Thibodeaux v. Executive Jet International: Determining Whether Fair Labor Standards Exemptions for Overtime Compensation Apply to Fractional Ownership Programs

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THIBODEAUX v. EXECUTIVE JET INTERNATIONAL: 
DETERMINING WHETHER FAIR LABOR STANDARDS 
EXEMPTIONS FOR OVERTIME COMPENSATION 
APPLY TO FRACTIONAL OWNERSHIP PROGRAMS

KRISTEN BELL

SINCE THE INTRODUCTION of “Netjets” by Executive Jet International ("EJI"), numerous companies have formed fractional ownership programs.\(^1\) As these programs grow more and more popular, categorizing them has become the subject of much legal debate.\(^2\) Because these programs consist of a group of owners and a managing company that services and operates the aircraft, the legislature and courts have not had an easy time determining whether these programs serve as public or private entities. In Thibodeaux v. Executive Jet International, the Fifth Circuit oversimplifies this determination, utilizing an ill-suited standard to define EJI as a “common carrier.”\(^3\)

The “Netjets” program is EJI’s largest source of business, comprising 98% of the company’s operations from 1999 to 2001.\(^4\) The program allows companies or individuals unable to justify the expense of purchasing their own aircraft to have full access to one by fractionally owning or leasing aircraft through EJI.\(^5\) The aircraft in the “Netjets” program are operated under Part 91 of the Federal Aviation Regulations (“FAR”) and are there-

\(^1\) Eileen M. Gleimer, The Regulation of Fractional Ownership: Have the Wings of the Future Been Clipped?, 67 J. AIR L. & COM. 321, 323-28 (2002) (defining fractional ownership programs as “multi-year programs covering a pool of aircraft, most of which are owned by more than one party and all of which are placed in a dry lease exchange pool . . . available to any program participant . . .”).

\(^2\) See, e.g., Executive Jet Aviation, Inc. v. United States, 125 F.3d 1463, 1464-69 (Fed. Cir. 1997); see also Valdivieso v. Atlas Air, Inc., 305 F.3d 1283, 1286-87 (11th Cir. 2002).

\(^3\) Id. at 742, 753 (5th Cir. 2003).

\(^4\) Id. at 745.

\(^5\) Id. at 745-46. EJI has a sister company, Executive Jet Aviation, Inc. (“EJA”), that has programs similar to EJI, yet its employees opted to unionize. Therefore, employee grievances are handled through the National Mediation Board. Id.
fore not subject to the heightened safety and registration standards found in Part 135, the provision regulating commercial aircraft.\textsuperscript{6}

EJI does not own the aircraft it manages, but only operates and maintains the aircraft fractionally-owned or leased by its customers and provides flight attendants upon request.\textsuperscript{7} Larry Thibodeaux is a flight attendant for EJI's "Netjets" program.\textsuperscript{8} Thibodeaux and other flight attendants regularly work overtime hours for the "Netjets" program, yet they are not compensated for this time.\textsuperscript{9} Under the Fair Labor Standards Act ("FLSA"), overtime must be paid to employees unless the employer is a "carrier by air subject to the provisions of [T]itle II of the Railway Labor Act."\textsuperscript{10}

In response to EJI's refusal to pay overtime compensation, Thibodeaux and other flight attendants for the "Netjets" program filed suit against EJI, requesting payment of overtime compensation under the FLSA.\textsuperscript{11} Because neither the FLSA nor Title II of the Railway Labor Act defines "common carrier," the courts must determine whether a fractional ownership program such as the "Netjets" program is a "common carrier" for purposes of the FLSA and Railway Labor Act.\textsuperscript{12}

The district court refused to find as a matter of law that EJI was a "common carrier by air" under the FLSA exemptions.\textsuperscript{13} The court further stated that even if EJI was found to be a common carrier by air, Thibodeaux and other flight attendants would still be entitled to overtime because they spent over 20% of their workweek performing "nonexempt" work, namely that on Part 91 flights.\textsuperscript{14} Therefore, because such a small percentage of EJI's flights were conducted under the commercial provision

\textsuperscript{6} Id. at 745; see also Eileen M. Gleimer, When Less Can Be More: Fractional Ownership of Aircraft—The Wings of the Future, 64 J. AIR L. & COM. 979, 1002-03 (1999) ("[U]nder Part 135 restrictions apply to the types of airports that can be used, the use and hiring of flight crews, and the exterior and interior of the aircraft.").

\textsuperscript{7} Thibodeaux, 328 F.3d at 745.

\textsuperscript{8} Id. at 744.

\textsuperscript{9} Id.


\textsuperscript{11} Thibodeaux, 328 F.3d at 744.

\textsuperscript{12} Id. at 749. The issue of whether Thibodeaux engaged in "nonexempt" work is not discussed here, because the court's holding was premised solely on the court's finding that EJI was not a common carrier.


