

US Airways Seeks Emergency Exit From Skycaps Suit

By Melissa Lipman

Law360, New York (August 19, 2008) -- US Airways Inc. asked a judge to be dismissed from a proposed wage-and-hour class action over the carrier's bag-checking fee Monday, arguing that it did not employ the skycaps and that federal aviation laws pre-empt the suit's common law claims.

The lawsuit — originally filed in April in the U.S. District Court for the District of Massachusetts — accuses the airline, along with contractor and alleged joint employer Prime Flight Aviation Services Inc., of depriving curbside baggage handlers of tips that constitute the bulk of their earnings after US Airways' 2007 decision to institute a \$2 fee on customers who use the checking services at more than a dozen airports nationwide.

Other groups of skycaps have brought similar suits against United Airlines Inc., JetBlue Airways and American Airlines Inc. In the American suit, nine plaintiffs won a verdict for more than \$325,000.

US Airways argues that the plaintiffs have failed to demonstrate sufficient facts under Twombly that the airline jointly employs the skycaps with Prime Flight, according to a memorandum in support of the dismissal, also filed Monday. The airline said it cannot make hiring or firing decisions regarding the skycaps, control their schedules or work conditions, decide how much to pay them or keep records of their employment, all of which the carrier argues are essential to the joint employment claims.

"US Airways could not have failed to pay Plaintiffs federal or Massachusetts minimum wage and could not have improperly taken a 'tip credit' against the minimum wage ... if it was not Plaintiffs' employer ... Plaintiffs are well aware of this, and yet, they expect that a factually unsupported conclusory allegation entitles them to pursue these ... claims," the memorandum says.

The court has ruled in previous similar cases that the skycaps can be employed by both the airline and the contractor, according to an attorney for the plaintiffs, Shannon Liss-Riordan of Pyle Rome Lichten Ehrenberg & Liss-Riordan PC.

"Historically, the airlines used to directly employ the skycaps generally, and then in more recent years they've

shifted that to these contractor companies so that they don't have to deal with payroll and other details of employment," Liss-Riordan said. "But they still maintain the control and that's what we expect to show."

US Airways has contracted out its skycaps services for at least three years and only directly employs one skycap in San Francisco as a result of a settlement, according to an attorney for the airline, Ellen Kearns of Foley & Lardner LLP.

"Any time you contract out certain parts of your business, sometimes plaintiffs claim that the contracting out creates a joint employment situation ... but these facts ...don't meet the test," Kearns said.

"The contract we has between US Airways and Prime Flight says we cannot give a direct order to a Prime Flight employee, Prime Flight has to do that," Kearns added.

The airline further argues that the tortious interference and unjust enrichment claims "seek to regulate how US Airways provides baggage handling service and ultimately prices its fares," and as such are pre-empted by federal legislation governing the airlines, including the Airline Deregulation Act.

The memorandum also alleges that regardless of the pre-emption concerns, the plaintiffs failed to "show they reasonably expected to be paid by US Airways as a result of the ... charge," and thus did not state a proper claim for relief.

While courts have found the federal aviation laws to pre-empt some claims filed by airline passengers, suits dealing with how employees are paid have generally escaped such challenges, according to Liss-Riordan.

"The airline's argument was rejected in the American case ... The courts have not found employment-related claims to be pre-empted under the Airline Deregulation Act, and Judge Young followed that line of cases," Liss-Riordan said.

US Airways hopes that Judge Nancy Gertner, who is overseeing the current case, will take a different view, according to Kearns.

"We really think that when you talk about that \$2 bag charge, there could be nothing more related to airline pricing or airline services than what you charge for a bag," Kearns said.

The plaintiffs seek class certification, permission for other skycaps to opt into the suit, injunctive relief, restitution for lost tips and wages as well as full minimum wage, liquidated and multiple damages where permitted, and attorneys' fees and costs.

On Aug. 13, United also asked a judge to dismiss a similar suit filed against it, also using the argument that

federal aviation laws pre-empt the suit's state law claims.

That air carrier's motion, filed in the same court, argues that the Federal Aviation Act and Airline Deregulation Act of 1978 bars the skycaps' claims, filed under the Massachusetts Tips Law, regarding United's 2005 decision to institute a \$2 fee on baggage service. The plaintiffs in all the cases argue that doing so discourages customers — many of whom allegedly do not know the fee doesn't go to the workers — from tipping the skycaps.

United argued that state law claims made in the amended complaint, filed Aug. 11, fall under two of the three categories — "price, route, or service of an air carrier" — pre-empted by the ADA. The defendants allege that in seeking to have either the \$2 curbside baggage-handling fee erased or converted into an automatic tip for the skycaps, the plaintiffs' arguments come under the price and service conditions.

United further argued that the FAA also "occupies the field of airline communications to passengers, including disclosures concerning the rates charged for baggage handling and other services."

The United suit, originally filed in April, "involv[es] nearly identical claims" to those in a case filed against American in the same district in January 2007, according to the amended complaint.

In April, a Massachusetts jury awarded more than \$325,000 to nine skycaps employed by American at Logan Airport, finding the carrier liable for Massachusetts tortious interference and tips law claims. A tenth plaintiff, a skycap at Lambert-St. Louis International Airport, lost his suit for claims of tortious interference under Missouri law.

In June, the judge in the American suit ruled that the jury had been given erroneous instructions regarding the airline's liability to independent contractors and granted a retrial for eight of the skycaps. The order did not apply to a nearly \$42,000 verdict for a ninth skycap who worked directly for American.

The plaintiffs argued that under Massachusetts tips law, it does not matter whether the airline directly employed the skycaps or not, according to Liss-Riordan. The judge in that case told the parties he would certify the question to the Massachusetts Supreme Judicial Court. If the state high court agrees with the plaintiffs' argument, then they will not have to retry the American case, Liss-Riordan said.

American had claimed that the service charge was implemented in order to cut costs while the airline faced bankruptcy. The skycaps, who assist passengers with luggage and perform check-in duties at curbside check-in facilities, countered that the airline made huge profits in 2006 and 2007, which included revenue of \$9 million to \$11 million nationally from the skycap service charges.

In a separate case, American agreed in May to rescind its curbside check-in fee nationally and its no-tipping policy for skycaps at Boston's Logan Airport to settle purported class action claims that the policy was put in place in retaliation for the previous wage-and-hour lawsuit over the airline's curbside fee.

In May, a group of three North Carolina skycaps also filed four separate purported class actions against American, United, Delta Air Lines Inc. and US Airways for allegedly cheating the check-in service workers in violation of a state tips law. Those suits, filed in the U.S. District Court for the Eastern District of North Carolina, also name G2 Secure Staff LLC, which contracts skycaps to the airlines, as a defendant.

The plaintiffs are represented in this matter by Pyle Rome Lichten Ehrenberg & Liss-Riordan PC. US Airways is represented by attorneys from Foley & Lardner LLP.

The case is Mitchell et al v. US Airways Inc. et al., case number 1:08-cv-10629, in the U.S. District Court for the District of Massachusetts.

--Additional reporting by Ron Zapata