets each director manages
20 differ, and they report to different company officials, the job duties for each position are
21 identical.

22 The Director of Training and 400 Fleet Manager reports to the Vice President of
23 Flight Operations. The Director of Training and 200 Fleet Manager reports to the Senior

1 Director of Training Resources. Their principal duties include: (1) identifying,
2 evaluating and implementing initiatives to improve service; (2) maintaining
3 communication within and between departments, which includes coordinating with the
4 Marketing and Planning Departments to evaluate and plan future operations, and
5 delivering aircraft to the Sales and Marketing Departments; (3) maintaining relationships
6 with government agencies, aviation companies, and trade associations; (4) establishing
7 and meeting unit cost targets for training and crews, managing crew resources,
8 overseeing crew training programs, and maintaining training manuals; (5) ensuring
9 compliance with legal and corporate policy requirements; and (6) maintaining records in
10 databases. The Directors are also responsible for maintaining effective labor relations
11 and ensuring compliance with the collective bargaining agreement.

12 ***Questions Presented***

- 13 1. *Are the Chief Pilots and Directors of Training and Flight Operations*
14 *Administration "executive or administrative personnel" of Atlas Air and Polar Air and*
15 *therefore part of Atlas Worldwide's restricted class?*
- 16 2. *If the answer to question 1 is "yes", may Atlas Worldwide solicit the Chief Pilots*
17 *and Directors of Training and Flight Operations Administration of Atlas Air and Polar*
18 *Air for contributions to the Atlas Worldwide PAC given that these employees are not*
19 *currently acting in the capacity of "professional" employees and are not eligible to serve*
20 *as full-fledged members in the labor organization with the customary rights of*
21 *representation?*

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1 ***Legal Analysis and Conclusions***

2 1. *Are the Chief Pilots and Directors of Training and Flight Operations*
3 *Administration “executive or administrative personnel” of Atlas Air and Polar Air and*
4 *therefore part of Atlas Worldwide’s restricted class?*

5 Yes, these employees are part of Atlas Worldwide’s “executive or administrative
6 personnel” for the reasons explained below.

7 Under Commission regulations, a corporation’s restricted class consists of the
8 corporation’s “executive or administrative personnel” and their families, and its
9 stockholders and their families. 11 CFR 114.1(j). The restricted class also includes the
10 executive or administrative personnel of a corporation’s subsidiaries. *Id.* Because Atlas
11 Air and Polar Air are subsidiaries of Atlas Worldwide, Atlas Air and Polar Air’s
12 executive or administrative personnel are part of Atlas Worldwide’s restricted class.

13 Atlas Air is wholly owned by Atlas Worldwide. Atlas Worldwide jointly owns
14 Polar Air with another corporation but controls Polar Air by holding a majority of the
15 voting shares. Because Atlas Worldwide has a controlling interest in Polar Air, Polar Air
16 is also a subsidiary of Atlas Worldwide. *See* Advisory Opinion 2003-28 (Horizon Lines).

17 The Chief Pilots and Directors of Training and Flight Operations Administration
18 are executive or administrative personnel. The Act and Commission regulations define
19 “executive or administrative personnel” as individuals who are employed by a
20 corporation, are paid on a salaried basis, and have “policymaking, managerial,
21 professional, or supervisory responsibilities.” 2 U.S.C. 441b(b)(7); 11 CFR 114.1(c).
22 This definition includes individuals who run the corporation’s business, such as officers;
23 other executives; and plant, division, and section managers; and professionals, such as

1 lawyers and engineers. 11 CFR 114.1(c)(1). The definition excludes “[p]rofessionals
2 who are represented by a labor organization,” as well as “[s]alaried foremen and salaried
3 lower level supervisors having direct supervision over hourly employees.” 11 CFR
4 114.1(c)(2). In determining which individuals have “policymaking, managerial,
5 professional, or supervisory responsibilities,” the Fair Labor Standards Act, 29 U.S.C.
6 201, *et seq.* (“FLSA”) and the regulations issued under the FLSA, 29 CFR Part 541, “may
7 serve as a guideline.”³ *See* 11 CFR 114.1(c)(4).

8 Under the FLSA, “administrative employees” are salaried employees whose
9 primary duties are “directly related to the management or general business operations of
10 the employer” and who “exercise discretion and independent judgment” on “matters of
11 significance.” 29 CFR 541.200 to 541.202. The term “directly related to the
12 management or general business operations of the employer” means that the employee
13 performs work directly related to assisting with the running or servicing of the business,
14 as distinguished from such tasks as working on a manufacturing production line or selling
15 a product. 29 CFR 541.201(a). The term “exercise discretion and independent
16 judgment” involves the comparison and evaluation of possible courses of conduct, and
17 acting or making a decision after the various possibilities have been considered. 29 CFR
18 541.202(a). “Matters of significance” refers to the level of importance or consequence of
19 the work performed. *Id.*

20 The Chief Pilot and the Directors of Training and Flight Operations

21 Administration appear to qualify as “administrative employees” under the FLSA. First,

³ Although the FLSA regulations provide general guidance as to the definition of executive, administrative, or professional employees, the FLSA definitions do not determine the composition of the restricted class that may be solicited as a matter of law under the Act and Commission regulations. Advisory Opinion 1993-16 (Blue Cross of California), n.3.

