IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 336
5298805

	BETWEEN	MICHAEL ALEXANDER TALBOT Applicant
	AND	AIR NEW ZEALAND First Respondent
	AND	THE NEW ZEALAND AIR LINE PILOTS ASSOCIATION INDUSTRIAL UNION OF WORKERS INCORPORATED Second Respondent
Member of Authority:	K J Anderson	
Representatives:	M Talbot, In person K Thompson, Counsel for First Respondent R McCabe, Counsel for Second Respondent	
Investigation Meeting:	23 February 2011 at Auckland	
Submissions Received:	24 March 2011 and 4 May 2011 for Applicant 20 April 2011 for First Respondent 12 April 2011 for Second Respondent	
Determination:	27 July 2011	

DETERMINATION OF THE AUTHORITY

The Dispute

[1] Pursuant to section 129 of the Employment Relations Act 2000 (the Act), Mr Talbot has raised a dispute about the interpretation, application, or operation of certain provisions of the collective employment agreement (CEA)[1] entered into between The New Zealand Air Line Pilots' Association Industrial Union of Workers Incorporated (the NZALPA) and Air New Zealand Limited (Air NZ). While Mr Talbot is not a

[1] While the CEA produced to the Authority has expired and a new agreement has been agreed to, it is commonly accepted that the relevant provisions pertaining to the dispute have not changed.

party to the CEA, he is "*bound*" by the terms of the agreement and hence he is entitled under s.129 of the Act to pursue a dispute in accordance with the applicable provisions of Part 10 of the Act, in particular, s.161(1)(a) which gives the Authority exclusive jurisdiction to make determinations in regard to:

> [disputes about the interpretation, application, or operation of an employment agreement.

[2] While the *Statement of Problem* and the subsequent *Amended Statement of Problem* do not specifically say so, on the basis of the overall evidence and respective submissions before the Authority, I am led to understand that Mr Talbot requires the Authority to provide its interpretation of the meaning of "first class" as contained in clauses 10A.1 and 10A.2 of the CEA; thus:

> 10A.1 In any case where a pilot is required to travel or be absent from his home base on the Company's business or at its request within New Zealand or overseas he shall, where procurable, be provided with ***first class*** meals, travel and hotel accommodation while so travelling or absent except as otherwise provided in this document.
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> 10A.2 Where it is not possible for the Company to arrange ***first class*** meals, travel or accommodation, then such other arrangements shall apply as may be agreed between the Company and the Contract Management Group. [Emphasis added]

[3] The Authority has received evidence from Mr Talbot along with submissions. Further evidence in respect of Mr Talbot's matter has been received from Mr Russell Wignall, Mr Trevor Lawson and Mr Murray Campbell-Cree. They are all pilots employed by Air NZ. Evidence has been given for Air NZ by Mr Gerard (Gus) Gilmore, General Manager – Operations; and there are submissions for Air NZ.

[4] Upon its application, the NZALPA has been joined as party to the proceedings on the basis that the outcome of the proceedings may affect or impact upon the NZALPA members and/or future NZALPA negotiations with Air NZ. Counsel for the NZALPA, Mr Richard McCabe, participated in the investigation meeting and he has presented submissions. All of the material evidence provided by the respective parties has been closely considered, albeit it may not be referred to in this determination.

Background

[5] Mr Talbot is a pilot employed by Air NZ. As with other Air NZ pilots, in the course of his duties Mr Talbot is required to be absent from his home base and

"stopover" in various international cities. Air NZ provides hotel accommodation in such circumstances. Relevant to the dispute before the Authority, Los Angeles is a city where Air NZ pilots and crew are required to stopover and for many years, until on or about 1st September 2009, Air NZ pilots stayed at the Marriott Torrance hotel.

[6] Some time prior to the expiry of the service contract with the operators of Marriott Torrance hotel, Air NZ commenced due diligence on several hotels in the Los Angeles area; for the purpose of compiling a shortlist of hotels that would meet the accommodation requirements of Air NZ and its pilots. In the process of selecting appropriate hotels, Air NZ uses a comprehensive (11 pages) "*Hotel Evaluation Checklist.*" The outcome of the due diligence process was that Air NZ compiled a shortlist of three hotels; the Manhattan Beach Marriott, the Marina Del Ray Marriott and the Glendale Hilton. The evidence of Mr Gilmore is that Air NZ considered that any of the three hotels would satisfy the accommodation requirements of the collective agreements that Air NZ is a party to.

