

No. 04-10860

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KITTY HAWK AIRCARGO, INC.,
Plaintiff – Appellee

v.

ELAINE CHAO, Etc
Defendant

AIR LINE PILOTS ASSOCIATION;
HAL WINTERS
Intervenor Defendants-Appellants

On Appeal from the United States District Court for the Northern District
of Texas, Dallas Division, Case No. 3:01-CV-1356-K

BRIEF OF INTERVENOR
DEFENDANT-APPELLANT CAPTAIN HAL WINTERS

Respectfully Submitted,

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DATED: October 8, 2004

CERTIFICATE OF INTERESTED PERSONS

No. 04-10860

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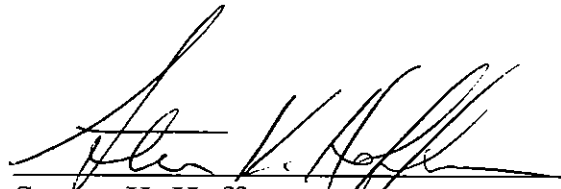
Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Kitty Hawk Aircargo, Inc. (Plaintiff-Appellee)
2. Kitty Hawk, Inc. (owns Kitty Hawk Aircargo, Inc.)
3. Everest Capital Limited (owns 10% or more of Kitty Hawk, Inc.'s stock)
4. Stockton, LLC (owns 10% or more of Kitty Hawk, Inc.'s stock)
5. Elaine Chao, Secretary of the United States Department of Labor ("DOL") (Defendant; governmental agency that issued the administrative decision challenged in this case)

6. Captain Hal Winters, an individual residing in Chapel Hill, North Carolina, and an airline pilot directly affected by the challenged administrative decision (Intervenor Defendant-Appellant)
7. Airline pilots currently and previously employed by Kitty Hawk Aircargo, Inc. (persons directly affected by the challenged administrative decision)
8. Airline pilots who worked for contractors with the United States Postal Service (“USPS”) providing services pursuant to the USPS’ ANET and WNET contracts (persons directly affected by the challenged administrative decision)
9. Air Line Pilots Association (Intervenor Defendant-Appellant; collective bargaining representative of the Kitty Hawk Aircargo, Inc. pilots)
10. Steven K. Hoffman (counsel for Intervenor Defendant-Appellant Captain Hal Winters)
11. Sean G. Bajkowski (counsel for Intervenor Defendant-Appellant Captain Hal Winters)
12. James & Hoffman, P.C. (counsel for Intervenor Defendant-Appellant Captain Hal Winters)

13. Robert Russell Bailey (counsel for Intervenor Defendant-Appellant Air Line Pilots Association)
14. Marta Wagner (counsel for Intervenor Defendant-Appellant Air Line Pilots Association)
15. James L. Hicks (counsel for Intervenor Defendant-Appellant Air Line Pilots Association and for Intervenor Defendant-Appellant Captain Hal Winters)
16. Hicks & Associates (counsel for Intervenor Defendant-Appellant Air Line Pilots Association and for Intervenor Defendant-Appellant Captain Hal Winters)
17. Leif G. Jorgenson (counsel for DOL)
18. Douglas J. Davidson (counsel for DOL)
19. Steven J. Mandel (counsel for DOL)
20. Frank D. Able (counsel for DOL)
21. Gerard F. Doyle (counsel for Plaintiff-Appellee)
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25. Monique M. Kleck (counsel for Plaintiff)
26. Michael L. Hood (counsel for Plaintiff-Appellee)

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29. Jeffrey S. Lowenstein (counsel for Plaintiff-Appellee)
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REQUEST FOR ORAL ARGUMENT

The issues in this case are complex and substantial. Intervenor Defendant-Appellant Captain Hal Winters seeks the reversal of a ruling below that seriously misinterprets the standing requirements of Article III of the United States Constitution, seriously undermines the uniform regulation of interstate commerce under the Service Contract Act, and conflicts with settled legal authority, including the relevant precedent of the Supreme Court, this Court, and other federal courts. Captain Winters therefore respectfully submits that oral argument is appropriate and necessary in this case.

