U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

SABRA WILLBANKS,

COMPLAINANT,

v.

ATLAS AIR WORLDWIDE HOLDINGS, INC.,

and

FLIGHT SERVICES INTERNATIONAL, LLC,

RESPONDENTS.

ARB CASE NO. 14-050

ALJ CASE NO. 2014-AIR-010

DATE: JUL 17 2014

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
David M. Minces, Esq.; *Mize Minces, P.C.*, Houston, Texas

For Respondent Flight Services International, LLC:
Jeffrey C. Londa, Esq. and Sunita P. Shirodkar, Esq.; *Ogletree, Deakins, Nash, Smoak & Stewart, P.C.;* Houston, Texas

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge;* Joanne Royce, *Administrative Appeals Judge;* and Lisa Wilson Edwards, *Administrative Appeals Judge*

ORDER GRANTING PETITION FOR INTERLOCUTORY REVIEW AND ESTABLISHING BRIEFING SCHEDULE

This case arises under the whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121 (Thomson/West 2007) (AIR 21), and implementing regulations, 29 C.F.R. Part 1979 (2013). Sabra Willbanks filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that

Atlas Air Worldwide Holdings, Inc. (Atlas Air) and Flight Services International LLC (FSI) (Respondents) violated AIR 21 when her employment was terminated. On April 15, 2014, the ALJ entered an Order Staying Proceeding and Compelling Complainant to Arbitrate AIR 21 Complaint. Willbanks petitioned the Administrative Review Board (ARB) for review of the interlocutory order. On May 9, 2014, the ARB ordered the parties to show cause whether Willbanks' interlocutory appeal should be dismissed. Upon review of the responses filed by the parties, the Board grants interlocutory review.

BACKGROUND

Willbanks filed a complaint with OSHA alleging that her termination violated the employee protection provision of AIR 21. OSHA dismissed Willbanks' complaint. On January 31, 2014, Willbanks requested a hearing before an ALJ. On March 17, 2014, prior to a hearing, FSI filed a Motion to Dismiss and Compel Arbitration or, Alternatively, Stay Proceedings and Compel Arbitration (Motion). The Motion states that Willbanks signed an employment agreement stating

> that all disputes, claims, and controversies which I may have with FSI, whether individual, joint, or as part of a class, shall be arbitrated pursuant to the rules of the American Arbitration Association, and any decision or award shall be final, binding, and enforceable in a court of law.

Motion at 1, quoting Exhibit A (Arbitration Provision).

On April 15, 2014, the ALJ issued an order staying the administrative proceeding and requiring Willbanks to arbitrate her AIR 21 complaint pursuant to the Arbitration Provision of the employment agreement. *See* Order Staying Proceeding and Compelling Complainant to Arbitrate AIR 21 Complaint (Stay Order). The ALJ observed that under the Federal Arbitration Act, a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Stay Order at 2, quoting 9 U.S.C.A. § 2. The ALJ noted that the Federal Arbitration Act requires that any proceeding referred for arbitration under the Act "shall be stayed pending arbitration." Stay Order at 2, citing 9 U.S.C.A. § 3.

DISCUSSION

The ARB has made clear that "interlocutory appeals are generally disfavored and that there is a strong policy against piecemeal appeals." *Jordan v. Sprint,* ARB No. 06-105, ALJ No. 2006-SOX-041, slip op. at 3 & n.9 (ARB June 19, 2008). The ARB is authorized, however, to grant review of interlocutory orders in "exceptional circumstances." Secretary's Order No. 1-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012). *See also Milton v. Norfolk Southern,* ARB No. 11-

076, ALJ No. 2011-FRS-004, slip op. at 3 (ARB Sept. 30, 2011). Exceptional circumstances warrant our review here.

As Willbanks argues, there exists the realistic prospect that referral to arbitration could foreclose any meaningful subsequent review by the Department of Labor or the courts of her rights under AIR 21.[1] Should that occur, it is not merely a question whether Willbanks' rights under AIR 21 have been properly vindicated, but whether the underlying purposes of AIR 21 have been served. As the ARB recognized in *Clemmons v. Ameristar Airways*, ARB No. 12-105, ALJ No. 2004-AIR-011, slip op. at 8-9 (ARB Nov. 25, 2013), in enacting AIR 21, Congress sought more than the mere vindication of employee rights. Congress intended that whistleblowers play an important role in achieving AIR 21's underlying purposes.[2] Certainly were we to delay consideration of the issue presented by Willbanks' interlocutory appeal pending arbitration, there exists the distinct prospect that not only will Willbanks be precluded from further Department of Labor or court consideration of her AIR 21 claim, but we well may be thwarting the underlying purposes and policies Congress sought to achieve by affording whistleblower protection under AIR 21. We thus find that the instant appeal meets the "exceptional circumstances" standard imposed by the Secretary of Labor for entertaining interlocutory appeals.