[7] In May 2009, the NZALPA and the other pilot union, The Federation of Air New Zealand Pilots (FANZP), were invited by Air NZ to undertake their own independent inspection of the three shortlisted hotels. There is a letter to Mr Gilmore, dated 4th June 2009, over the name of Mr John Robertson,[2] the NZALPA International Accommodation Representative. The letter contains a summary and recommendations following the union's inspections of the three hotels under consideration by Air NZ as replacement accommodation for the Marriott Torrance hotel.[3] In summary, the NZALPA preferred one of the three hotels that had been inspected; the Manhattan Beach Marriott. This is recorded thus:

> The hotel is recommended, provided rooms are allocated from the 5th floor up.

It is also recorded that:

> The hotel does not possess a restaurant compliant for the purposes of the meal reviews but this is no issue, given the neighbourhood selection of dining possibilities.

The FANZP also confirmed the Manhattan Beach Marriott as a suitable hotel for its members.

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[2] It is signed on his behalf. It seems that the inspection of the hotels was carried out by someone other than Mr Robertson (Mr Howard North), but there is no dispute about his authority to represent the NZALPA.

[3] It appears that the tariff price required by the Marriott Torrance hotel was not acceptable to Air NZ.

[8] Following the receipt of the recommendation from the NZALPA, Air NZ entered into a four year accommodation agreement with the Manhattan Beach Marriott hotel and effective from 1st September 2009, this hotel has been used as accommodation for Air NZ pilots.

The nature of the dispute

[9] On 20th October 2009, Mr Talbot wrote to Mr Gilmore. The following (relevant) extract [4]from Mr Talbot's letter is:

> The Company has not, it appears to me, complied with the ALPA CEA Section 10. It is bound to only utilize a hotel with first class restaurant meeting first class standards, i.e. 5 star minimum. It has not done so I contend. A first class hotel and first class dining facilities are mandatory "where procurable." You surely don't contend such criteria is not "procurable" in LA do you? Specifically:
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> (a) The walls of each room are in my view, too thin (not up to standard);
> (b) The air conditioning significantly noisy (not up to standard); and
> (c) The in-room dining/refreshment drinking vessels (cardboard) are substandard; and
> (d) There is no first class restaurant in the hotel, particularly for the criteria required to set meal allowances.
>
> With respect, how you and your family find any particular hotel you choose to stay in on holiday in LA and the nature of any closeby [sic] eating and retail facilities is with respect to our (ALPA) CEA obligations the company has, irrelevant. Such views and opinions have no place whatsoever if you are suggesting that such views are to be taken into consideration by any of we [sic] pilots. I am not aware of any legitimate basis per the ALPA CEA that permits Air New Zealand to avoid the strict criteria for first class accommodation and in-house first class restaurant facilities. In this respect I know of no criteria that permits NZALPA to permit otherwise. It appears to me the Company is in breach of that Section 10 ALPA CEA criteria. I seek your views. If you wish I can particularise.

[10] Via a letter to Mr Gilmore dated 3rd November 2009, Mr Talbot provided: *Notice of dispute and personal grievance pursuant to the Employment Relations Act 2000 (ERA).* Mr Talbot advised that:

> The dispute and personal grievance are in the matter of an alleged failure by the Company to comply with Section 10A.1 of the CEA and Sections 10.3.3.2, 10.3.3.1.1, 10.3.3.2.2.

Mr Talbot advised that:

> … in respect to the Los Angeles layover Port there is no question that first class hotel accommodation is capable of being procurable by the Company in that city.

[4] The letter comprises six pages and addresses a variety of matters that appear to be of some concern to Mr Talbot.

Mr Talbot further advised that under the terms of section 10 3.3.2.1 of the CEA the Manhattan Beach Marriott hotel is required to have a first class restaurant and it does not have this facility. Therefore, Mr Talbot advised, "*the hotel does not meet a first class standard*." Finally, Mr Talbot advised that section 10A.2 of the CEA does not have application in regard to the "*not possible*" qualification.

[11] Via a letter dated 10th March 2010, to Mr Rob Rea, the NZALPA Council, Accommodation Representative, Mr Talbot provided some photos and expressed some concerns about his recent accommodation at the Manhattan Beach Marriott hotel. It would appear that some discussions took place between Mr Rea and Mr Gilmore as evidenced by a letter dated 15th March 2010 from the former to the latter. Mr Rea concludes his letter:

> I stand by my assessment that the Manhattan Marriott does no meet the "First Class" requirements and we need to look at other options."

Mr Rea also records in the *Air New Zealand Pilots' Council* newsletter dated 8th April 2010 that:

> We are still in dispute with the Company over certain issues at the Manhattan Beach Marriott Hotel in LA. The issues relate to S10A1 of the NZALPA CEA. The issues pertain to complaints of moisture and air conditioning noise and the lack of a first class restaurant. Gus Gilmore, GM International Airline, has asked for direct feedback to Gus.Gilmore@airnz.co.nz and copy in the Council airnz@nzalpa.org.nz. Th Company has agreed that we should assess another hotel for LA and this will be conducted as soon as possible.

It seems that there was some "feedback" to Mr Gilmore but, to date, the issues arising from the Manhattan Beach Marriott hotel do not appear to be of a wide enough concern for the NZALP and/or Air NZ to actively pursue other options in regard to alternative accommodation.

The matter to be determined

[12] The dispute before the Authority is not about whether or not the Manhattan Beach Marriott hotel meets the criterion of "first class" accommodation. Rather, what Mr Talbot seeks from the Authority is an interpretation of the term "first class" as it is set out in clauses 10A.1 and 10A.2 of the CEA.

[13] However the matter is not as simple as Mr Talbot appears to suggest. This is because the aforementioned clauses cannot be read in isolation. The following provisions of the CEA are also relevant:

> 10.4.2 **Change of Accommodation**
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> 10.4.2.1 Where the Company wishes to change existing hotel accommodation they shall advise the Contract Management Group [CMG] of their intent and the list of hotels being considered as possible alternatives. The Contract Management Group may make written submissions to the Company within 30 days of being notified by the Company, as to any of the listed hotels which are considered by them as being unsuitable for crew accommodation. Any such submissions must state the reasons that any particular hotel is considered to be unsuitable.
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> Any change to existing accommodation will not be made without considering the CMG's submissions except where, for any reasons of safety, security or quality of rest provided, the existing hotel becomes temporarily unsuitable. In such a situation the Company or the Captain may exercise discretion to move the flight crew to more suitable accommodation.
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> - Where the Company has initiated this temporary move for a period of less than two weeks, advice by the pilots concerned as to the accommodation suitability will suffice.
> - Where the Company has initiated this temporary move he will, where possible, consult with the Company as to the alternative accommodation.
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> In any event the Captain shall file an Operations Occurrence Report.
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> Where no assessment of a proposed hotel has been carried out in the last year, no change to that hotel shall take place until a satisfactory assessment has been completed.
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> 10.4.2.2 Where the Contract Management Group recommends a change to the existing hotel accommodation, they may make written submissions to the Company to this effect. Any such submissions must state the reasons that the existing hotel is now considered by them to be unsuitable. Should the Company accept the recommendations contained in the submissions, the procedure contained in 10.4.2.1 will be initiated within 30 days of receipt of such submission.

At Section 9 of the CEA, there are provisions that recognise that Air NZ will:

> … facilitate the availability of a 5 member Contract Management Group consisting of members of the Company's pilot population as nominated by NZALPA. (clause 9.1)

And at clause 9.3:

> The Contract Management Group may make recommendations to the appropriate Fleet Manager, who shall consider such recommendations and advise them as to their suitability. Recommendations with regard to scheduling matters where these do not affect commonality put forward by the Contract Management Group will not be unreasonably delayed prior to implementation by the Company.

At clause 3.14 of the CEA, and relevant to Mr Talbot's membership of NZALPA, is:

> Pilots covered by this Agreement undertake to be represented by the Contract Management Group specified in Section 9 of this Agreement.

