



In the Matter of:

ROBERT STEVEN MAWHINNEY,

ARB CASE NO. 14-060

COMPLAINANT,

ALJ CASE NO. 2012-AIR-017

v.

DATE: January 21, 2016

AMERICAN AIRLINES,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

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

For the Respondent:

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

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*. Judge Corchado, concurring.

DECISION AND ORDER VACATING AND REMANDING

Robert Mawhinney filed a complaint against American Airlines (American); the Transportation Workers Union (TWU); and the following named members of the union: Chris Oriyano, John Ruiz, Robert Norris, Aaron Klippell, Aaron Mattox, Frank Krznicar, 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.¹ 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.”² On July 19, 2012, the Administrative Law Judge (ALJ) issued an order severing this case from Case No. 2012-AIR-014, and this case was placed in abeyance pending American Airlines’s bankruptcy proceedings. On April 8, 2014, Respondent filed a Motion to Compel Arbitration and to Dismiss Action. Finding that Complainant agreed to arbitrate all claims arising from his employment relationship with Respondent, the ALJ granted Respondent’s motion to compel arbitration and dismissed Mawhinney’s AIR 21 claim.³ Mawhinney appealed the dismissal of his AIR 21 complaint 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 Mawhinney filed. American Airlines first employed Mawhinney in 1989. Respondent terminated his employment in 2001, and he subsequently filed a complaint under the Act, as well as a civil action against Respondent. The complaint and the civil action were resolved, and Mawhinney and Respondent signed a settlement agreement in December 2002. Pursuant to the agreement, Respondent reinstated Mawhinney to his former employment as Aircraft Maintenance Technician. The settlement agreement also contained the following provision:

In the event of any dispute . . . arising at any time in the future between the Parties . . . involving [Complainant]’s employment which may lawfully be the subject of pre-dispute arbitration agreements, and which Plaintiff chooses not to grieve under any Collective Bargaining Agreement governing his employment, [Complainant and Respondent] agree to submit such dispute to final and binding arbitration (“Private Arbitration”) for resolution. Private Arbitration shall be the exclusive means for resolving any such disputes and no other action will be brought in any other forum or court

In September 2011, American Airlines again terminated Mawhinney’s employment. He filed an AIR 21 complaint with OSHA in October 2011. He alleged that Respondent retaliated against him by terminating his employment because he made safety complaints against

¹ 49 U.S.C.A. § 42121 (Thomson/West 2007); 29 C.F.R. Part 1979 (2015).

² Mawhinney Complaint filed October 5, 2011 (2011 Complaint).

³ *Mawhinney v. American Airlines*, No. 2012-AIR-017 (May 14, 2014) (O.D.C.).

Respondent.⁴ Given the 2002 settlement agreement’s language, the ALJ found that “the only issue meriting discussion is whether [Mawhinney’s] complaint under AIR 21 may lawfully be the subject of a pre-dispute arbitration agreement.” O.D.C. at 2. The ALJ found that Congress did not invalidate any agreements to arbitrate claims arising under AIR 21. He also found that the agreement to arbitrate is a “condition of employment” that allows for arbitration under related Title VII cases.⁵ After rejecting Complainant’s remaining contentions, and noting that Mawhinney himself invoked the arbitration clause, the ALJ concluded that Mawhinney’s AIR 21 claim falls within the scope of the agreement to arbitrate, and that he must pursue his claim in arbitration.⁶ The ALJ compelled arbitration of the dispute and dismissed Complainant’s AIR 21 complaint.

DISCUSSION

Before the ALJ, Respondent filed a Motion to Compel Arbitration and to Dismiss Action pursuant to the terms of a settlement agreement signed in December 2002. The agreement to arbitrate was a provision of this settlement, and it is this provision that Respondent seeks to enforce. In adjudicating an AIR 21 whistleblower complaint, the ALJ and Board have only the authority expressly or implicitly provided by law.⁷ The Act requires the Secretary to (1) investigate an AIR 21 whistleblower complaint and issue findings; (2) permit parties to object to the Secretary’s findings and participate in a hearing before an ALJ; and (3) issue a final order, including relief for the complainant if the Secretary believes that an AIR 21 violation occurred.