Moreover, the circumstances presented in this case meet the collateral order exception to the finality requirement set out in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). *See Jordan,* ARB No. 06-105, slip op. at 3. "To come within the 'small class' of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively

---

[1] *See* Complainant's Response to Show Cause Order at 3, citing *Oxford Health Plans LLC v. Sutter*, ___U.S.___, 133 S. Ct. 2064, 2068 (2013), and *Hall Street Assoc., LLC v. Mattel Inc.*, 552 U.S. 576, 583 (2008).

[2] Those purposes, *Clemmons* noted, include ensuring

> the safety of the air traveling public by strengthening the United States' aviation system. AIR21 introduced wide-sweeping reforms of the Nation's aviation industry – including modernization of the FAA's air traffic services, restructuring and expansion of the FAA's budget, and extension of the protections afforded to disabled air travelers – and the statute's legislative history makes clear that the primary focus of AIR21 was to initiate "broad, fundamental improvements in aviation safety." Statement of the President of the United States Signing the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 36 Weekly Comp. Pres. Doc. 745-47 (April 6, 2000); *see also*, 146 Cong. Rec. H1002-01, H1009 (daily ed. March 15, 2000) (statement of Rep. Kelly) ("let there be no mistaking that our fundamental purpose here for undertaking this initiative is to ensure the safety of the traveling public.").

ARB No. 12-105, slip op. at 8 (citations omitted).

determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468-469 & n.10 (1976) (citing *Cohen*, 337 U.S. at 546). The circumstances presented in this case satisfy these factors. First, the ALJ's decision "conclusively determines the disputed question" whether the agreement entered into by the parties requires arbitration to the exclusion of proceeding under AIR 21 before the ALJ (and, on appeal, before the ARB). *Coopers,* 437 U.S. at 468. Second, the ALJ's decision "resolves an important issue completely separate from the merits of the action." *Id.* The ALJ's order addresses an important question as to the Labor Department's jurisdiction over AIR 21 whistleblower complaints.[3] Third, review of the ALJ's order may become "effectively unreviewable on appeal from a final judgment" if interlocutory review is not granted. *Id.* Once Willbanks' case is fully arbitrated, the question of agency jurisdiction pending arbitration that is raised by this appeal may become moot, if not precluded from agency consideration entirely.

CONCLUSION

For the foregoing reasons, we grant interlocutory review of the ALJ's Order Staying Proceeding and Compelling Complainant to Arbitrate Air 21 Complaint (issued April 15, 2014). The parties are directed to submit their respective legal briefs addressing the merits of Complainant's interlocutory appeal, in accordance with the following:

Willbanks must file an original and four copies of her initial brief, not to exceed thirty (30) double-spaced typed pages on or before twenty (20) calendar days following the date on which this Order is issued. Willbanks shall simultaneously serve a copy of the supporting legal brief upon the Respondents, and file a certification of such service with the Board. If Willbanks fails to file the initial brief on time or fails to provide the required information and documentation within the specified time period, the Board may dismiss the petition for review or impose such sanctions as the Board deems warranted.

Respondents may file a reply brief (original and four copies), not to exceed thirty (30) double-spaced typed pages, on or before twenty (20) calendar days after the date on which Willbanks files her initial brief. Respondents shall simultaneously file a copy of the response upon Willbanks, and file a certification of such service with the Board. Failure to provide the required information and documentation within the specified period may result in granting the petition for review or in such other sanctions as the Board deems warranted.

Within ten (10) calendar days of the date on which Respondents file a response brief, Willbanks may file a reply memorandum (original and four (4) copies) with the Board, not to exceed ten (10) double-spaced typed pages. A copy of the reply memorandum shall simultaneously be filed upon the Respondents and certification of such service filed with the Board.

---

[3] *See, e.g., Lucia v. Am. Airlines,* ARB Nos. 10-014, -015, -016; ALJ Nos. 2009-AIR-017, -016, -015; slip op. at 6-8 (ARB Sept. 16, 2011); *see also* Railway Labor Act, 45 U.S.C. 181.

All motions and other requests for extraordinary action by the Board (including, but not limited to, requests for extensions of time or expansion of page limitations) shall be in the form of a motion appropriately captioned, titled, formatted and signed, consistent with customary practice before a court. *See, e.g.*, Fed. R. Civ. P. 7(b).

All pleadings, briefs and motions should be prepared in typographic scalable 12 point, 10 character-per-inch type or larger, double-spaced with minimum one inch left and right margins and minimum 1.25 inch top and bottom margins, printed on 8½ by 11 inch paper, and are expected to conform to the stated page limitations unless prior approval of the Board has been granted. **Furthermore, all pleadings should include the ARB case number as it appears in this Order.** If a party fails to file a brief that complies with the requirements of this briefing order, the Board may refuse to accept the brief.

All pleadings, including briefs, appendices, motion, and other supporting documentation shall be filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-5220, Washington, D.C., 20210.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge