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VIA FEDERAL EXPRESS

OSHA Docket Office
Docket No. OSHA-2018-0005
Room N-3653
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: OSHA – AIR 21

Dear Sir or Madam:

In the last five years, our law firm has represented aircraft mechanics, pilots and flight attendants in over fifty (50) AIR 21 cases involving such carriers as American Airlines, Southwest Airlines, Delta Air Lines, United Airlines, US Airways, Federal Express Corporation, Asia Pacific Airlines, ExpressJet Airlines, and Xtra Airways.

We submit this statement in response to OSHA's request for comments with respect to the following questions: (1) How can OSHA deliver better whistleblower customer service? (2) What kind of assistance can OSHA provide to explain the whistleblower law it enforces?, and (3) Are there any safety issues in the airline industry that you think the agency needs to be aware of?

I. DELIVERING BETTER WHISTLEBLOWER SERVICE

A. Positive Models

It is to be expected that when an agency asks the public how it can improve its service, it will receive comments of a critical nature. And, indeed, we shall provide such critical comments. However, the goal of achieving a higher level of customer service may also be fostered by identifying OSHA representatives who, in our experience, have exceeded their peers.

In case no. 1-0280-15-038, involving a claim against Spirit Airlines, Inc., we were originally advised by OSHA Investigator John Kananowicz that, due to a backlog of cases, it would probably be seven months or more before he could review the file. A few weeks later, however, Investigator Kananowicz initiated an informal mediation process that resolved the case. Throughout the process, he demonstrated great common sense and an instinct for getting the parties to meet somewhere in the middle.

In case no. 6-1730-19-070, involving a claim against Southwest Airlines, the timely intercession of Regional ADR Coordinator Stan Lewis, of OSHA's Fort Worth office, revived the stalled settlement negotiations and resolved the case. We also commend Mr. Lewis for his zealous engagement in outreach/educational efforts.

In case no. 4-1050-17-150, involving a claim against American Airlines, Investigator Gilbert Feliciano II played a constructive and proactive role in facilitating a settlement of the case.

In case no. 9-0370-17-069, involving a claim against Southwest Airlines, Regional Investigator Nichelle Engard played a constructive role in diligently reviewing the parties' respective proposals and resolving conflicts in a manner that allowed a final settlement of the matter.

To an unfortunate degree, we consider the service rendered by the above-referenced individuals to be exceptional. As explained further below, we have found OSHA to be more of an impediment, than an asset, in resolving AIR 21 cases. Indeed, where we are working with a client that has sufficient economic resources, we consistently advise that he/she seek an expedited dismissal of the case so that the matter can proceed to litigation before an administrative law judge.

B. Delayed Processing – Frequently in Excess of Two Years

In our experience, the time interval between the filing of the complaint and an OSHA determination has frequently been in the range of two years or more. We provide the following examples:

* Case No. 4-1510-17-028 (ExpressJet-Atlanta): complaint filed on April 17, 2017, and the case is still pending.

* Case No. 0-1960-16-095 (Delta-Seattle): complaint filed on July 7, 2016, and the Secretary's findings are dated July 13, 2018

* Case No. 6-2450-15-022 (AA-Dallas): complaint filed on October 3, 2014, and the Secretary's findings are dated September 9, 2016;

* Case No. 5-2330-15-001 (AA-Chicago): complaint filed on October 6, 2014, and the Secretary's findings are dated December 6, 2016;

* Case No. 4-2950-14-039 (UAL-Atlanta): complaint filed on December 10, 2013, and the Secretary's findings are dated September 14, 2016.

The last of these cases was particularly heartbreaking in that, while awaiting OSHA's long-delay decision, United terminated the avionics mechanic who had assembled the group of five complainants. With his termination, the resolve of the group fell apart and no appeal of OSHA's final determination was made. We believe that it is a fair statement that OSHA's credibility on

United property has been damaged and the message communicated that there is no effective remedy for an aircraft mechanic who suffers retaliation for reporting aircraft damage.

The majority of OSHA regions now have an expedited pilot program where, in exchange for accepting a dismissal of his case for lack of evidence, the complainant may acquire the right to appeal his matter to an administrative law judge within months rather than years. We now routinely advise our clients to accept such a loss on the grounds that OSHA appears to be incapable of rendering timely decisions.

Although it is our firm's general preference to bypass OSHA as a hindrance to the enforcement of AIR 21, we have experienced what we consider to be inappropriate pressure on claimants by OSHA investigators to accept a dismissal. There are many claimants who simply do not have the assets to litigate a claim or would only have the courage to endure the requisite economic sacrifice where OSHA had rendered an initial decision in the claimant's favor. OSHA investigators need to understand that claimants are uniformly outgunned by their carrier adversaries who are better positioned to prevail in a battle of attrition.

C. OSHA Investigator Interviewing Techniques

Case No. 0-1960-16-095 involved a Delta pilot who submitted a detailed safety report to the carrier's Flight Department. Delta subsequently ordered her to submit to a compulsory psychiatric examination. In investigating her safety allegations, the FAA's report substantiated that Delta had violated federal aviation standards. Although the OALJ's decision is still pending, the administrative law judge stated on the last day of the hearing that he was "really troubled" by Delta's referral. The judge further stated that everything in the evidentiary record was "diametrically opposed" to the report by human resources representative, Ms. Kelley Nabors, which triggered the troubling psychiatric referral.

The OSHA investigation was conducted by Paul McDevitt. We had the opportunity to listen to an audio recording of Mr. McDevitt's interview of Ms. Nabors. The tone of the interview was exceedingly deferential. Leading questions, phrased in a manner that suggested an answer favorable to Delta's position, were employed rather than open-ended questions that would elicit a full explanation of Ms. Nabors' decision-making process. Although we do not challenge Mr. McDevitt's good intentions, the audio tape reflects that OSHA investigators require training in proper interviewing techniques.

Case No. 4-1760-14-002 involved a FedEx Express pilot who, after reporting safety concerns to senior flight department managers, was ordered to submit to a compulsory psychiatric examination. Investigator Jason Brush interviewed the complainant in a hostile manner and castigated him for failing to adhere to a chain-of-command concept. Brush suggested that the complainant should have known better than to disrespect the chain-of-command since the complainant had served in the United States Air Force. In any context, the tone and questioning would have been improper for an agency responsible for assisting fearful complainants. Still more so in this case, where the complainant had already explained his prior, frustrated efforts to report the issues to his immediate superiors.

D. Delays Based on Pending Arbitrations

We have experienced OSHA investigators taking the position that they would defer further investigation of an AIR 21 complainant due to the existence of a pending grievance or even the theoretical possibility of a filing a grievance. We believe this is one of several by-products of OSHA's lack of staffing.

Union arbitrations are not an adequate substitute for effective AIR 21 enforcement for many reasons. In the first instance, many "adverse actions" do not provide the basis for a contract grievance. For example, we have had ten instances of individuals removed from inspection work or field trips due to their reports of aircraft damage. Whereas American has argued it has the contractual discretion to make these reassignments, the reassignments would satisfy AIR 21's broad definition of adverse action.

Union arbitrations do not afford the full spectrum of remedies available under AIR 21, including attorney's fees and compensatory damages.

Discovery in the arbitration process is either limited or non-existent. Particularly in the context of aircraft operations, evidence in the form of aircraft history, damage reports, and FAA communications, are almost exclusively in the control of the respondents. Compelling a complainant to have his fate determined by an inferior arbitrator proceeding effectively denies him of due process.

II. EXPLAINING AIR 21

In our experience, most airline employees are completely in the dark with respect to the scope of protections afforded by AIR 21. Even labor union leaders are frequently ignorant of the statute's provisions. We believe further educational outreach by OSHA is critical, particularly with respect to non-union repair stations.

III. SAFETY ISSUES IN THE AIRLINE INDUSTRY

We have reviewed the comments submitted by the Aircraft Mechanics Fraternal Association and Local 591 of the Transport Workers Union concerning the massive outsourcing of aircraft maintenance by U.S. flag airlines and its deleterious impact on the quality of aircraft maintenance. We agree wholeheartedly with these comments and adopt them herein by reference.

What we would add to these comments are two anecdotes that illustrate the atmosphere of fear that prevails within aircraft maintenance community.

Case Nos. 9-0050-17-035, 036, 037, 038, and 039, involved five Las Vegas-based Southwest aircraft mechanics who alleged that they were subject to coercive threats as a result of reporting component damage that was undisputedly in excessive of permitted limits. Originally, there were six aircraft mechanics who agreed to participate as co-complainants; however, the sixth complainant advised me on the eve of filing the complaint that he wanted his name removed. This man explained to me that he had made a decision to yield to management pressure and allow for the release of unairworthy aircraft because he had an eight-month child at home and could not afford to lose his job.

Case No. 5-2330-15-001 involved six Chicago-based American Airlines aircraft mechanics who were reassigned away from all aircraft inspection work because they allegedly made "too many" reports of aircraft damage. These six mechanics were represented by an active local labor union; however, they were all fearful. One mechanic reported to the FAA investigator that he had to lie to his wife – whom he described as his best friend – about participating in a whistleblower complaint. She begged him to simply release unairworthy aircraft if that is what the carrier directed him to do. He said that, notwithstanding her request and the domestic strain he was under, he felt obligated to fulfill his obligations to the traveling public.

With respect to this case, in a memorandum dated March 25, 2015, H. Clayton Foushee, FAA Director of Audit and Evaluation, cited an "exemplary investigation" by FAA investigators, which concluded that Americas Airlines maintenance managers had:

> "[P]ressured [mechanics] to not record discrepancies, take shortcuts with maintenance activities, or improperly sign-off on work which was not actually completed. …
>
> An [FAA] investigation team … conducted an exemplary investigation, interviewing dozens of witnesses and gathering hundreds of documents, ultimately *substantiating all of the complainants' allegations.*

FAA Memorandum dated March 25, 2015, by Director, Office of Audit and Evaluation, H. Clayton Foushee. (Attachment A).

American's problem was not limited to Chicago. FAA Director Foushee concluded that the above-referenced degradation of American's maintenance culture:

> may be much more prevalent across American's organization than even the complainants' alleged, affecting maintenance activities in Dallas, New York, Miami and beyond. Additionally, there exists a substantial likelihood that American has not properly conducted lightning strike inspections for a protracted period of time.

Among the specific allegations substantiated by the cited investigation was that Regional Maintenance Director Evita Rodriguez – now known as Evita Garces -- instructed AA technicians:

> You need to strike a balance between safety and productivity. When I was stationed in JFK, I signed for sumping the Airbus, yet I never did. I am looking for that balance.

ASO CMO-67 Investigation Team Report dated February 27, 2015 at 11. (Attachment B).

Notwithstanding this FAA report, on November 13, 2018, American Airlines appointed Ms. Garces, formally Evita Rodriguez, as the carrier's new FAA-certificated Director of Maintenance (DOM). The DOM is one of five key positions essential for any airline to operate as required by the Federal Aviation Administration's Code of Federal Regulations. It is hard to imagine anything that would chill the blood of conscientious aircraft mechanics more thoroughly than the appointment of Ms. Garces. One mechanic described it to me as "a kick in the gut."

Although the six mechanics kept their jobs, they were referred to by management representatives conducting new-hire training as "the ISIS 6."

In short, even at the largest and most unionized airlines, those who foster safety are blacklisted and denigrated. Those who, according to the FAA, subvert maintenance safety culture, are promoted.

There is a dire need for the service with which OSHA is entrusted and it is very much in the public interest that the agency dedicate itself to enhancing this service.

Sincerely,

/s/ Lee Seham
Lee Seham