



In the Matter of:

SABRA WILLBANKS,

ARB CASE NO. 14-050

COMPLAINANT,

ALJ CASE NO. 2014-AIR-010

v.

DATE: March 18, 2015

**ATLAS AIR WORLDWIDE HOLDINGS,
INC.,**

and

**FLIGHT SERVICES INTERNATIONAL,
LLC,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

David M. Mincec, Esq.; Mize Mincec, P.C.; Houston, Texas

For Respondent Flight Services International, LLC:

**Jeffrey C. Londa, Esq.; Sunita P. Shirodkar, Esq.; Aimee B. Parsons, Esq.; Ogletree,
Deakins, Nash, Smoak & Stewart, P.C.; Houston, Texas**

For the Assistant Secretary of Labor for Occupational Safety and Health as Amicus Curiae:

**M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Megan E.
Guenther, Esq.; Quinn Philbin, Esq.; U.S. Department of Labor, Washington,
District of Columbia**

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

FINAL DECISION AND ORDER ON INTERLOCUTORY APPEAL

This case arises under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121 *et seq.* (Thomson/West 2007)(AIR 21 or Act), and its implementing regulations, 29 C.F.R. Part 1979 (2014). Complainant Sabra Willbanks filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondents Flight Services International, LLC (FSI) and Atlas Air Worldwide Holdings (Atlas Air) violated the Act by terminating her employment in retaliation for having engaged in AIR 21 whistleblower-protected activity. OSHA denied Willbanks' complaint, and she requested a hearing before the Department of Labor's Office of Administrative Law Judges. On April 15, 2014, the presiding Administrative Law Judge (ALJ), granted FSI's motion to stay, and ordered Willbanks, pursuant to 9 U.S.C.A. §§ 2 and 3, to arbitrate her AIR 21 claim against FSI in accordance with a pre-employment arbitration agreement that she had entered into with FSI, while staying all other proceedings in the case.¹ Willbanks petitioned the Administrative Review Board (ARB) for interlocutory review of the ALJ's Order, and on July 17, 2014, the ARB granted the petition for interlocutory review and ordered briefing. Pursuant to the ARB's request, the Assistant Secretary of Labor for OSHA subsequently submitted a legal brief as *amicus curiae*, to which FSI responded.

For the following reasons, the Administrative Review Board vacates the ALJ's Order, and remands this case to the ALJ for resumption of proceedings under AIR 21.

BACKGROUND²

Willbanks, a flight attendant, began working for Global Inflight Services (GIS) in March 2010. The company provided flight attendant services to Atlas Air. FSI took over GIS's services in May 2012 and, under a contract of employment with FSI, Willbanks continued performing flight attendant services for Atlas Air. Prior to or at the time Willbanks entered into employment with FSI, she signed an employment application form (dated May 12, 2012) containing the following provision:

I agree 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. I understand that nothing contained

¹ *Willbanks v. Atlas Air & Flight Servs. Int'l*, Order Staying Proceeding and Compelling Complainant to Arbitrate AIR 21 Complaint, ALJ No. 2014-AIR-010 (Apr. 15, 2014) (ALJ's Order).

² The Background Statement is recounted for interlocutory review purposes only, and is based on the record the parties provided.

in my employment application, granting of an interview or flight attendant training, is intended to create an employment contract between FSI and myself for either employment or obligates FSI to provide me with any benefits.³

Willbanks alleged in her OSHA complaint that in September 2013, she spoke to an inspector for the International Transport Association's Operational Safety Audit Program (Auditor) about the safety of service carts used on Atlas Air flights. She allegedly informed the Auditor that brakes on the carts were not functioning properly and that shelves were falling out of the carts, that a cart can weigh 250-300 pounds, and that she was concerned about losing control of the carts during flights with possible resulting injury to passengers or flight attendants. Willbanks informed the Auditor that she and other flight attendants had complained to Atlas Air and/or FSI management about the condition of the carts, and further alleges in her complaint that she believes that the Auditor reported her concerns to Jeff Carlson, Vice President of Flight Operations with Atlas Air, and that Carlson, in turn, informed Joni Ffrench, President of FSI. Complaint at 5-7.