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STATEMENT OF JURISDICTION

It is the position of Intervenor Defendant-Appellant Captain Hal Winters (“Captain Winters”) that the district court lacked jurisdiction to hear this case because the sole plaintiff below, Appellee Kitty Hawk Aircargo, Inc. (“Kitty Hawk”), personally suffered no judicially cognizable injury in fact and therefore lacked standing to invoke the federal judicial power.

On January 26, 2004, the district court issued a memorandum opinion and order granting Kitty Hawk’s motion for summary judgment. R. at 604. On May 24, 2004, the district court entered an amended final judgment disposing of all of Kitty Hawk’s claims. R. at 622.

Pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B), which governs cases where a federal agency is a party, all parties had 60 days from entry of the amended judgment to file notices of appeal. On July 20, 2004, Captain Winters and Intervenor-Defendant Air Line Pilots Association (“ALPA”) separately filed timely notices of appeal. R. at 625-26. Pursuant to Federal Rule of Appellate Procedure 28(a)(4)(D), this is an appeal from a final judgment that disposes of all parties’ claims. This appeal seeks the reversal of the district court’s erroneous

exercise of jurisdiction over Kitty Hawk’s claims. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

- I. Did the district court err when it failed to dismiss this suit for lack of jurisdiction on the ground that Kitty Hawk lacks standing to sue?
- II. Did the district court err in holding that the Department of Labor (“DOL”) Administrative Review Board’s (“ARB”) ruling that commercial airline pilots, including the pilots employed by Kitty Hawk, are not “learned professionals” exempt from the prevailing wage requirements of the McNamara-O’Hara Service Contract Act (“SCA”), 41 U.S.C. §§ 351-58, was arbitrary, capricious, an abuse of discretion, and not in accordance with the law?

STANDARD OF REVIEW

All questions presented are questions of law to be reviewed de novo. See, Gibson v. United States Postal Serv., 380 F.3d 886, 888 (5th Cir. 2004) (“We review the district court’s grant of summary judgment de novo.”); Delta Commercial Fisheries Ass’n v. Gulf of Mexico Fishery Mgmt. Council, 364 F.3d 269, 272 (5th Cir. 2004) (“We review questions of standing de novo.”).

STATEMENT OF THE CASE

This case concerns the efforts of airline pilots who provided services under contracts awarded by the United States Postal Service (“USPS”) to procure a statutorily required wage determination for their services under the SCA. This particular action arose out of the ARB’s August 4, 2000 decision holding that commercial airline pilots are not “learned professionals” for purposes of the SCA. R. at 80. On July 16, 2001, Kitty Hawk filed this action in the District Court for the Northern District of Texas against the DOL Secretary, seeking judicial review of the ARB’s decision pursuant to the Administrative Procedure Act, 5 U.S.C. 551, et seq. Kitty Hawk’s complaint alleged that the ARB’s decision incorrectly construed the SCA and DOL’s regulations exempting “learned professionals” from coverage by the SCA. R. at 19-20. Kitty Hawk sought a declaration that the ARB’s decision “is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law” and “a permanent injunction enjoining [DOL] from implementing [the ARB’s decision].” R. at 36.

On September 17, 2001, DOL moved to dismiss Kitty Hawk’s complaint for lack of subject matter jurisdiction on the ground that the ARB’s decision was not ripe for judicial review. R. at 44. On December 17, 2001, the district court denied

DOL's motion without an opinion. R. at 224. The DOL answered Kitty Hawk's complaint on December 26, 2001. R. at 225.

In the interim, on October 9, 2001, Captain Winters and ALPA filed an unopposed joint motion to intervene as defendants. R. at 125. The district court granted the intervention motion, and the intervenors filed a joint answer to Kitty Hawk's complaint on October 15, 2001. R. at 178.

On May 30, 2002, after discovery on jurisdictional issues, Captain Winters and ALPA filed a joint motion for summary judgment seeking dismissal of the complaint on the grounds that (1) Kitty Hawk lacked standing to sue and (2) the ARB decision was proper, consistent with law and did not violate the APA. R. at 257. The district court denied the motion without an opinion on July 30, 2003, declaring only that "the relief requested is not warranted." R. at 380.