1 they are salaried employees of Atlas Air and Polar Air. Second, their primary duties are
2 directly related to the management or general business operations of Atlas Air and Polar
3 Air in that they exercise substantial responsibility in assisting the management and
4 running of the business. The Chief Pilots perform work involving personnel
5 management, human resources, legal and regulatory compliance, and quality control. *See*
6 29 CFR 541.201(b). The Directors of Training and Flight Operations Administration also
7 assist in managing and running the business. Their functional responsibilities include
8 budgeting, quality control, personnel management, human resources, labor relations,
9 government relations, internet and database administration, and legal and regulatory
10 compliance.⁴ *See id.*

11 Finally, the job descriptions demonstrate that these employees exercise discretion
12 and independent judgment in performing these tasks. The Chief Pilots independently
13 evaluate procedural changes that result in safer and more efficient aircraft and handle
14 crew discipline.

15 The exercise of discretion and independent judgment does not require actually
16 taking an action; rather, it may include recommendations for action that are subject to
17 further review. 29 CFR 541.202(c). Thus, the Chief Pilots must have the authority to
18 make independent choices, free from immediate direction, or supervision, even if their
19 recommendations are ultimately reviewed and approved or rejected at a higher level. *Id.*
20 Also, the choices of the Chief Pilots must arise from more than the use of skill in

⁴ To the extent that the Directors of Training and Flight Operations Administration may engage in some work that may be characterized as more routine in nature, such as maintaining training manuals and records in databases, for example, this work appears to be “directly and closely related” to their more exempt work of establishing and meeting targets for training and crews or managing crew resources, and therefore would also be considered exempt under the FLSA regulations. *See* 29 CFR 541.703.

1 applying well-established techniques, procedures, or specific standards described in
2 manuals or other sources. 29 CFR 541.202(e). The position description suggests that the
3 Chief Pilots do not simply apply established procedures in carrying out their management
4 duties.

5 The Directors of Training and Flight Operations Administration also exercise
6 discretion and independent judgment in performing their duties, which involve
7 establishing cost targets for training and crews; identifying and evaluating initiatives to
8 improve service; coordinating with other departments to evaluate and plan future
9 operations; managing crew resources; overseeing training programs, and fuel monitoring
10 and conservation; and maintaining effective labor relations. These tasks all necessarily
11 require discretionary authority to respond creatively and flexibly to changing situations,
12 and to devise solutions, without immediate supervision even if some of these decisions
13 may ultimately be subject to further review by more senior managers. 29 CFR
14 541.202(c).

15 The Chief Pilots and the Directors of Training and Flight Operations
16 Administration perform duties that appear to be consistent with the criteria for
17 qualification as “administrative” employees under the FLSA. 29 CFR 541.201. The
18 Commission concludes, therefore, that their primary function is to exercise policymaking,
19 supervisory, and managerial functions under the Act and Commission regulations.
20 11 CFR 114.1. Accordingly, these Atlas Air and Polar Air employees qualify as
21 “executive or administrative” personnel under the Act and Commission regulations at
22 11 CFR 114.1(c).

1 The Commission’s conclusion is not altered by the fact that these managers
2 supervise some hourly employees, along with salaried employees. As noted above,
3 Commission regulations do not treat “foremen” or lower level supervisors, who directly
4 supervise hourly workers as executive or administrative personnel. 11 CFR
5 114.1(c)(2)(ii). But the supervision of hourly employees does not by itself control if the
6 supervisors otherwise function as executive or administrative personnel. *See* Advisory
7 Opinion 2010-04 (Wawa).

8 Only ten percent of the workers whom the Atlas Air and Polar Air managers
9 supervise are hourly workers, suggesting that supervising hourly employees is not the
10 principal function of the Chief Pilots and the Directors of Training and Flight Operations
11 Administration. *See* AO 1976-75 (Re:AOR by Communicators - Political Action Club).
12 Because supervising hourly workers comprises only a small fraction of their job duties,
13 and their responsibilities are otherwise consistent with “executive or administrative
14 personnel,” the Commission concludes that the Chief Pilots and Directors of Training and
15 Flight Operations Administration qualify as executive or administrative personnel.