Willbanks alleges that FSI terminated her employment "at the request of Atlas (its sole client) after truthfully answering a safety auditor's question about a safety hazard that violated Federal Aviation Administration regulations." Petition for Review at 2. At an October 2, 2013 meeting, during which Ffrench informed Willbanks of her discharge, Willbanks alleges that Ffrench informed her that she had received a "very nasty phone call from Jeff Carlson about [Willbanks] talking to the Auditor." *Id.*, Exhibit 1 at 7. Willbanks asserts that Ffrench told her that "[Atlas] almost got written up and [Jeff Carlson] is very mad." *Id.* Willbanks also asserts that Ffrench told her that, "Atlas feels like you won't represent them in a good manner and they don't trust you now, so I have to ask for your resignation." *Id.*

Following OSHA's dismissal of Willbanks' AIR 21 complaint against Atlas Air and FSI,⁴ on January 31, 2014, Willbanks requested a hearing before an ALJ. On March 17, 2014, FSI moved to dismiss the complaint and compel arbitration. FSI asserted that, when Willbanks began her employment with FSI, she "entered into a valid agreement to arbitrate disputes" with FSI. Motion to Dismiss at 4. Willbanks responded by arguing that the Federal Arbitration Act, 9 U.S.C.A. § 1 *et seq.* (FAA), exempts her position from the arbitration requirement. Following briefing by all parties (including Atlas Air and FSI), on April 15, 2014, the ALJ issued an order staying the case and requiring Willbanks to arbitrate her AIR 21 complaint against FSI. The ALJ determined that Willbanks' "job duties relate to the movement and service of passengers and have no relation to the movement of goods in interstate commerce," and that she is "not a

³ Respondent Flight Services International, LLC's Motion to Dismiss and Compel Arbitration or, Alternatively, Stay Proceedings and Compel Arbitration (Motion to Dismiss), Exhibit A.

⁴ Willbanks' amended complaint named Atlas Air Worldwide Holdings (AAWW) and FSI as respondents.

transportation worker and thus not exempt from the F[ederal] A[rbitration] A[ct].”⁵ The ALJ ordered that the proceeding be “stayed pending [Willbanks’] pursuit of mandatory arbitration,” and directed Willbanks to “invoke the arbitration process and to provide the [ALJ] with a progress report within 60 days indicating the steps she has taken to arbitrate her dispute. Failure to comply with this Order may result in case dismissal.”⁶

Willbanks petitioned the ARB for interlocutory review of the ALJ’s Order on May 1, 2014. We granted interlocutory review and ordered the parties and requested the Assistant Secretary for OSHA to file briefs. Willbanks, FSI, and the Assistant Secretary (as amicus curiae) filed briefs.

JURISDICTION AND STANDARD OF REVIEW

In addition to the Administrative Review Board’s appellate jurisdiction pursuant to 29 C.F.R. § 1979.110, the ARB has the authority to hear interlocutory appeals of ALJ orders under AIR 21 in exceptional circumstances. *See* 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 (ARB Sept. 30, 2011) (Final Decision on Interlocutory Review).

DISCUSSION

The Federal Arbitration Act (FAA) provides that arbitration agreements “shall be valid, irrevocable, and enforceable” unless grounds “exist at law or in equity for the revocation of any contract.” 9 U.S.C.A. § 2. The FAA nevertheless exempts from coverage all “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C.A. § 1. It is recognized that the FAA manifests a liberal federal policy favoring arbitration agreements, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991), that, in turn, mandates that the Section 1 exclusion from arbitration be narrowly construed. *Circuit City Stores v. Adams*, 532 U.S. 105, 119 (2001). However, explained below, Section 1 is not to be so narrowly construed that airline employees engaged in interstate commerce are precluded from exemption under 9 U.S.C.A. § 1 as are similarly engaged seamen and railway workers.

In this case, the ALJ interpreted *Circuit City* as holding that the FAA’s arbitration exemption found at 9 U.S.C.A. § 1 (“contracts of employment of seamen, railroad workers, or any other class of workers engaged in foreign or interstate commerce”) is limited to “transportation workers . . . actually engaged in the movement of goods in interstate commerce.”

⁵ ALJ’s Order at 3.