On August 22, 2003, DOL and Kitty Hawk filed cross-motions for summary judgment. R. at 381, 413. Captain Winters and ALPA filed briefs in support of the DOL's motion and in opposition to Kitty Hawk's motion, again contending that Kitty Hawk lacked standing to sue and that the ARB decision did not violate the APA. R. at 320. In a Memorandum Opinion and Order entered on January 26, 2004, the district court granted Kitty Hawk's motion and denied DOL's motion.

R. at 589. The Memorandum Opinion did not address the standing issues raised by the Intervenors. R. at 589-599. On the APA issue, the district court held that Kitty Hawk's pilots are "learned professionals" who exercise discretion and judgment and are paid on a salary basis. R. at 594-596. The district court also held that the ARB decision was arbitrary, capricious, an abuse of discretion and not in accordance with the law. R. at 596.

On February 19, 2004, the district court issued an Order and Final Judgment rescinding the ARB decision, permanently enjoining DOL from implementing that decision, and permanently enjoining DOL from "taking any actions inconsistent with the Court's findings that the Kitty Hawk pilots . . . qualify for exemption as 'professional employees' pursuant to the [SCA]." R. at 605. On February 24, 2004, DOL moved to amend the judgment. R. at 606. The district court granted DOL's motion on May 24, 2004, and entered an amended final judgment, which enjoined DOL from enforcing the ARB decision against Kitty Hawk and unidentified "related parties" or from taking any action against Kitty Hawk inconsistent with the district court's decision. R. at 620-623. On July 20, 2004, Winters and ALPA separately filed timely notices of appeal from the amended final judgment entered by the district court. R. at 625, 626.

STATEMENT OF FACTS

In order to transport its “priority” and “express” mail by air, the USPS contracts with private airlines for air cargo services. R. at 22. Section 351(a)(1) of the McNamara-O’Hara Service Contract Act (“SCA”), 41 U.S.C. §§ 351-58, requires that such contracts contain a provision establishing the minimum wage rates to be paid to the employees providing services under the contracts; those wage rates are to be based on the prevailing wages for the pertinent categories of employees as determined by the Secretary of Labor:

Every contract (and any bid specification therefor) entered into by the United States . . . , the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain . . . [a] provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement[.]

41 U.S.C. § 351(a)(1). Because USPS’s air cargo service contracts are multi-year contracts, the determined minimum wage rates are subject to a biennial review pursuant to 29 C.F.R. § 4.4(d).

For a number of years, Kitty Hawk provided USPS with air cargo services under contracts, particularly the so-called “WNET” contracts,¹ subject to the SCA. R. at 17-18, 22. In accordance with the SCA, those contracts incorporated wage determinations issued by the DOL’s Wage and Hour Division (“WHD”) that set minimum wage rates for various classes of service employees working under the contracts, including airline pilots. R. at 17-18, 22-23. Each of those contracts built the then-prevailing wage rate into the contract price and expressly provided that in the event an applicable wage determination was increased or otherwise changed, the Postal Service would adjust the contract price so that the Postal Service -- not the contractor -- was obligated to absorb the cost of any such wage and/or benefit increase. Doc. 62 at 6-7.² These contracts also required Kitty Hawk to maintain detailed records, including hours worked, compensation rates

¹ As explained in the ARB decision, “[t]here are three major types of Postal Service air transport contracts: the ANET, WNET and CNET contracts.” R. at 82. “ANET” contracts handle USPS’ Express Mail operations nationwide, “WNET” contracts handle USPS’ operations in the western area of the United States, and “CNET” contracts (as well as “CNET” contracts) are two-week contracts to handle USPS’ heavy traffic during the holiday season. R. at 82-84.

² While the district court included appendices to the various motions and memoranda submitted below in the Record on Appeal, it did not incorporate them into the Record’s consecutive pagination. It did, however, paginate each appendix. This brief will cite materials contained in these appendices as “Doc. X at Y,” where *x* signifies the particular numbered document in the appendix to be referenced and *y* refers to the particular page within the document where the cited material is found. For example, the citation “R. Doc. 62 at 6-7a” refers to pages 6 and 7 of document number 62, which is Kitty Hawk’s appendix to its brief in support of its motion for summary judgment.

and work classification, for each employee performing services under these contracts for three years. R. Doc. 68 at 53, 64, 74, 90, 102, 116, 144-45. At the time the district court entered judgment, the only two USPS contracts Kitty Hawk currently held that were subject to SCA wage determinations -- Contract XSEG-02-08 and Contract DAP-02-026 -- contained clauses requiring the Postal Service to defray any increased costs in wages and benefits resulting from a change in the applicable wage determination. R. Doc. 62 at 5-7. Those clauses, in fact, are required for each such USPS contract pursuant to 48 C.F.R. § 52.222-43.³

Between 1988 and the WHD's May 16, 1996, Wage Determination No. 95-0229, Kitty Hawk made no challenge to the WHD's authority to issue wage determinations with respect to airline pilots or to the several wage determinations issued by WHD during that period. R. Doc. 62 at 2-3. On May 16, 1996, WHD issued Wage Determination No. 95-0229 (Revision 1) ("WD 95-0229" (Rev. 1)) to adjust the wage rates for captain, first officer, and flight engineer pilots performing work under USPS contracts in accordance with data collected by

³ Each of the USPS contracts Kitty Hawk previously held that were subject to SCA wage determinations contained functionally identical clauses. R. Doc. 39 at 32, 49, 56, 60, 67, 70, 77, 85, 92-93, 105, 112, 139, 147, 149. Pursuant to the required SCA contract clause, any adjustment in contract price attributable to a new wage determination also covers any increases in Social Security and unemployment taxes and workers' compensation insurance triggered by an increase in wages or fringe benefits required by a new DOL wage determination. *Id.*

DOL's Bureau of Labor Statistics in 1995. R. at 22, 84-85; Admin. R. at 18, 76-77.⁴ That wage determination applied, inter alia, to Kitty Hawk's WNET contract and its seasonal CNET contracts with the Postal Service as well as to the ANET contract held by several other contract air carriers, including Ryan International Airways, the employer of Captain Winters. Id. The Postal Service, Kitty Hawk, a number of other Postal Service contractors and several other interested parties petitioned WHD to review and reconsider the rates for captains and first officers; no one, however, challenged the WHD's authority to determine rates for flight engineers or the particular rate determined for such employees by the WHD. R. at 23, 84-85. The various contract carriers challenged the amounts of the wages determined and the methodology used to determine them; they also argued that captains and first officers were exempt from coverage by the SCA altogether as "professionals." Id. That particular argument was based on the SCA's definition of "service employee," which specifically excludes any person employed in a "bona fide executive, administrative, or professional capacity, as those terms are

⁴ The Department of Labor compiled and filed with the district court a nine-volume, continuously paginated Administrative Record of the proceedings before the ARB. This Administrative Record is part of the official record of this case, noted as documents 28-36 in the Record on Appeal, but was not re-paginated by the district court. This brief will cite to the Administrative Record as "Admin. R. at ___."

defined in part 541 of Title 29, Code of Federal Regulations[.]” 41 U.S.C.

§ 357(b). R. at 22, 85-86.⁵

On December 13, 1996, WHD issued a reconsidered wage determination in response to the petitions. R. at 23, 85; Admin. R. at 18-21. That determination reduced the minimum wage rates for captains and first officers for the ANET and WNET postal contracts, but did not address the argument that commercial airline pilots were exempt from coverage as professional employees. R. at 23, 85. The reconsidered wage determination also set entirely different and still lower pilot rates for the seasonal CNET contracts held by Kitty Hawk and other contractors. Admin. R. at 20.