16 2. *If the answer to question 1 is “yes”, may Atlas Worldwide solicit the Chief Pilots
17 and Directors of Training and Flight Operations Administration of Atlas Air and Polar
18 Air for contributions to the Atlas Worldwide PAC given that these employees are not
19 currently acting in the capacity of “professional” employees and are not eligible to serve
20 as full-fledged members in the labor organization with the customary rights of
21 representation?*

22 Yes, Atlas Worldwide may solicit the Chief Pilots and Directors of Training and
23 Flight Operations Administration who are employees of Atlas Air and Polar Air for

1 contributions to the Atlas Worldwide PAC where these employees are not currently
2 acting in the capacity of “professional” employees and are not eligible to serve as full-
3 fledged members in the labor organization with the customary rights of representation.

4 As explained in the response to question 1, the managers are executive or
5 administrative personnel of Atlas Worldwide’s subsidiaries Atlas Air and Polar Air and
6 therefore, under the Act and Commission regulations, are members of Atlas Worldwide’s
7 restricted class. Answering question 1 does not end the inquiry, however, because the
8 Chief Pilots and Directors of Training and Flight Operations Administration also have
9 certain limited membership rights in the labor organization that represents pilots at the
10 two companies. Commission regulations exclude from membership in a restricted class
11 “professional” employees who are represented by a labor organization. 11 CFR
12 114.1(c)(2). The Commission must therefore determine whether the managers’ status as
13 inactive union members who are not currently working as professionals and are not
14 eligible to serve as full-fledged members in the labor organization with the customary
15 rights of representation prevents them from membership in Atlas Worldwide’s restricted
16 class. The Commission concludes that it does not.

17 Assuming pilots are considered “professionals” under the FLSA regulations,⁵ the
18 Chief Pilots and Directors of Training and Flight Operations Administration would still
19 not fall into this category, because they do not fly airplanes as part of their defined job
20 duties. Instead, they perform only managerial and administrative tasks. Therefore, the
21 Commission concludes that the managers are not “professionals” under the Act and

⁵ Compare *Paul v. Petroleum Equipment Tools, Co.*, 708 F.2d 168 (5th Cir. 1983) (holding airline pilots qualified as professionals), with *Pignataro v. Port Authority of New York and New Jersey*, 593 F.3d 265, 271-73 (3rd Cir. 2010) (criticizing *Paul* and holding helicopter pilots did not qualify as professionals).

1 Commission regulations.⁶ *See Craig v. Far West Engineering Co.*, 265 F.2d 251, 257 (9th
2 Cir. 1959), *cert. den.* 361 U.S. 816 (1959) (capacity in which employee works, rather
3 than capability, experience, or training, controls exempt status for FLSA purposes).

4 Even if they were professional employees, because the Commission also
5 concludes that these managers are not eligible to serve as full-fledged members in the
6 labor organization with the customary rights of representation, they would still be part of
7 Atlas Worldwide's restricted class. The managers' participation in the union is
8 predominantly confined to receiving literature and attending meetings. They do not pay
9 dues, do not vote for union officers, may not serve as officers, may not benefit from
10 union representation in collective bargaining negotiations, are not covered by the
11 collective bargaining agreement, and may not participate in strikes. They may request
12 union assistance if they should have a grievance against more senior management, but
13 this limited right does not outweigh the serious limitations placed on their union
14 membership rights by virtue of their "inactive" status.

15 In summary, the Commission concludes that the managers qualify as "executive
16 or administrative" personnel under 11 CFR 114.1(c) and (j). Because they so qualify,
17 they are within the restricted class of their respective corporations, Atlas Air and Polar
18 Air. Further, because Atlas Air and Polar Air are both subsidiaries of Atlas Worldwide,
19 these employees are also part of the restricted class of the parent corporation, Atlas
20 Worldwide. 11 CFR 114.5(g). Finally, their inactive and limited membership in a labor
21 organization does not otherwise remove them from Atlas Worldwide's restricted class.

⁶ The Commission does not address the situation in which a Chief Pilot or Director of Training and Flight Operations Administration resumes flying airplanes for either of the companies.

1 Therefore, Atlas Worldwide may solicit the managers for political contributions to its
2 separate segregated fund at any time.

3 This response constitutes an advisory opinion concerning the application of the
4 Act and Commission regulations to the specific transaction or activity set forth in your
5 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
6 of the facts or assumptions presented, and such facts or assumptions are material to a
7 conclusion presented in this advisory opinion, then the requestor may not rely on that
8 conclusion as support for its proposed activity. Any person involved in any specific
9 transaction or activity which is indistinguishable in all its material aspects from the
10 transaction or activity with respect to which this advisory opinion is rendered may rely on
11 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
12 conclusions in this advisory opinion may be affected by subsequent developments in the
13 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
14 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
15 directly from the Commission's Advisory Opinion searchable database at
16 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

Caroline C. Hunter
Chair