⁴ In its decision in *Mawhinney v. Transportation Workers’ Union*, ARB No. 12-108, ALJ No. 2012-AIR-014 (Sept. 18, 2014), the Board vacated the ALJ’s finding that the TWU is not a “company,” and thus it cannot by definition be a contractor or subcontractor subject to liability under the Act. Rather, the Board held that the common legal definition of “contractor” manifestly includes labor unions, and that the proper inquiry is whether the Collective Bargaining Agreement (CBA), or any other contract, between the TWU and American, which was in effect during Mawhinney’s employment with American, provides for the performance of safety-sensitive functions by the TWU or its members. Therefore, the Board remanded this issue to the ALJ to determine initially whether the CBA or any other contract between the TWU and AA provides for performance of safety-sensitive functions.

⁵ 42 U.S.C.A. § 2000 *et seq.* (Thomson Reuters 2012).

⁶ The arbitration was conducted on September 3-5 and 9-11, 2014. The arbitrator issued her decision on November 24, 2014. Details of the proceedings were not provided.

⁷ *See, e.g., Wonsock v. Merit Sys. Prot. Bd.*, 296 Fed. Appx. 48, 50 (Fed. Cir. 2008) (Federal Circuit Court agreed with the Merit Systems Protection Board that the administrative law judge had no jurisdiction to review the Office of Personnel Management’s discretionary decision pertaining to benefit rules).

See 49 U.S.C.A. § 42121(b)(2), (3). Pursuant to 49 U.S.C.A. § 42121(b)(3)(A), a pending whistleblower “proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.”

Initially we hold that the Secretary’s approval of the December 2002 settlement agreement does not mean that Complainant was precluded from pursuing a whistleblower claim with OSHA and DOL against American without clearer indication from the Secretary that this preclusion was intended. Moreover, the parties simultaneously participated in the arbitration process and the AIR 21 whistleblower claim without raising an objection.

Whenever any person has failed to comply with an order issued under the Act, including orders approving settlement agreements, the person on whose behalf the order was issued may commence a civil action to require compliance with such order.⁸ The Act provides that the appropriate United States district court shall have jurisdiction to enforce such order.⁹ Thus, the issue of whether a settlement agreement has been breached is not a matter for the Board to determine. “A settlement is a contract. Its construction and enforcement are dictated by principles of contract law.”¹⁰ As the AIR 21 whistleblower section provides for enforcement of settlement agreements in the appropriate United States district court, the federal district courts, not the ALJ, nor this Board, have jurisdiction to consider actions based on alleged settlement breaches. Therefore, we hold that the ALJ erred in compelling arbitration and dismissing the claim, and remand the claim to the ALJ for further consideration.¹¹

Further, our review of the case is impeded by our inability to determine the positions taken by the parties. For example, Respondent appears to have filed a motion to compel

⁸ 49 U.S.C.A. §42121(b)(6)(A); *see also* 29 C.F.R. §1979.113.

⁹ *Id.*

¹⁰ *Ruud v. Westinghouse Hanford Co.*, ARB No. 96-087, ALJ No. 1988-ERA-033, slip op. at 8 (ARB Nov. 10, 1997).

¹¹ Moreover, in an intervening case, the Board acknowledged in *Willbanks v. Atlas Air Worldwide Holdings, Inc.*, ARB No. 14-050, ALJ No. 2014-AIR-010 (Mar. 18, 2015), that the Federal Arbitration Act (FAA) manifests a federal policy favoring arbitration agreements. However, the Board also noted that transportation workers engaged in foreign or interstate commerce are exempted from the arbitration requirements of the FAA. Without explicitly holding that the FAA applies to AIR 21 claims, the Board concluded that this exemption applies to interstate air transportation of passengers and thus the complainant, a flight attendant, was entitled to pursue her AIR 21 retaliation claim before the DOL. The FAA arbitration exclusion for “transportation workers” might similarly apply to Mawhinney who was employed by American Airlines as an Aircraft Maintenance Technician.

arbitration after the date Complainant had invoked arbitration.¹² In addition, as noted earlier, the parties simultaneously participated in arbitration and the claim under AIR 21. Therefore, on remand, the ALJ is instructed to clarify the positions taken by the parties, consider the contentions raised, and provide a full explanation for resolution of the contested issues. Though his pleadings are unclear, we assume Mawhinney appealed the ALJ's ruling compelling arbitration only to the extent that it disallowed a concurrent determination of his AIR 21 claim before the Department of Labor. In *Lucia v. American Airlines, Inc.*, ARB Nos. 10-014, 015, 016; ALJ No. 209-AIR-017, 016, 015 (Sept. 16, 2011),¹³ the Board held that the contractual arbitration proceeding and the retaliation proceeding then pending before the Secretary can both proceed, as the causes of action are different and wholly independent. The Board further noted that any judicial relief ordered can be equitably structured such that it is offset by any arbitration award ordered for the same relief to avoid duplicate recovery.