Kitty Hawk, the USPS, and other contract carrier parties appealed the reconsidered wage determination to the ARB, which has jurisdiction to review wage determinations as the designated representative of the Secretary of Labor. 29 C.F.R. § 8.1(b)(1), (c); R. at 23-24, 85. Captain Winters, a pilot for Ryan International Airlines who had participated in the proceeding since its inception, also appealed, arguing that the reconsidered wage determination was lower than the requisite methodology would allow. R. at 81. Before the ARB, Kitty Hawk,

⁵ 29 C.F.R. Part 541 was promulgated by DOL under authority of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 213(a)(1).

USPS, and other industry parties contended again, *inter alia*, that captains and first officers were exempt from SCA coverage because they were “professionals” for purposes of the SCA. R. at 85. In an order dated July 25, 1997, the ARB remanded the case to WHD for an initial determination on the applicability of the professional exemption to commercial airline pilots. Admin. R. at 1817-19.

On September 16, 1998, WHD issued a decision on the exemption issue, holding that the captains and first officers in question were not exempt from coverage by the SCA. R. at 85. The decision applied to the pilots the so-called “short test” for the professional exemption set forth in the regulations at 29 C.F.R. § 541.3(e), noting that the burden of showing that the elements of the test are met rests on the party seeking the exemption (*i.e.* Kitty Hawk and the other contract carriers). Admin. R. at 1849. 29 C.F.R. § 541(e) (2003) provided in relevant part:

In order for an employee who is paid on a salary or fee basis of at least \$250 per week to qualify for exemption as a bona fide learned professional employee, he or she must have as his or her primary duty work that requires knowledge of an advanced type in a specialized field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study. The exemption also requires that the work involve the consistent exercise of discretion and judgment.

Relying on the record before it, WHD declared that “it is not customary [for an airline pilot] to receive a four-year degree in a specialized field of learning in order to obtain” the skills necessary to perform the duties of a captain or first officer. Admin. R. at 1849. Rather, as WHD indicated,

Captains and first officers obtain their ratings and certifications through a multi-step process involving primarily personal instruction and actual flying And while the captains and first officers must possess specific Federal Aviation Administration (FAA) certificates, it is still the “aeronautical experience” and “aeronautical skill” which are the most important elements for qualifying as a captain or first officer.

Admin. Rec. at 1849-50. Accordingly, WHD concluded that, while the work performed by an airline pilot “consists of highly skilled technical duties acquired primarily through classroom training and actual flying experience, it is not the type of work contemplated by the regulations for exemption as a professional employee.” Id.

The WHD did not rule in favor of Kitty Hawk, USPS, and the other industry parties on the other two requirements of the professional exemption’s “short test” either. R. at 26-27, 85; Admin Rec. 85, 1850-51. Specifically, WHD found that, from the information provided by the parties regarding the airlines’ pay practices, it could not “conclude that the employers in this case have met their burden of

demonstrating that captains and first officers are paid on a salary basis.” Admin. R. at 1852. WHD declined to opine on whether the third prong -- that the work in question required the consistent exercise of discretion and independent judgment - - was satisfied. Admin. R. at 1850.

The Postal Service and other industry parties appealed the WHD’s September 16, 1998 decision to the ARB. Admin. R. at 1859. On November 12, 1998, ALPA, which represented employees at several of the contract carriers, intervened in the ARB proceeding. R. at 85. After extensive briefing, the ARB heard oral argument on June 24, 1999 from the USPS, Winters and ALPA and issued a decision on August 4, 2000. R. at 80-124; Admin. R. at 3547-3717.

In that decision, the ARB affirmed the WHD’s decision that airline pilots are not “learned professionals” as defined by the SCA. R. at 101-02. In reaching that conclusion, the ARB emphasized that the relevant question is not “the worth of airline pilots or the importance of their work” but whether airline pilots satisfy the “learned professionals” test as set forth in DOL’s regulations. R. at 92. Finding from the record that “the training of airline pilots in this country typically does not revolve around specialized college-type academic instruction, but more-closely resembles the classic apprenticeship model,” the ARB held that airline pilots are not required to achieve the kind of “formal specialized academic training