⁶ *Id.*

ALJ Order at 2 (quoting *Circuit City*, 532 U.S. at 112). In concluding that Willbanks was not a transportation worker exempt from the FAA’s mandatory arbitration requirement, the ALJ applied the “movement of goods” test established in *Lenz v. Yellow Transp.*, 431 F.3d 348 (8th Cir. 2005), which similarly quotes the same language from *Circuit City* for the legal proposition that the exception to mandatory arbitration is limited “to transportation workers, defined [. . .] as those workers ‘actually engaged in the movement of goods in interstate commerce.’” *Lenz*, 431 F.3d at 351. However, the limitation on the definition of “transportation worker” imposed by the ALJ, as interpreted by the Eighth Circuit, mischaracterizes the cited passage from *Circuit City*, which in turn results in a fundamental misunderstanding of the Supreme Court’s holding.

When the cited passage from *Circuit City* is considered in its entirety, without omission or deletion, it is clear that the Supreme Court was merely noting that *prior* to its ruling in *Circuit City* it had been the conclusion of “[m]ost Courts of Appeals [that] the exclusion provision is limited to transportation workers, defined, *for instance*, as those workers ‘actually engaged in the movement of goods in interstate commerce.’” 532 U.S. at 112 (quoting *Cole v. Burns Int’l Security Servs.*, 105 F.3d 1465, 1471 (D.C. Cir. 1997) (emphasis added)). By inclusion of the words “for instance” in its reference to the “engaged in the movement of goods” requirement identified by the D.C. Circuit in *Cole*, the cited passage in *Circuit City* can be read as nothing more than the Supreme Court’s acknowledgement that the *Cole* requirement was an *example*—albeit an admittedly predominate example—of the different interpretations of “transportation worker” that the circuit courts had up until *Circuit City* applied.⁷

Noting the split among the various Courts of Appeals at the time, between those that interpret 9 U.S.C.A. § 1 as “exempting contracts of employment of transportation workers, but not other employment contracts,” and those that construe “the exemption so that all contracts of employment are beyond the FAA’s reach, whether or not the worker is engaged in transportation,” the Supreme Court concluded that “the better interpretation is to construe the statute, as most Courts of Appeals have done, to confine the exemption to transportation workers.” 532 U.S. at 109. The Supreme Court’s holding was simple, straightforward, and unadorned with interpretation: “Section 1 exempts from the FAA only contracts of employment of transportation workers.” 532 U.S. at 119.

The Assistant Secretary is thus correct in asserting that “*Circuit City* did not explicitly define, or identify, those classes of workers the Court considered to be transportation workers.” Amicus Brief at 10. Nevertheless, various federal circuit courts, in addition to the Eighth Circuit

⁷ Indeed, examples of prior circuit court decisions in which the movement of goods were not cited as a limiting condition to exclusion from the FAA arbitration requirement were cited by *Cole*, 105 F.3d at 1471, including *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir.1984) (Section 1 applies only “to workers employed in the transportation industries”); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) (Section 1 applies “only to those actually in the transportation industry.”); *United Elec., Radio & Mach. Workers v. Miller Metal Prods., Inc.*, 215 F.2d 221, 224 (4th Cir. 1954) (questioning, in dicta, the narrow interpretation of § 1).

in *Lenz*, have interpreted *Circuit City* as limiting the FAA arbitration exemption to transportation workers engaged in the movement of goods in interstate commerce.⁸ There is language within *Circuit City*, aside from the aforementioned citation to *Cole*, that arguably could be construed as limiting the Court's holding to transportation workers engaged in the movement of goods, *i.e.*, "[a]s for the residual exclusion of 'any other class of workers engaged in foreign or interstate commerce,' Congress' demonstrated concern with transportation workers and their necessary role in the free flow of goods explains the linkage to the two specific, enumerated types of workers identified in the preceding portion of the sentence." *Circuit City*, 532 U.S. at 121. However, when this sentence is considered within the context in which it was made, a broader understanding of the Court's ruling is warranted (as explained below).

Applying the maxim *ejusdem generis* to the wording of Section 1 of the FAA, the Supreme Court construed the provision's residual phrase "any other class of workers engaged in foreign or interstate commerce" as "controlled and defined" by reference to "seamen" and "railroad workers." *Circuit City*, 532 U.S. at 114-115. "It is reasonable to assume," the Court stated, "that Congress excluded 'seamen' and 'railroad employees' from the FAA for the simple reason that it did not wish to unsettle established *or developing* statutory dispute resolution schemes covering specific workers." *Id.* at 121 (emphasis added).⁹ "It would be rational for Congress to ensure that workers in general would be covered by the FAA's provisions, while reserving for itself more specific legislation for those engaged in transportation. [citation omitted]. Indeed, such legislation was soon to follow, with the amendment of the Railway Labor Act in 1936 to include air carriers and their employees, see 49 Stat. 1189, 45 U.S.C. §§ 181-188." *Id.*

As the Supreme Court noted, when Congress passed the FAA in 1925, "Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers, see Shipping Commissioners Act of 1872, 17 Stat. 262." *City Circuit*, 532 U.S.