The Interpretation

[14] In order to assist the Authority with its task, Mr Talbot has provided references from the *Concise Oxford Dictionary* in regard to the words "*first*" and "*class*" and he has also referred the Authority to *AA Quality Standards for AA Recognised Hotels* and the various criteria used to assess two stars through to five stars accommodation. Equally, Mr Thompson, for Air NZ, has provided a definition of a first class hotel from the *Travel Industry Dictionary;* being:

> A hotel offering top quality services and, usually, a prime location and extensive amenities.

Also provided for Air NZ is a *Wikipedia* extract regarding hotels. This compares the various categories of hotels with the top category being "upscale luxury." While Wikipedia cannot be seen as an authoritative source, I note with interest that the Manhattan Beach Marriott hotel is described as an example of a *first class* hotel.

[15] But of course the problem with all of this is that even with the application of the most objective analysis by the Authority, it is not possible to give a meaningful interpretation to the term "first class" in the context of the use of those words in the relevant provisions of the CEA. This is because it is the parties to the CEA[5] that decide whether particular accommodation is recommended (or not) as evidenced by the NZALPA recommendation for the Manhattan Beach Marriott (report 4th June 2009) and by similar exercises that have been carried out for other accommodation for pilots in Narita (report 9th March 2010), Wellington (report 6th July 2010) and Osaka (report 5th October 2010).

[16] While one can accept that Mr Talbot (and some of his colleagues) have some issues regarding certain aspects of the Manhattan Beach Marriott hotel, and that he is entitled to bring forth his concerns accordingly, it is not possible for the Authority to provide a meaningful interpretation of the term "first class" in the context advanced by Mr Talbot. It is the parties to the CEA that decide such matters, via a process that

[5] Air NZ and the NZALPA.

has been agreed upon, and that (to date) has been deemed to be acceptable. The interpretation of what "first class" means to Air NZ and NZALPA, in regard to accommodation for pilots, is what ever the parties decide is acceptable following a due process of inspection and subsequent recommendation. Indeed, I note in the three reports (above) the term "first class" is only used once and that is in regard to the dining at the Imperial Hotel.[6] Rather, terms such as "*high quality*" (The Hilton Narita), "*excellent facilities*" (Holiday Inn), and "*meets the criteria*" (Hilton Osaka) have been used.

Determination

[17] Regrettably, I am unable to assist Mr Talbot in regard to providing him with an objective interpretation of what "first class" means in the context of the relevant provisions of the CEA. I would add that perhaps the term may be somewhat outdated and may apply to another era of travel, as Mr Gilmore suggests in his evidence. But even if this is not so, I would envisage that there are better hotels than those where aircrew are currently accommodated at throughout the world, that would meet the definition of first class. For example, Claridges Hotel in London or the Burj Al Arab in Dubai, but clearly accommodating air crew at such establishments would not be within the realms of commercial reality for the industry in general, hence airlines such as Air NZ and pilot unions such as the NZALPA, via a consultation process, arrive at a realistic agreement in regard to what constitutes an acceptable standard of accommodation. Also, it appears that the term first class is not generally referred to by the parties to the CEA in regard to accommodation.[7]

[18] A further difficulty for Mr Talbot is that, by his membership of the NZALPA, pursuant to clause 3.14 of the CEA, he undertakes to be represented by the Contract Management Group (CMG); among other things, it acts on his behalf in regard to assessing and recommending appropriate accommodation. The effect of an agreement being reached between Air NZ and the CMG, in regard to appropriate accommodation (and other matters), is that such agreement becomes binding upon all NZALPA members, including Mr Talbot. Nevertheless, it has been submitted for the NZALPA, that under clause 10.4.2.2 of the CEA, Mr Talbot is able to approach the CMG and

[6] "First class a la carte dining provided at the French restaurant Les Saisons, Chinese fare at Jasmine Garden and all day dining at the Flying Tomato Café.
[7] Albeit it does appear to have some active usage in regard to appropriate restaurants and meals.

ask that it recommend a change to the existing hotel accommodation, but there is no evidence of him doing so.

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can, taking into account the outcome, that the investigation meeting was completed within half of a day, and the usual daily tariff approach of the Authority. In the event a resolution cannot be reached, the respondents have 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority