ADMINISTRATIVE REVIEW BOARD

UNITED STATES DEPARTMENT OF LABOR

SABRA WILLBANKS,	*	
	*	
Complainant	*	ARB Case No. 14-050
	*	
v.	*	ALJ Case No. 2014-AIR-010
	*	
ATLAS AIR WORLDWIDE HOLDINGS, INC.,	*	
	*	
and	*	
	*	
FLIGHT SERVICES INTERNATIONAL, LLC,	*	
	*	
Respondents	*	
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BRIEF FOR THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE

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BRIEF FOR THE ASSISTANT SECRETARY OF LABOR
FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE

Pursuant to 29 C.F.R. § 1979.108(a)(1) and the Administrative Review Board's ("ARB" or "Board") October 23, 2014 Order, the Assistant Secretary of the Occupational Safety and Health Administration ("OSHA") submits this brief as amicus curiae to address the four questions posed by the Board related to whether respondent Flight Services International ("FSI") can compel Sabra Willbanks ("Willbanks") to arbitrate her retaliation complaint under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). The four questions that the ARB poses are:

(1) Whether an agreement to arbitrate employment-related claims entered into as a precondition to employment is enforceable under the Federal Arbitration Act ("FAA") including whether and under what conditions or circumstances, if any, such an agreement might constitute an unenforceable contract of adhesion;

(2) Whether a flight attendant covered by the whistleblower protection provisions of AIR 21 is a transportation worker within the meaning of Section 1 of the FAA and thus exempt from the mandatory arbitration provisions of Section 2;

(3) Whether the statutory text of AIR 21 (including, *inter alia* 49 U.S.C. § 46301(a)), its legislative history, or AIR 21's underlying purposes evidence a congressional intent to preclude any waiver of administrative and/or judicial remedies for the whistleblower rights at issue; and

(4) Whether the Railway Labor Act, which extends the obligation thereunder to arbitrate certain employment-related disputes between employers and employees in the airline industry, precludes the enforceability of arbitration agreements under the FAA.

In OSHA's view, while agreements to arbitrate employment-related claims are generally enforceable under the FAA unless the agreement itself is revocable under § 2 of the FAA or there is a specific prohibition on mandatory arbitration in the statute that provides the employee's cause of action, the Board may conclude that Willbanks is a transportation worker exempt from the FAA's arbitration requirements. However, as explained herein, while OSHA believes that the Board may conclude that Willbanks is a transportation worker exempt from the FAA, OSHA believes that the better course of action would be to remand this case to the ALJ for fuller consideration of the factual issues related to the questions that the Board poses and to address the additional question raised in FSI's brief of whether FSI can compel Willbanks to arbitrate her claim under the Texas Arbitration Act ("TAA") even if she is a transportation worker exempt from arbitration under the FAA.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework.

This case involves the intersection of four separate statutory schemes that bear on whether FSI can compel Willbanks to arbitrate her AIR 21 retaliation claim — AIR 21's

whistleblower protection provision itself, 49 U.S.C. § 42121; the FAA, 9 U.S.C. § 1 *et seq.*; the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*; and the TAA, Tex. Civ. Prac. and Rem. Code § 171.001.

AIR 21 generally prohibits air carriers or contractors or subcontractors of air carriers from discharging or otherwise discriminating against an employee because the employee has engaged in specified whistleblowing activity. *See* 49 U.S.C. § 42121(a)(1)-(4). AIR 21 defines contractor as including a "company that performs safety-sensitive functions by contract for an air carrier." 49 U.S.C. § 42121(e). Congress defines "interstate air transportation" as the "transportation of passengers or property by aircraft as a common carrier for compensation or the transportation of mail by aircraft." 49 U.S.C. § 40102(a)(25). It defines "interstate air commerce" as including the "transportation of passengers or property by aircraft for compensation." 49 U.S.C. § 40102(a)(24).

The FAA provides that:

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The FAA further states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The FAA also provides that:

> [i]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon

> being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been held in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3. Although this section explicitly refers to a stay of a suit or proceeding in a court, the Department has viewed the FAA as requiring a stay of its administrative proceedings. *See, e.g.*, *Abhyankar v. Countrywide Fin. Corp.*, ARB No. 11-043, 2013 WL 1497069, at *1 (ARB Mar. 29, 2013) (noting that the ALJ had stayed the whistleblower proceeding pending arbitration pursuant to 9 U.S.C. § 3).

Section 181 of the RLA provides that:

> [a]ll of the provisions of subchapter 1 of this chapter except section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

45 U.S.C. § 181. The RLA defines "employee" as:

> includ[ing] every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Surface Transportation Board now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Board pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders . . . .

45 U.S.C. § 151.

Finally, the TAA states that:

> (a) A written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that:
>
> (1) exists at the time of the agreement; or

(2) arises between the parties after the date of the agreement.

(b) A party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a contract.

Tex. Civ. Prac. and Rem. Code § 171.001.

B. Facts.

In the period pertinent to Willbanks's complaint, she was a flight attendant and flight instructor. Her job duties involved the provision of services on passenger airplanes. *See* FSI Response in Opposition to Complainant's Brief in Support of Interlocutory Appeal ("FSI Resp."), p. 9. Thus, Ms. Willbanks worked within a transportation industry. *See* Respondent FSI's Reply to Complainant's Response Opposing Motion to Dismiss and Compel Arbitration ("FSI Reply"), p. 6; Complainant Response Opposing Motion to Dismiss and Compel Arbitration ("Comp. Resp."), p. 5.

FSI employed Ms. Willbanks as a flight attendant to perform flight attendant duties for Atlas Air, Inc., with which FSI contracted to provide trained flight attendants. Complainant's Amended Complaint ("Am. Cmpl."), ¶1; FSI Resp., p. 13. Willbanks accordingly performed flight attendant duties aboard Atlas Air, Inc. planes. Comp. Resp., p. 7, ¶14; FSI Resp., p. 13. Willbanks's AIR 21 complaint with OSHA, which she filed on December 26, 2013, identified both FSI and "Atlas Air" as her employers and contended that the companies' discharged her in October 2013 in retaliation for her cooperation with a firm auditing Atlas Air's compliance with airline industry safety policies and standards. Complainant's Brief in Support of Interlocutory Appeal, Compl. Br., Exhibit ("Ex.") 1.

While aboard Atlas Air, Inc. flights, Willbanks was subject to policy guidelines providing that the Atlas Air Code of Conduct generally applied to Willbanks. Comp. Resp., pp. 9-10. Willbanks also had to comply with all legal and reasonable directives, requests, or orders of Atlas, and wear an Atlas I.D. contract employee badge while on Atlas Air Flights. *Id.* The obligation to comply with all legal and reasonable directives, requests, or orders of Atlas extended to instances in which Atlas trained Willbanks, and the obligation to wear the Atlas I.D. contract badge extended to any time Willbanks was on duty or on either Atlas Air or FSI property. *Id.* at 9. Willbanks additionally was required to keep her personal information in "Atlas Crew Scheduling" up-to-date, and to regularly check her Atlas Air e-mail inbox for any messages FSI or Atlas may have sent. *Id.* at 10.

C. Course of Proceedings and the ALJ's Decision.

OSHA investigated Willbanks's December 26 AIR 21 complaint, and concluded that there was no reasonable cause to believe a violation of AIR 21 occurred. It accordingly dismissed the complaint. Willbanks timely filed objections to OSHA's dismissal to the Department of Labor's Office of Administrative Law Judges. Willbanks's objections named FSI and Atlas Air Worldwide Holdings, Inc. ("AAWW") as the party respondents.

On March 3, 2014, AAWW moved to dismiss Willbanks's AIR 21 action, asserting that it was not a proper respondent because it is merely the parent holding company of Atlas Air, Inc., and, as such, has no employees or operations. Willbanks subsequently requested leave to amend her complaint to add the correct

Atlas respondent, which Willbanks identified in the motion as Atlas Air, Inc. OSHA understands that the ALJ has never ruled on AAWW's motion to dismiss or Willbanks's request to amend her complaint to add Atlas Air, Inc. as a respondent.[1]

On March 17, 2014, FSI filed a Motion to Dismiss and Compel Arbitration, or Alternatively, to Stay Proceedings and Compel Arbitration ("FSI Motion to Dismiss"). In support of its motion to dismiss, it cited a provision in Willbanks's employment application with FSI, which stated:

> I agree that all disputes, claims, and controversies which I may have with FSI, whether individual, joint, or as a 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.

On April 15, 2014, the ALJ issued an Order Staying Proceeding and Compelling Complainant to Arbitrate her AIR 21 Complaint ("ALJ Order"). ALJ Order, p. 3.

In his ruling, the ALJ rejected Complainant's argument that she is a "transportation worker" for purposes of *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) and thus within the "residual phrase," exempting such workers from the FAA. *Id*. at 114. The ALJ reached this conclusion based exclusively on the application of an eight factor test the Eighth Circuit Court of

[1] It appears that the ALJ in this matter may believe that his order compelling arbitration resolves all issues pending before him. It does not. Even if Willbanks must arbitrate her claim against FSI, the ALJ must still resolve the issues of whether an Atlas Air entity employed Willbanks, whether Willbanks properly named an Atlas Air entity in the complaint or in her request to amend her complaint, and whether an Atlas Air entity can compel Willbanks to arbitrate her claims against it. As explained herein, OSHA believes Atlas Air, Inc. is an RLA-covered employer and understands that neither Atlas Air, Inc. (nor any other Atlas Air entity) is a party to the arbitration agreement between FSI and Willbanks. For those reasons, an Atlas Air entity cannot compel Willbanks to arbitrate an AIR 21 claim, and remand is needed so that the ALJ can resolve the outstanding issues related to Atlas Air.

Appeals has adopted to decide whether an employee is a transportation worker because his or her "job duties are so closely related to interstate commerce . . . ." *Lenz v. Yellow Transp., Inc.*, 431 F.3d 348, 352 (8th Cir. 2005). The ALJ ostensibly found that Complainant failed to satisfy any of the *Lenz* factors. ALJ Order, pp. 2-3. In essence, the ALJ ruled, consistent with FSI's arguments, that Willbanks was not a transportation worker because her duties did not relate to the transportation of goods, but rather related exclusively to the provision of services on passenger airplanes. FSI Resp., p. 9. He accordingly concluded that "Complainant is not a transportation worker and thus is not exempt from the FAA." ALJ Order, p 3. On May 1, 2014, the ALJ denied Willbanks's request for reconsideration of his April 15 Order compelling arbitration. This petition for review followed.

SUMMARY OF ARGUMENT

Agreements to arbitrate employment-related claims entered into as a condition of employment are generally enforceable under the FAA unless the worker falls into the FAA's exemption for transportation workers, the statute on which the employment-related claim is based precludes arbitration, or the arbitration agreement itself is revocable. In this case, the ARB could conclude that Willbanks is within the transportation worker exemption based on her duties transporting passengers on Atlas Air, Inc. airplanes in interstate commerce. Indeed, the ALJ erred in taking a narrow view of the transportation worker exemption as limited to workers involved in the transportation of goods. He also erred in relying solely on the Eighth Circuit's decision in *Lenz*, *supra*, to

determine whether Willbanks is a transportation worker, to the exclusion of other instructive federal court decisions, and in reading a transportation of goods requirement into several of the factors discussed in *Lenz* that do not contain such a requirement.

While the Board could reverse the ALJ's decision that Willbanks is a transportation worker and remand the case for hearing, OSHA believes a remand for consideration of several other issues is preferable. First, the ALJ did not address whether an Atlas Air entity employed Willbanks or whether FSI was subject to the RLA. Both of those questions could be dispositive to the question of whether Willbanks is a transportation worker. In addition, Willbanks's factual allegations raised questions not considered by the ALJ regarding whether her duties were related to the transportation of goods. Finally, the ALJ did not consider whether the TAA applies to Willbanks's claim or whether there are facts indicating that the arbitration agreement is invalid as a matter of law.

ARGUMENT

A. Standard of review.

The Secretary of Labor has delegated authority to the Board to decide this matter. Secretary's Order 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012). The ARB reviews findings of facts in AIR 21 matters under the substantial evidence standard and conclusions of law de novo. *See Clemmons v. Ameristar Airways, Inc.*, ARB No. 12-105, 2013 WL 6354832, at *2 (Nov. 25, 2013), *aff'd*, 771 F.3d 268 (5th Cir. 2014) (citation omitted).

B. While employment-related disputes are generally arbitrable under the FAA, the Board may conclude that Willbanks is a transportation worker exempt from the FAA's mandatory arbitration provisions.

The FAA generally compels parties to arbitrate disputes pursuant to a written arbitration provision. *See* 9 U.S.C. § 2. Thus, agreements to arbitrate employment-related claims entered into as a precondition to employment are normally enforceable under the FAA. *See, e.g., Desiderio v. NASD, Inc.* 191 F.3d 198 (2d Cir. 1999); *cf. Circuit City*, 532 U.S. at 122-124 (remanding arbitrability issue to Circuit court where an employment application signed by employee prior to the commencement of employment contained the applicable arbitration clause). However, Section 1 of the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. This residual phrase does not exempt all contracts of employment of workers engaged in foreign or interstate commerce from the FAA; rather the Supreme Court has held that "[s]ection 1 exempts from the FAA only contracts of employment of *transportation workers*." *Circuit City*, 532 U.S. at 119 (emphasis added).

The Supreme Court noted in *Circuit City* that most "Courts of Appeals [had] conclude[d] the exclusion provision is limited to transportation workers, defined, *for instance*, as those workers 'actually engaged in the movement of goods in interstate commerce.'" *Circuit City*, 532 U.S. at 112 (emphasis added). However, *Circuit City* did not explicitly define, or identify, those classes of workers the Court considered to be transportation workers. Thus, the Supreme Court has not limited the transportation worker exemption to workers who transport goods. Furthermore, no court of appeals has addressed whether a worker who transports passengers, but not goods, can fit within the

transportation worker exemption.[2] For the reasons explained below, OSHA believes that the ARB can, consistent with *Circuit City*, its progeny and the facts in the record, conclude Willbanks is a transportation worker, regardless of whether her work involves transporting goods.

1. Willbanks performs work within a transportation industry and need not show that her work involves transportation of goods.

Willbanks performs work within a transportation industry. She performs her work on the means of transportation, i.e., an airplane, within that industry. She performs that work while the airplane is in interstate transit. The Board may reasonably conclude an individual performing work duties within a particular transportation industry while the means of transportation within that industry is in interstate transit is a transportation worker. *See, e.g., ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters*, 728 F.3d 853, 859 (8th Cir. 2013) (noting that the FAA "does not apply in th[e] case" where Defendant

[2] The few trial court decisions on the issue of whether transportation of goods (not passengers) is necessary for a worker to fit into the transportation exemption have reached different conclusions. *Compare Kowalewski v. Samandarov*, 590 F.Supp.2d 477, 484 (S.D.N.Y. 2008) (ruling that car service employees transporting solely passengers interstate are not transportation workers because they are "too far removed from the type of work engaged in by seamen and railroad workers – that is, being a member of an industry that primarily involves the actual, physical movement of goods through interstate commerce"); *Gadsdon v. Supershuttle Int'l*, No. 10-cv-01057, 2011 WL 1231211, at *5 (D. Md. Mar. 30, 2011) *vacated and remanded on other grounds sub nom. Murithi v. Gadsdon*, 712 F.3d 173 (4th Cir. 2013); *JetBlue Airways Corp. v. Stephenson*, No. 650691/2010, 2010 WL 6781684, at *3 (N.Y. Sup. Ct. 2010) (ruling that passenger pilots are not within the residual clause, even though JetBlue's passenger planes carry goods, because petitioners failed to show the "cargo services of JetBlue rise to the level of its primary function") *with Lepera v. ITT Corp.*, No. CIV-97-14611997 WL 535165, at *7 (E.D. Pa. Aug. 12, 1997) (ruling that a pilot who transported solely passengers, and not goods, is within the residual clause where "it is simply nonsensical to exclude from coverage those workers engaged in the direct transportation of goods, but not those engaged in the direct transportation of persons"); *TransWorld Airlines, Inc. v. Sinicropi*, 887 F. Supp. 595, 610 n. 13 (S.D.N.Y. 1995) (noting in *dicta* that "[c]ontracts of airline employees . . . are exempted from the [FAA]").

union's members are truck drivers travelling in interstate commerce); *Lepera v. ITT Corp.*, No. CIV. 97-1461,1997 WL 535165 (E.D. Pa. Aug. 12, 1997) (ruling that pilot transporting passengers interstate is within the residual phrase).[3]

Because Willbanks worked in a transportation industry and provided services on the means of transportation within that industry while the means of transportation was in interstate transit, Willbanks's work duties render her engaged in interstate commerce as a matter of law. In *Circuit City*, the Court concluded that the statutory reference to "engaged in . . . commerce" in section 1 of the FAA evinces a congressional intent not "to regulate to the outer limits of authority under the Commerce Clause." 532 U.S. at 116. Rather than interpreting "engaged in . . . commerce" in a manner coterminous with Congress's constitutional authority, the Court cited *United States v. American Building Maintenance Industry*, 422 U.S. 271 (1975) and *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974) with approval as decisions that properly define the scope of "engaged in . . . commerce." 532 U.S. at 117-18. Both these decisions ruled that the phrase's scope "appears to denote only persons or activities within the flow of interstate commerce – the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." *Am. Bldg. Maint. Indus.*,

[3] OSHA believes federal courts have correctly decided that under certain circumstances individuals can be transportation workers without performing work on the means of transportation within the particular industry. *See Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 593 (3d Cir. 2004); *Zamora v. Swift Transp. Corp.*, No. EP-07-CA-00400-KC, 2008 WL 2369769, at *4, 9 (W.D. Tex. June 3, 2008). Thus, OSHA is not advocating the Board's adoption of this position - i.e., an individual performing work duties within a particular transportation industry while the means of transportation within that industry is in interstate transit is a transportation worker - as a *standard* to apply to *all* employees claiming they are transportation workers. Rather, OSHA merely submits Complainant's personal work circumstances are more than sufficient to render her a transportation worker.

422 U.S. at 276; *Gulf Oil Corp*., 419 U.S. at 195. The Court in *Circuit City* accordingly acknowledged that the provision of services within the flow of interstate commerce constitutes engagement in interstate commerce. Since it is undisputed Willbanks provides services for the interstate airline market as a flight attendant, the Board could reasonably find that she was "within the flow of interstate commerce" such that her work rendered her engaged in interstate commerce for purposes of the FAA residual phrase.

Furthermore, the RLA extends coverage to "every common carrier by air *engaged in interstate or foreign commerce*." 45 U.S.C. § 181 (emphasis added). Atlas Air is an air carrier engaged in interstate transportation and interstate commerce within the respective meanings of both AIR 21 and the RLA. *See* 49 U.S.C. § 40102(a)(24)-(25); *Atlas Air, Inc. v. Air Line Pilots Ass'n*, 232 F.3d 218 (D.C. Cir. 2000). Thus, Ms. Willbanks's work while on Atlas Air flights constitutes engagement in interstate commerce. Finally, Congress has defined "interstate air commerce" to include the "transportation of passengers." 49 U.S.C. § 40102(a)(24). Since Atlas Air's transportation of passengers constitutes interstate air commerce, Ms. Willbanks is engaged in interstate commerce through her provision of services to such passengers.

For these reasons (and because the Supreme Court in *Circuit City* did not suggest that the determination of whether an individual is a transportation worker turns on a narrow view of whether the worker is transporting goods versus passengers), a finding that Willbanks is a transportation worker exempt from the FAA is consistent with the Supreme Court precedent interpreting the FAA, even if Willbanks does not demonstrate any level of involvement in the transportation of goods. Such an interpretation of the residual phrase is additionally consistent with various federal court decisions that have

ruled that employees who did not themselves transport goods in interstate or foreign commerce were nonetheless exempt from the FAA. *Brown v. Nabors Offshore Corp.*, 339 F.3d 391 (5th Cir. 2003) (ruling that a seaman not involved in the transportation of goods in commerce is within the FAA exclusionary language); *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 593 (3d Cir. 2004) (ruling that the direct supervisor of truck drivers engaged in delivering interstate shipments is a transportation worker under the FAA residual clause because her work is "'so closely related to [interstate and foreign commerce] as to be in practical effect part of it'") (quoting *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am.*, 207 F.2d 450, 452 (3d Cir. 1953)); *Zamora v. Swift Transp. Corp.*, No. EP-07-CA-00400-KC, 2008 WL 2369769, at *4, 9 (W.D. Tex. June 3, 2008) (ruling that the terminal manager of truck drivers is a transportation worker "based upon both the . . . analysis in *Lenz* and the . . . analysis in *Palcko*," and rejecting the argument that the residual phrase does not apply to the plaintiff "because he is not a truck driver, directly involved in the movement of goods interstate"); *Lepera*, 1997 WL 535165, at *7 (ruling that a pilot who transported solely passengers, and not goods, is within the residual phrase where "it is simply nonsensical to exclude from coverage those workers engaged in the direct transportation of goods, but not those engaged in the direct transportation of persons").[4]