⁸ See, *e.g.*, *International Brotherhood of Teamsters Local Union No. 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 957 (7th Cir. 2012); *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1290 (11th Cir. 2005). Consistent with these circuit court decisions, in *Rojas v. TK Commc'ns*, 87 F.3d 745 (5th Cir. 1996), a decision preceding *Circuit City*, the Fifth Circuit, in *dicta* (*Brown v. Nabors Offshore Corp.*, 339 F.3d 391, 393 (5th Cir. 2003)), narrowly construed the exclusionary clause of § 1 in the FAA "to apply to employment contracts of seamen, railroad workers, and any other class of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are." 87 F.3d at 748.

⁹ When the FAA was adopted, moreover, grievance procedures existed for railroad employees under federal law, see Transportation Act of 1920, §§ 300-316, 41 Stat. 456, and the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent, see Railway Labor Act of 1926, 44 Stat. 577, 46 U.S.C.A. § 651 (repealed)." *Circuit City*, 532 U.S. at 121.

at 121. Seamen, “whether they are in the business of transporting goods or not, have been found to be exempted from arbitration under the FAA § 1.”¹⁰

The Railway Labor Act (RLA) was originally adopted in 1926, 44 Stat. 577, 45 U.S.C.A. § 151 et seq.¹¹ Its purpose is to promote stability in labor-management relations “by providing a comprehensive framework for the resolution of labor disputes in the railroad industry.” *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987). See also 45 U.S.C.A. § 151a. To realize this goal, the RLA established a mandatory arbitral mechanism for the resolution of two classes of disputes—“major” disputes related to the formation of collective bargaining agreements concerning “rates of pay, rules or working conditions,” *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 723 (1945), and “minor” disputes involving the enforcement of collective bargaining agreements generally arising as the result of “controversies over the meaning of an existing collective bargaining agreement in a particular fact situation.” *Brotherhood of R.R. Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 33 (1957). As adopted, the RLA applied to both freight and commuter/passenger railroads.¹²

As a result of the RLA’s amendment in 1936, its “comprehensive framework for resolving labor disputes” was expanded to include labor relations in the airline industry, including the passenger airline industry. See *Hawaiian Airlines v. Norris*, 512 U.S. 246, 252 (1994); *Stockton v. Northwest Airlines*, 804 F. Supp. 2d 938, 947 (D. Minn. 2011); *Rakestraw v. United Airlines, Inc.*, 765 F. Supp. 474 (N.D. Ill. 1991), *aff’d in part, rev’d in part*, 981 F.2d 1524 (7th Cir. 1992). Congress’s “general aim was to extend to air carriers and their employees the same benefits and obligations available and applicable in the railroad industry.” *Int’l Ass’n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 685 (1963). Granted, the RLA neither preempts nor precludes a statutory cause of action if it involves rights and obligations existing

¹⁰ *Veliz v Cintas Corp.*, ___ F. Supp. 2d ___, 2004 WL 2452851 at *4 (N.D. Cal. 2004) (citing *Brown v. Nabors Offshore Corp.*, 339 F.3d 391, 393 (5th Cir.2003), and *Buckley v. Nabors Drilling USA Inc.*, 190 F. Supp. 2d 958, 965 n.2 (S.D. Tex. 2002)). Cf. *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1214 n.9 (11th Cir. 2011) (Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C.A. §§ 201-208, “precludes application of the exemption for seamen’s employment agreements set forth in 9 U.S.C. § 1” to dispute involving employee of cruise ship); *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148 (9th Cir. 2008)(same).

¹¹ When adopted, grievance procedures existed for railroad employees under the Transportation Act of 1920, §§ 300-316, 41 Stat. 456, with the passage of the Railway Labor Act of 1926, a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes, imminent. *Circuit City*, 532 U.S. at 121.

