



**In the Matter of:**

**ROBERT STEVEN MAWHINNEY,**

**ARB CASE NO. 12-108**

**COMPLAINANT,**

**ALJ CASE NO. 2012-AIR-014**

**v.**

**DATE: September 18, 2014**

**TRANSPORTATION WORKERS UNION,  
CHRIS ORIYANO, JOHN RUIZ,  
ROBERT NORRIS, AARON KLIPPELL,  
AARON MATTOX, FRANK KRZANIC,  
JOSE MONTES, LARRY COSTANZA, and  
KEN MACTIERNAN,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Robert Steven Mawhinney, *pro se*, La Jolla, California**

*For Respondent Transportation Workers Union, et al.:*

**Patricia S. Waldeck, Esq.; *Law Offices of Patricia S. Waldeck*, Los Angeles,  
California**

*For Respondent Jose Montes:*

**Robert Jon Hendricks, Esq. and Larry M. Lawrence, Esq.; *Morgan, Lewis &  
Bockius, LLP*; Los Angeles, California**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative  
Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge***

**DECISION AND ORDER VACATING AND REMANDING**

Robert Mawhinney filed a complaint against American Airlines; the Transportation Workers Union (TWU); the following named members of the union: Chris Oriyano, John Ruiz, Robert Norris, Aaron Klippell, Aaron Mattox, Frank Krznaric, Larry Costanza, and Ken Mactiernan; and Jose Montes, an American Airlines employee, under the whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or Act) and its implementing regulations.<sup>1</sup> He alleged that a “concerted effort” to remove him from employment was “orchestrated by American Airlines with the assistance of the Transport Workers Union Local 564”.<sup>2</sup> On July 19, 2012, the Administrative Law Judge (ALJ) issued an order severing this case from Case No. 2012-AIR-017<sup>3</sup> and ordered the parties to show cause why the case should not be dismissed against the named Respondents. After the parties submitted responses, the ALJ dismissed the complaint. Mawhinney appealed to the Administrative Review Board (ARB).

### BACKGROUND

As there has not been a hearing on the merits, the following background is based on the complaint filed in October 2011, the pleadings of the parties, and the decision in a previous AIR 21 action filed by Mawhinney. Mawhinney was an employee of American Airlines (American) when he filed his first complaint under the Act, which was resolved by settlement on January 23, 2003.<sup>4</sup> According to the terms of the agreement, Mawhinney returned to his position at American. However, he alleges that when he returned to work he was subjected to a hostile work environment. Mawhinney filed another complaint in October 2011, alleging that he had been “threatened, ignored, abandoned, and subjected to a hostile work environment” and ultimately terminated on September 23, 2011, by American acting in concert with the TWU.<sup>5</sup> Specifically, he contends that the TWU and the individual named respondents conspired with American to retaliate against him for continuing to report safety violations to management and the federal authorities.

On July 19, 2012, the ALJ severed this case from Mawhinney’s complaint against American. At the same time, the ALJ issued an order to the parties to show cause why the Respondents in this case should not be dismissed.<sup>6</sup> After a review of the responses, the ALJ

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<sup>1</sup> 49 U.S.C.A. § 42121 (Thomson/West 2013); 29 C.F.R. Part 1979 (2013).

<sup>2</sup> Mawhinney Complaint filed October 5, 2011 (“2011 Complaint”).

<sup>3</sup> Mawhinney’s complaint against American Airlines, ALJ No. 2012-AIR-017, was placed in abeyance pending American Airlines bankruptcy proceedings.

<sup>4</sup> *Mawhinney v. American Airlines*, ALJ No. 2002-AIR-0013 (Jan. 24, 2003).

<sup>5</sup> 2011 Complaint.

<sup>6</sup> This included all of the Respondents in the two claims, with the exception of American Airlines.

found that neither the named individuals nor the TWU are “air carriers” for the purposes of the Act; that neither the TWU nor its members can be held liable as a contractor or subcontractor and that AIR 21 does not provide for individual liability. Accordingly, the ALJ dismissed the claims against the named Respondents. We vacate and remand.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated authority to the ARB to issue final agency decisions in AIR 21 cases.<sup>7</sup> In this case, the ALJ issued an Order to Show Cause, sua sponte, and then dismissed Mawhinney’s complaint on several legal grounds. Therefore, we review the ALJ’s conclusions de novo and limit our review to the legal grounds Mawhinney raised.<sup>8</sup>

### **DISCUSSION**

AIR 21’s whistleblower protection provision, 49 U.S.C.A. § 42121, provides at subsection (a):

No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . . provided or is about to provide . . . to the employer or Federal Government information relating to 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 under this subtitle or any other law of the United States.

The implementing regulations provide that an “[a]ir carrier means a citizen of the United States undertaking by any means, directly or indirectly, to provide transportation.” 29 C.F.R. § 1979.101. The term “contractor” under Section 42121 is defined at (e) as “a company that performs safety-sensitive functions by contract for an air carrier.”

#### **1. Complainant did not adequately raise the issue of individual liability under AIR 21**

Mawhinney alleged in his administrative complaint that AA and the TWU contrived to terminate his employment, and he listed a number of employees of American Airlines and Union

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<sup>7</sup> Secretary’s Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1978.109(a).

<sup>8</sup> See *Saporito v. Publix*, ARB No. 10-073, ALJ No. 2010-CPS-001, slip op. at 4 (ARB Mar. 28, 2012).

members who threatened him. See OSHA Complaint dated Oct. 5, 2011. The ALJ dismissed the complaint, in part, based on a determination that these employees could not be individually liable under the AIR 21. Order of Dismissal (O. D.) at 2. We vacate this finding.

In dismissing Mawhinney's OSHA complaint on the ground that AIR 21 does not permit individual liability, the ALJ answered the wrong question. The OSHA complaint Mawhinney filed on October 5, 2011, does not appear to seek to hold the named individuals personally liable for the purported violations alleged. Rather, the complaint seeks to hold American Airlines and the Union liable for the acts of its employees and members in the course of their duties at AA. Mawhinney named in his complaint nine persons acting in the context of their official roles as agents of, or on behalf of, the company and/or the Union. See Mawhinney OSHA Complaint at 1 (dated Oct. 5, 2011) ("The concerted effort to remove me from employment at American Airlines was orchestrated by American Airlines with the assistance of the Transport Workers Union Local 564."). Mawhinney did not thereby seek to pursue personal liability against the named individuals. Although Mawhinney may name individuals as respondents in their official capacities, individual respondents are unnecessary since Mawhinney also sued American and the Union. In any case, Mawhinney failed to adequately raise, much less brief, the issue of personal liability under AIR 21 and we decline to address it.<sup>9</sup> Consequently, we vacate the ALJ's determination that AIR 21 does not permit individual liability.

## **2. The TWU may be considered a "contractor" under AIR 21**

The ALJ also ruled that because the TWU is not a "company," it cannot by definition be a contractor or subcontractor subject to liability under the Act. We agree with the ALJ that an individual union member cannot be a "company" but we reject his conclusory assertion that "the [TWU] is not a company." O. D. at 3. Neither the Act nor the implementing regulations specifically address the liability of a labor union. However, as we noted earlier, the definition of a "person" under the regulations includes the broad category of "any group of persons," as well as "association." Additionally, the definition of "company" is broad enough to encompass the TWU. Black's Law Dictionary defines "company" as follows: "a corporation – or, less commonly, an association, partnership, or union – that carries on a commercial or industrial enterprise."<sup>10</sup> Especially in light of our obligation to interpret AIR broadly to facilitate the

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<sup>9</sup> Complaints and briefs filed by pro se litigants should be construed "liberally in deference to their lack of training in the law." *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 7 (ARB Apr. 30, 2010). However, "[w]e recognize that while adjudicators must accord a pro se complainant 'fair and equal treatment, [such a complainant] cannot generally be permitted to shift the burden of litigating his case to the [adjudicator], nor to avoid the risks of failure that attend his decision to forgo expert assistance.' *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 10 n.7 (ARB Feb. 29, 2000), quoting *Dozier v. Ford Motor Co.*, 707 F.2d 1189, 1194 (D.C. Cir. 1983)." *Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 2003-STA-047, slip op. at 2, n.2 (ARB Apr. 26, 2005).

<sup>10</sup> BLACK'S LAW DICTIONARY at 318 (9th ed. 2009).

critical air safety policies behind AIR 21, we discern no common sense reason for treating the TWU in this case differently from a contractor.

Indeed, the common legal definition of “contractor” manifestly includes labor unions. According to Mawhinney, a collective bargaining agreement (CBA) between the TWU and American Airlines management addresses the terms of employment of the TWU’s members. A “collective-bargaining agreement” is defined as “a contract between an employer and a labor union regulating employment conditions, wages, benefits, and grievances.”<sup>11</sup> And since the definition of “contractor” is “a party to a contract,”<sup>12</sup> TWU may be considered a “contractor.” However, only a contractor that “performs safety-sensitive functions by contract for an air carrier” is subject to suit under AIR 21. Therefore, the proper inquiry is whether the CBA (or any other contract) between the TWU and American (in effect during Mawhinney’s employment with American) provides for the performance of safety-sensitive functions by the TWU or its members.

Under the terms of the CBA, the TWU appears to play a role in ensuring that air carrier safety rules and regulations are followed at American Airlines. Citing the CBA, the TWU acknowledges its role in airline safety: “[t]he Agreement between TWU and AA sets out in its Preamble that the parties enter in to the Agreement ‘in the mutual interests of the employees and of the Company to promote the safety and continuity of air transportation.’ . . . The Crew Chiefs have an obligation to bring to the attention of management any hazardous conditions, unsafe practices, or improperly functioning equipment and tools. Some of these obligations are repeated in the Aviation Safety Action Partnership (“ASAP”) between the Union, AA and the Federal Aviation Administration.”<sup>13</sup> However, we remand this issue to the ALJ to determine in the first instance whether the CBA or any other contract between the TWU and AA provides for performance of safety-sensitive functions.

If, on remand, the ALJ finds that any of the union Respondents may be deemed “air carriers” or “contractors” for purposes of the Act, the ALJ must consider the appropriate remedy given the role of each Respondent with regard to the Complainant’s employment.<sup>14</sup>

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<sup>11</sup> *Id.* at 299.

<sup>12</sup> *Id.* at 375.

<sup>13</sup> Response of Respondents to Order to Show Cause at 3 (citations to Exhibits omitted)(dated August 7, 2012).

<sup>14</sup> For example, if Mawhinney’s employment is dependent on his being a member in good standing of the TWU, his recourse against the union, if prohibited retaliation has occurred, should include reinstatement as a member in the union; see also *Parson v. Kaiser Aluminum*, 583 F.2d 132, 134 (5th Cir. 1978)(apportionment of liability and relief between employer and union should proceed on a “flexible basis with regard to the comparative equities”).

## **CONCLUSION**

Without expressing any view on the merits of Mawhinney's complaint, we **VACATE** the ALJ's Order of Dismissal, hold that the issue of personal liability under AIR 21 was not adequately raised and **REMAND** for further consideration consistent with this opinion.

**SO ORDERED.**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**LISA WILSON EDWARDS**  
**Administrative Appeals Judge**