[4] Some Circuit courts, post-*Circuit City*, have emphasized the need to transport goods to be a transportation worker. *See, e.g., Int'l Bhd. of Teamsters, Local 150 v. Kienstra Precast LLC*, 702 F.3d 954 (7th Cir. 2012); *Lenz, supra; Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286 (11th Cir. 2005). However, in none of these cases did an employee provide services to passengers while both were in interstate transit, a showing that renders individuals' work, including Complainant's, within the flow of interstate commerce for purposes of *Circuit City, American Building* and *Gulf Oil Corp.*

Finally, the Court in *Circuit City* observed the "residual clause . . . should itself be controlled and defined by reference to the enumerated categories [i.e., seamen and railroad employees] which are recited just before it." 532 U.S. at 115 (emphasis added).[5] This pronouncement suggests that to the extent it is not necessary to transport goods to be a "railroad employee" or "seamen" for purposes of the FAA, it is equally unnecessary to transport goods to be a transportation worker within the ambit of the residual phrase. Since one need not transport goods to be a seaman or railroad employee under the FAA, *see Brown*, 339 F.3d at 394 (interpreting *Circuit City* to "support[] the view that employment contracts of the enumerated workers – seamen and railroad workers – are without limitation, exempt from application of the FAA . . ."), it is not necessary to transport goods to qualify as a transportation worker.[6]

[5] The Supreme Court appears to have identified "any other class of workers engaged in foreign or interstate commerce" as both a "residual phrase" and a "residual clause" in *Circuit City*. *See* 532 U.S. 114-15. This memorandum refers solely to this set of words as a "residual phrase," unless it is quoting a source that used the "residual clause" language.

[6] *Brown* interpreted the FAA's exclusionary language to cover a seaman, and by implication a railroad employee, regardless of whether he engages in the transportation of goods in foreign or interstate commerce because it concluded that the clause "engaged in foreign or interstate commerce" in the residual phrase modified solely "any other class of workers." *See Brown*, 339 F.2d at 392 (rejecting employer's argument that "Brown fell outside of the § 1 exemption because he was not involved in the transportation of goods in commerce"). While the *Brown* court's reasoning makes clear that the Fifth Circuit has concluded that transportation workers, unlike seamen and railroad employees, must show they are engaged in foreign or interstate commerce to be subject to Section 1's exclusion, it did not address whether it is necessary to show that the engagement in interstate or foreign commerce involves the transportation of goods. If the *Brown* court had addressed the question, the proper answer would be no. *See supra*.

2. The factors enunciated in *Lenz v. Yellow Transportation* are not determinative of whether Willbanks is a transportation worker and, in any event, the ALJ misstated and misapplied those factors.

This matter did not arise within the Eighth Circuit's jurisdiction, and the decisions of that Circuit have no special weight in deciding whether Willbanks is a transportation worker. Nonetheless, should the Board choose to rely on those factors, it can conclude that Willbanks is a transportation worker under the eight factor test in *Lenz,* 431 F.3d at 352. This is because the ALJ improperly read a transportation of goods requirement into many of the *Lenz* factors. In addition, while *Lenz* involved a customer service agent for a trucking company, who if he qualified as a transportation worker, would have done so based on his involvement with the transportation of goods, the factors announced by the Eighth Circuit were explicitly a non-exhaustive list of the factors a court could consider. Properly stated, the *Lenz* factors are:

1. whether the employee works in the transportation industry;

2. whether the employee is directly responsible for transporting the goods in interstate commerce;

3. whether the employee handles goods that travel interstate;

4. whether the employee supervises employees who are themselves transportation workers, such as truck drivers;

5. whether, like seamen or railroad employees, the employee is within a class of employees for which special arbitration already existed when Congress enacted the FAA;

6. whether the vehicle itself is vital to the commercial enterprise of the employer;

7. whether a strike by the employee would disrupt interstate commerce; and

8. the nexus that exists between the employee's job duties and the vehicle the employee uses in carrying out his duties (i.e., a truck driver whose only job is to deliver goods cannot perform his job without a truck).

Lenz, 431 F.3d at 352. Contrary to the ALJ's decision in this case, Willbanks satisfies most of the *Lenz* factors, as follows:

a. she satisfies the first factor. As previously discussed, she does work in a transportation industry, commercial aviation;

b. she satisfies the sixth factor, i.e., the airplane(s) on which she actually works is/are vital to an airlines commercial enterprise, *see* FSI Resp., p. 15;

c. she satisfies the seventh factor, i.e., a strike by Atlas Air/ FSI flight attendants would disrupt interstate commerce;[7]

d. she satisfies the eighth factor, i.e., a very close nexus exists between her job duties and the airplane because Willbanks cannot perform her job without the airplane; and

e. at the time of the FAA's enactment in 1925, commercial air travel was in its nascence. Approximately ten years after the FAA's enactment, as commercial air travel expanded, Congress amended the RLA to cover common carriers by air and their employees, thereby subjecting them, where applicable, to the same grievance-arbitration process as employees of rail carriers. *See Circuit City*, 532 U.S. at 121. Given this history, it is not appropriate to apply the fifth factor - which asks whether, like seamen or railroad employees, the employee is within a class of employees for which special arbitration already existed when Congress enacted the FAA

[7] FSI mistakenly states the inquiry under the seventh factor as whether the individual employee's strike would disrupt interstate commerce. FSI Resp., p. 15. While *Lenz* initially articulates the seventh factor as "whether a strike by the employee would disrupt interstate commerce," 431 F.3d at 352, its analysis clarifies the proper inquiry is whether a strike by individuals within the employee's classification would disrupt interstate commerce. *Id*. at 353 (noting a "strike by *commercial service representatives* . . . would not disrupt interstate commerce") (emphasis added). With respect to the substance of the seventh factor, the disruptions that labor-management disputes, including strikes, were visiting upon interstate commerce constituted a motivating purpose behind the RLA's enactment, *see Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 562 n.9 (1987), as well as the amendment of the RLA to add airline employees. *See, e.g., Int'l Ass'n of Machinists v. Cent. Airlines*, 372 U.S. 682, 687 (1963) (noting "Congress has long concerned itself with minimizing interruptions in the Nation's transportation services by strikes and labor disputes and has made successive attempts to establish effective machinery to resolve [such] disputes . . . ."). Thus, a strike by flight attendants disrupts interstate commerce as a matter of law.

> – literally here. Rather, Congress's application of statutory grievance-arbitration procedures so early in the history of commercial air transportation suggests Willbanks satisfies the spirit of the fifth factor. At a minimum, the Board should treat the factor as neutral.

Since Willbanks satisfies a majority of the applicable *Lenz* factors, i.e., five out of eight, or four out of seven, the Board can reasonably conclude she is a transportation worker under *Lenz*. *See, e.g., Zamora*, 2008 WL 2369769 at *8 (finding employee a transportation worker where "the majority of the factors weigh in favor of finding Zamora a transportation worker under the FAA . . .").

C. While the ARB may conclude that Willbanks is a transportation worker, remand would also be appropriate because Willbanks may fall within the transportation worker exemption for other reasons not considered by the ALJ.

As previously noted, the Court in *Circuit City* stated that most "Courts of Appeals [had] conclude[d] 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, but it did not itself explicitly define transportation workers, or identify those classes of workers it considered to be transportation workers. The Court did, however, state that:

> [i]t would be rational for Congress to ensure that workers in general would be covered by the provisions of the FAA, 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 . . .

532 U.S. at 121. This statement suggests that the Court considers the employees of RLA-covered employers to be transportation workers. Atlas Air is a common carrier by air engaged in interstate or foreign commerce for purposes of the RLA. *See Atlas Air, Inc. supra*. Willbanks's December 26 complaint asserts that Atlas Air (in addition to FSI)

was her employer and the record before the ALJ contains facts showing Atlas Air may have exercised power over Willbanks's work duties. *See* Comp. Resp., p. 9. In addition, Willbanks's December 26 complaint form asserts her firing occurred at the request of Atlas Air and identifies an Atlas Air official as her supervisor. Comp. Br., Ex. 1. Given these facts and assertions, the ALJ prematurely issued a ruling adverse to Willbanks with respect to her status as a transportation worker without first resolving her alleged status as an Atlas Air employee. OSHA would accordingly recommend that the ARB remand the matter to the ALJ for a determination related to Willbanks's status as an Atlas Air employee.[8] OSHA would further suggest that the Board may wish to instruct the ALJ to seek additional factual development on this issue from the parties to assist in rendering his legal ruling. Finally, OSHA notes that if Willbanks was an employee of Atlas Air, it almost certainly cannot compel arbitration of her AIR 21 claim because it was not a signatory to the agreement.

Similarly, it is possible FSI, though not itself an air carrier, is subject to the RLA under the applicable National Mediation Board ("NMB") two-pronged test. The NMB conducts certain dispute-resolution proceedings between RLA–covered parties, including representation proceedings. In exercising this authority, the NMB has found an employer that is not itself an air carrier is subject to the RLA when (1) the nature of the work

[8] Because it will work no unfair surprise or other prejudice on Atlas Air, Inc., OSHA also recommends that the Board suggest that granting Complainant's motion to add Atlas Air, Inc. as a Respondent is warranted, subject to Atlas Air Inc.'s power to subsequently contend it did not employ Willbanks (and is accordingly not a proper Respondent). *Cf. Tamosaitis v. URS Inc.*, 771 F.3d 539, 550-51 (9th Cir. 2014) (finding administrative exhaustion in Energy Reorganization Act whistleblower claim in which complainant technically named the wrong corporate entity in his complaint to OSHA but also made clear that the complaint was against his employer).

performed by its employees is that traditionally performed by employees of air carriers (the "function" prong); and (2) the employer is directly or indirectly owned or controlled by or under common control with an air carrier (the "control" prong). *See, e.g., In Re Airway Cleaners, LLC*, 41 NMB 262 (NMB 2014); *In Re Bradley Pac. Aviation, Inc.*, 34 NMB 119 (NMB 2007).[9] As FSI's employees, including Willbanks, perform flight attendant duties, it almost certainly satisfies the first prong. OSHA would accordingly recommend that the Board direct the ALJ to consider whether Atlas Air exercises sufficient control over FSI flight attendants to establish RLA jurisdiction over FSI. *Compare Airway Cleaners, LLC* and *Bradley Pac. Aviation, Inc.*[10]

As discussed above, OSHA believes that it is not necessary for Willbanks to demonstrate any level of involvement with goods in interstate or foreign commerce in order to be a transportation worker. However, there are factual disputes in the record regarding the connectivity of Willbanks's work to the transportation of goods the

[9] OSHA does not believe Willbanks's status as a transportation worker is wholly contingent on demonstrating that her employer(s) (either FSI and/or Atlas Air) is/are subject to the RLA. It submits that Willbanks is a transportation worker regardless of the RLA-covered status of FSI or Atlas Air. OSHA does believe, however, that remand is appropriate because it is even more likely, if not certain, that Willbanks is a transportation worker if FSI or Atlas Air is both her employer and subject to RLA coverage.

[10] OSHA understands the question posed by the Board under the RLA to relate to the inquiry as to Willbanks's status as a transportation worker. If the Board is inquiring whether the RLA's grievance-arbitration procedure for airline employees covered by collective bargaining agreements proscribes processing an airline employee's AIR 21 whistleblower complaint outside the applicable grievance-arbitration scheme, OSHA notes an individual employment contract, rather than a collective bargaining agreement, covered Willbanks's employment with FSI and the "compulsory arbitration requirements of the RLA do not extend to disputes arising under individual employment contracts." *Fairbairn v. United Air Lines, Inc.*, 250 F.3d 237, 238 (4th Cir. 2001). Thus, the RLA does not compel arbitration of Willbanks's AIR 21 claim.

resolution of which might bolster a finding that she is a transportation worker. While Willbanks admits she did not handle goods that travel interstate, Comp. Br., p. 7, she also asserts that "goods [are] transported in the same aircraft she's flying on," *Id*. at 8, and that Atlas Air is a "cargo air carrier" and her employer. *Id*. It is unclear whether FSI is contending Willbanks served only on airplanes exclusively transporting passengers (and not goods/cargo), FSI Resp., p. 12, or merely had no responsibility for the goods that happened to be on planes on which she performed her duties. FSI Resp., p. 15 ("Complainant's presence on board the aircraft was unrelated to the aircraft's ability to transport goods"). An Atlas Air official admits that the company is primarily a cargo air carrier but indicates that passenger flight attendants' connection to cargo is, at best, tenuous. FSI Resp., Ex. J, Aff. of David R. Burgett. Given these facts, the ARB may remand the case for a reasoned explanation related to the ALJ's finding that Willbanks job duties have *no relation to* goods moving in interstate commerce. *See* ALJ Order, p. 3.

Should the Board remand the case, OSHA also asks that the Board instruct the ALJ on the proper application of the *Lenz* factors, consistent with OSHA's explanation above. *See supra*, at 16-18. OSHA additionally requests that the Board inform the ALJ that exclusive reliance on the *Lenz* test in determining whether an individual is a transportation worker unduly ignores the other instructive federal decisions discussed above, especially where the events giving rise to the dispute did not occur within the Eighth Circuit's jurisdiction.

D. The TAA may compel Willbanks to arbitrate her claim against FSI even if she is a transportation worker.

Although not addressed in the ARB's questions, FSI argued in its brief to the ARB that it could compel Willbanks to arbitrate her AIR 21 claim under the TAA even if

she falls within the transportation worker exemption in the FAA. Such a result is arguably in tension with Supreme Court precedent indicating that state law cannot conflict with the purposes and objectives of the FAA, *see Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), as an ostensible purpose or objective of Congress in enacting the FAA was to "reserv[e] for itself more specific legislation for those engaged in transportation." *Circuit City*, 532 U.S. at 121. Nonetheless, three circuit courts of appeals, including the Fifth Circuit (where this case arises), have rendered decisions consistent with FSI's position. *See Davis v. EGL Eagle Global Logistics*, LP, No. 06-31019, 2007 WL 2007547 (5th Cir. July 9, 2007) (nonprecedential decision); *Palko*, 372 F.3d at 595-96 (requiring arbitration of transportation worker's Title VII claim under state arbitration law). *See also Sherwood v. Marquette Transp. Co.*, 587 F.3d 841, 843 (7th Cir. 2009) (suggesting in *dicta* in suit arising under the Jones Act that *Palko* and *Davis* properly disposed of this issue). Thus, if Willbanks is not a transportation worker, OSHA believes her claim is arbitrable under the FAA, and in any event the claim may be arbitrable under the TAA, unless there is some basis in the AIR 21 statute itself or in state contract law for finding the arbitration agreement unenforceable.

E. Even assuming Willbanks is not a transportation worker, it is possible her claim is not arbitrable pursuant to state or federal law if the arbitration agreement is revocable.

While OSHA does not believe that there is anything unique in AIR 21, including the Federal Aviation Administration's authority to cite for AIR 21 violations under 49 U.S.C. § 46301(a), that suggests that AIR 21 precludes agreements to arbitrate

whistleblower claims,[11] there may be grounds at law or in equity for revocation of the parties' arbitration agreement even if Willbanks is not a transportation worker. *See* 9 U.S.C. § 2. Indeed, there may be facts indicating that Willbanks's arbitration agreement is an unconscionable contract of adhesion and therefore unenforceable as a matter of the applicable (likely Texas) state law. *See, e.g.*, *Circuit City Stores v. Adams*, 279 F.3d 889, 892-93 (9th Cir. 2002) (ruling that the arbitration "arrangement is unconscionable under California law," where *inter alia* the "agreement is a prerequisite to employment, and job applicants are not permitted to modify the agreement's terms – they must take it or leave it."). Assuming Texas contract law does apply, "[t]he determination regarding whether a contract or term is unconscionable is made in the light of its setting, purpose, and effect." S*ee, e.g.*, *Royston, Rayzor, Vickery & Williams v. Lopez*, No. 13-11-00757-CV, 2013 WL 3226847, at *5 (Tex. App. 2013), *petition for writ of mandamus filed and pending*, No. 14-0109 (Tex. Feb. 7, 2014). In order for Willbanks to void the arbitration agreement successfully, she would likely need to present facts showing either "weaknesses in the contracting process, fraud, [or] other invalidating causes" that would render the agreement so "grossly one-sided" as to be unconscionable. *Id.* (finding an arbitration

[11] Unless overridden by a contrary statutory command, the federal statutory claim of an individual is generally arbitrable pursuant to the FAA, including those involving employment disputes. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Thus, prior to the 2010 statutory amendments banning predispute arbitration agreements, such agreements had been held to be enforceable under the Sarbanes-Oxley Act whistleblower provision, which was identical to the AIR 21 whistleblower provision in all relevant respects. *See, e.g.*, *Guyden v. AETNA, Inc.*, 544 F.3d 376 (2d Cir. 2008). The presumption in favor of enforceability of arbitration agreements has been applied even when an administrative agency possesses independent enforcement authority related to the individual's arbitrable claim. *See, e.g.*, *Khazin v. TD Ameritrade Holding Corp.*, No. 14-1689, 2014 WL 6871393 (3d Cir. Dec. 8, 2014) (requiring arbitration of individual's claim under 15 U.S.C. § 78u-6(h), even though the Securities Exchange Commission also has enforcement authority over that provision).

agreement between an attorney and his client unconscionable where it permitted the attorney to litigate claims for fees and costs but did not allow the client to litigate her claims). Other than the document containing the arbitration agreement itself, there are very few facts in the record related to the circumstances of the parties' entry into the agreement. OSHA would accordingly recommend that the ARB instruct the ALJ to consider whether there are facts indicating that the arbitration agreement may be unenforceable as a matter of state contract law.

F. Even if FSI can compel Willbanks to arbitrate her AIR 21 claim, the parties' arbitration agreement cannot foreclose OSHA's, or the Federal Aviation Administration's, right to prosecute an AIR 21 retaliation claim.

OSHA also notes that even in those instances in which the FAA or state law compels an individual to arbitrate her AIR 21 complaint, neither the FAA nor state law can preclude Willbanks from a filing a charge of retaliation with the Federal Aviation Administration or OSHA, or foreclose the agencies from investigating retaliation in violation of AIR 21 and taking appropriate enforcement action.[12] In particular, if OSHA concluded retaliation had occurred, it could pursue the retaliation claim before an ALJ, regardless of whether Willbank's personal claim against FSI was subject to arbitration. *See* 29 C.F.R. § 1979.108(a)(1) (permitting OSHA to act as a party in an AIR 21 retaliation claim); *cf. E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 296 (2002) (finding that "whenever the EEOC chooses from among the many charges filed each year to bring

[12] Complaints of retaliation and OSHA's findings in all AIR 21 cases are sent to the FAA, so that the FAA may identify and investigate air safety issues implicated by the complaint, including retaliation for protected whistleblowing. 29 C.F.R. § 1979.104(a); U.S. Dep't of Labor, OSHA Whistleblower Investigations Manual, Directive No. CPL 02-03-003, at 5-33 (Sept. 20, 2011), available at: http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-003.pdf.

an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief" and therefore an arbitration agreement between an individual and an employer may not preclude the EEOC from bringing suit under Title VII or the ADA).[13]

CONCLUSION

In short, while OSHA believes that the Board may reasonably find that Willbanks is a transportation worker exempt from the FAA's mandatory arbitration provisions,

[13] Additionally, OSHA wishes to make clear that its views in this case are not inconsistent with the Department's longstanding position that the agency will not defer to an arbitrator's decision on a claim that is related to, but not the same as, a whistleblower claim except in the narrow circumstance in which the arbitrator has considered whether retaliation for the same conduct protected under the Department's statute occurred. *See CalMat Co. v. Dep't of Labor (CalMat I)*, 364 F.3d 1117, 1126 (9th Cir. 2004) (upholding Secretary's refusal to defer to CBA arbitration that did not address the employee protections provided by STAA); *Roadway Express, Inc. v. Brock*, 830 F.2d 179, 182 (11th Cir. 1987) (finding CBA arbitration was not due deference because it did not give full consideration to STAA whistleblower rights); *Lachica v. Trans-Bridge Lines*, ARB No. 10-088, 2012 WL 759334 (ARB Feb. 1, 2012) (reversing ALJ's decision to defer to arbitration proceeding because the arbitration proceeding did not consider whether retaliation based on whistleblowing occurred or whether the employer would have taken the same action absent whistleblowing). This case does not involve such a situation because at issue is whether Willbanks's AIR 21 claim itself must be arbitrated.

OSHA believes that a remand for the ALJ to more fully consider the facts consistent with the views expressed in this brief is preferable.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 16th day of December, 2014, copies of the foregoing BRIEF AS AMICUS CURIAE were sent via first class mail to:

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