¹² Courts have on numerous occasions recognized the applicability of the Railway Labor Act to labor disputes involving employees of passenger trains. See, e.g., *Norman v. Missouri Pac. R. R.*, 414 F.2d 73 (8th Cir. 1969); *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952); *Slocum v. Delaware, L & W.R. Co.*, 339 U.S. 239 (1950); *Missouri-Kansas-Texas R. Co. v. Randolph*, 164 F.2d 4 (8th Cir. 1947).

independent of a collective bargaining agreement. *Hawaiian Airlines*, 512 U.S. at 252; *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1115 (8th Cir.1995). However, the RLA's significance, for purposes of resolving the question presented in *Willbanks*, lies elsewhere—in the fact that just as the RLA, at 45 U.S.C.A. §§ 151-165, covers both railroad freight and passenger trains,¹³ so too does the RLA, at 45 U.S.C.A. §§ 181-188, apply to both freight (cargo) and passenger airlines.

As previously noted, in limiting the residual exclusion found in Section 1 of the FAA (“any other class of workers engaged in foreign or interstate commerce”) to “transportation workers,” the Supreme Court in *Circuit City* neither explicitly defined nor identified the classes of workers it considered included in the term. Granted, the Court did not reject the definition of “transportation workers” reached by most federal circuit courts prior to *Circuit City* (*i.e.*, workers “actually engaged in the movement of goods in interstate commerce”). 532 U.S. at 112. However, in holding that the residual phrase “any other class of workers engaged in foreign or interstate commerce” was to be interpreted by reference to “seamen” and “railroad workers” for whom Congress had “reserve[ed] for itself more specific legislation,” 532 U.S. at 121, the Court clearly left open the prospect that airline carriers and their employees were to be excluded from the FAA’s arbitration mandate in the same manner and to the same extent as seamen and railroad workers.

As noted, the courts have interpreted the FAA arbitration exclusion as applying to seamen and railroad workers without distinction based on whether their employment involved the transportation of goods or passengers. Given this, and given that Congress has expressly reserved for resolution under the Railway Labor Act labor disputes involving employees engaged in interstate air transportation in the same manner as railroad workers, there is ultimately no basis for limiting the exclusion from FAA mandatory arbitration to only employees engaged in the interstate air transportation of cargo or goods.¹⁴ Employees engaged in the interstate air transportation of passengers, such as *Willbanks*, are to be afforded the same rights as are afforded railroad employees under the FAA, and thus entitled to the same exclusion from arbitration pursuant to 9 U.S.C.A. § 1.

¹³ Similarly, for purposes of coverage under 49 U.S.C.A. § 10501 *et seq.*, “rail carriers” engaged in interstate transportation is understood to include both railroad freight and passenger carriers. See *American Orient Express Ry. Co., LLC v. Surface Transp. Bd.*, 484 F.3d 554 (D.C. Cir. 2007) (affirming the Surface Transportation Board decision in *In re American Orient Express Ry.*, STB Decision No. FD 35738 (Dec. 29, 2005)). *Accord In re Desertxpress Enters.*, STB Decision No. FD 34914, 2010 WL 1822102 (May 6, 2010).

¹⁴ If one considers the practical implications of limiting the exclusion from mandatory arbitration to just employees engaged in the interstate air transportation of goods, it is difficult to argue with Chief Judge Cahn’s comment in *Lepera v. ITT Corp.*, Civ. No. 97-1461, 1997 WL 535165, at *7 (E.D. Pa., Aug. 12, 1997), that such an exclusion in disregard of similarly excluding those engaged in the direct air transportation of passengers would be “simply nonsensical.”

CONCLUSION

Willbanks is a transportation worker exempt, pursuant to 9 U.S.C.A. § 1, from the arbitration requirements of the Federal Arbitration Act.¹⁵ As such, she is entitled to pursue her AIR 21 retaliation claim against FSI and Atlas Air before the Department of Labor. Accordingly, the ALJ's Order of July 15, 2014, staying proceedings and compelling arbitration is **VACATED**. The case is **REMANDED** to the Office of Administrative Law Judges for the continuation of proceedings before the presiding ALJ under AIR 21.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

¹⁵ In light of the Board's determination that Willbanks is exempt from the arbitration requirements of the FAA, 9 U.S.C.A. § 1 et seq., other issues addressed on appeal by the parties are either moot or not relevant to the arbitration exemption issue resolved herein.