Consequently, we hold that the ALJ erred in dismissing Mawhinney's AIR 21 case as he did not have jurisdiction to enforce the terms of the settlement agreement. We vacate the ALJ's order dismissing the complaint and remand for proceedings consistent with this decision.

CONCLUSION

The ALJ's Order Dismissing the Complaint is **VACATED**, and the case is **REMANDED** for further consideration consistent with this opinion.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

¹² We are cognizant of the fact that Mawhinney can, and did, invoke arbitration. The record indicates that arbitration of Mawhinney's claims was conducted last year and was followed by a decision issued on November 24, 2014. This information is provided by Respondent. *See American Airlines, Inc.'s Status Update for Pending Petition For Review* (Jan. 20, 2015).

¹³ Mawhinney appears to have cited this case before the ALJ, but the ALJ directed the discussion to another case, *Alexander v. Gardner*, 415 U.S. 36 (1974), which he found was not analogous.

Judge Corchado, concurring:

I agree with the majority that this matter should be remanded; however, without more analysis and facts, I cannot agree at this time with all of the majority's reasons. To be clear, like the majority, I found no provision in the whistleblower statutes or regulations that expressly authorizes the OALJ or the Board to grant a "motion to compel" to enforce an arbitration clause in a settlement agreement. As the majority opinion indicates, the OALJ and ARB may exercise only the authority they are explicitly or inherently granted. Congress has explicitly authorized the Secretary of Labor to adjudicate whistleblower claims arising in various safety-sensitive industries (planes, trains, trucking, nuclear plants, etc.).

In my view, American Airlines pointed to insufficient legal authority to support its motion to compel and allow the Department of Labor to opt out of fulfilling the Congressional mandate to adjudicate AIR 21 whistleblower claims by subjecting the claim to exclusive arbitration. Congress wanted to ensure the public learned about safety concerns in industries where many people can die or be seriously injured if a plane or train or 80,000 pound semi-trailer crashes, a nuclear plant threatens to melt down, or the drinking water of a town has toxic poisons. Whistleblower laws also aim to protect us from experiencing another world financial crisis caused by Enron-like scandals. Burying these safety disclosures in the world of arbitration would defeat this Congressional purpose for whistleblower laws. Also, like the majority, I think the Secretary's approval of a settlement agreement must explicitly state that a whistleblower is foreclosed from filing future whistleblower claims with OSHA before the Board can say that OALJ and ARB no longer have delegated authority to adjudicate a whistleblower claim.

In the interest of moving this case forward, I will simply list the reasons for my concurrence and wait for another day to address these issues more fully. To begin with, there is no question that the ALJ faced an area of unsettled whistleblower law and confusing conduct by the parties. Recently, in *Willbanks*, the Board discussed the Federal Arbitration Act and arguably suggests that it applies unless the employee is exempt under the Federal Arbitration Act's exemption provisions. The Board needs to clarify whether the Act applies, in the first place, to whistleblower cases and resolve the tension between the Congressional mandate to protect whistleblowers and the mandate to protect arbitration clauses through the Federal Arbitration Act. If the Federal Arbitration Act applies to the Board, then the Board must ensure it complies with the mandatory language of that arbitration act and, in my view, more thoroughly analyze the applicability of the arbitration act's exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." See 9 U.S.C.A. § 1. Neither party in this case provided the ALJ or the Board with sufficient argument on this point.

Because of the ambiguity in Board decisions like *Willbanks*, whistleblowers who disclose nuclear safety and environmental safety concerns might be treated differently from airline and railroad employees. But the Federal Arbitration Act was passed in 1925 without the slightest notion of the devastating power and real threat of nuclear meltdowns like those that occurred at Chernobyl (1986) and Fukushima (2011) and the feared meltdown of Pennsylvania's Three Mile

Island (1979). Lastly, American Airlines filed a motion to compel only one month after asking the ALJ to schedule the AIR 21 hearing to occur prior to the arbitration hearing. The significance and impact of this request is unclear to me on the record before us, and I reserve judgment on this point for another day. For the sake of the public and the Administrative Law Judges that must adjudicate the whistleblower claims, I hope the Board soon directly addresses the big question of the Federal Arbitration Act coverage.

LUIS A. CORCHADO
Administrative Appeals Judge