\textsuperscript{14} Id.
of the Federal Aviation Regulations, the court granted Thibodeaux overtime compensation without further inquiry.\textsuperscript{15}

After reviewing the district court's holding on interlocutory appeal, three judges for the Fifth Circuit ruled to reverse the finding of the district court and remand the case for entry of summary judgment in favor of EJI.\textsuperscript{16} The court disagreed with the district court's sole reliance on EJI's operation under Part 91 of the FAR as conclusive in showing that EJI may be different from EJA, which has already been identified as a "common carrier" by the National Mediation Board.\textsuperscript{17} Instead, the Fifth Circuit gave little or no weight to the FAR, relying solely on the holding in Woolsey \textit{v. National Transportation Board} to reach a different conclusion. The court found that no fact question existed regarding EJI's status and the company was a "common carrier" as a matter of law.\textsuperscript{18}

In Woolsey, the Fifth Circuit was faced with the question of whether it should revoke the license of a pilot who provided air support services to musicians when he failed to "comply with the safety requirements for pilots operating aircraft for a common carrier under Part 135" of the FAR.\textsuperscript{19} The court determined that Woolsey's company, Prestige Touring, Inc., was a "common carrier" because it indiscriminately solicited those in the music industry to contract for its air support services.\textsuperscript{20} To decide whether the more stringent standards of Part 135 should apply to Woolsey's carrier services, the court adopted an earlier definition offered by the Advisory Circular of the FAA.\textsuperscript{21} Using the circular's language, the court determined that Prestige Touring, Inc., "held itself out to the public or to a definable segment of the public as being willing to transport for hire, indiscriminately."\textsuperscript{22}

Therefore, Prestige Touring, Inc. was a "common carrier" under

\textsuperscript{15} Id.

\textsuperscript{16} \textit{See} Thibodeaux, 328 F.3d at 754-55.

\textsuperscript{17} Id. at 754.

\textsuperscript{18} Id. at 749-50; \textit{see} Woolsey \textit{v. Nat'l Transp. Safety Bd.}, 993 F.2d 516, 523 (5th Cir. 1993).

\textsuperscript{19} Woolsey, 993 F.2d at 518. According to the record, Woolsey violated § 91.13 of the FAR by acting as pilot even when he failed to meet the training and examination requirements under FAR Part 135. \textit{Id.}

\textsuperscript{20} Id.

\textsuperscript{21} Id. at 523.

\textsuperscript{22} Id. at 522-23. To reach this conclusion, the court explains that the underlying policy behind the Part 91 and Part 135 distinction is the public's "right to expect that airlines which solicit their business operate under the most searching tests of safety." \textit{Id.} at 522.
the FAR. Furthermore, the court held that this test was "objective," looking at what the carrier actually did and not how it intended to be defined.

In Thibodeaux, the court used the same definition to determine whether EJI should be defined as a "common carrier" under the language of the FLSA and Railway Labor Act. Using the objective language in Woolsey, the Fifth Circuit refused to take into account EJI's attempt to align itself with the provisions of Part 91 and concluded that the inquiry involved in defining a "common carrier" should be whether "EJI held itself out to the public as being willing to transport for hire." Because "Netjets" marketed to a definable segment of the public through direct mail, the internet, periodical advertisements, and attendance at public events, the Fifth Circuit determined that EJI held itself out to a segment of the public indiscriminately and was a common carrier as a matter of law entitled to the Railway Labor Act exemption for overtime pay.

A close look at the decisions of the district and appellate courts reveals that although each comes to a different conclusion, the foundation for their decision is based on the same legal principle—the distinction made between Part 91 and Part 135 in the FAR—that of "common carrier" status. The Woolsey test was initially created and utilized by the court to help determine whether a party was a "common carrier" and subject to Part 135 of the FAR. In addition, the Fifth Circuit in Thibodeaux recognizes that "common carriers," or commercial carriage, are generally "subject to the more stringent safety standards of FAR Part 135." Despite the court's strong statements against reliance on the FAR, the connection between

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23 Id. at 522-23.
24 Id. at 523.
25 Thibodeaux v. Executive Jet Int'l, 328 F.3d 742, 750 (5th Cir. 2003).
26 Id.; see also Valdivieso v. Atlas Air, Inc., 305 F.3d at 1283, 1286 (11th Cir. 2002) (utilizing the same test to determine that a commercial air carrier who owned and managed aircraft for transporting cargo was a "common carrier" under the FLSA exemption).
27 Thibodeaux, 328 F.3d at 752-53.
28 Id. at 749-50; see also Woolsey, 993 F.2d at 521-23.
29 Thibodeaux, 323 F.3d at 749-50. It should be noted that neither Thibodeaux nor EJI felt Woolsey was applicable to their case. Despite their arguments, the Fifth Circuit chose to use the Woolsey test as the standard for determining whether EJI was a common carrier. Id.
30 Id. at 750.
"common carrier" for the purpose of determining FLSA exemption and of setting safety regulations is clear and determinative.

Arguably, the Woolsey test should not be applied here to determine whether EJI is a "common carrier" under the FLSA. In 1999, the Federal Aviation Administration ("FAA") conducted an investigation to determine whether fractional ownership programs such as "Netjets" should be placed under more stringent standards than those outlined in Part 91 of the FAR. The FAA concluded that flights operated under EJI in the "Netjets" program are more similar to owners of whole aircrafts than charter carriers. Because fractional ownership programs are more closely compared with non-commercial entities, they should remain under Part 91 of the FAR regulations. The Fifth Circuit, however, buttressed its finding for EJI in Thibodeaux by using precedent which comes to an opposite conclusion, that there were "negligible differences" between "Netjets" and a commercial air charter business. Without explanation, the Fifth Circuit refused to consider the FAA's proposal in regard to fractional ownership programs. Instead, the court chose to adopt the definition of "common carrier" supported by the Federal Circuit for the payment of taxes, not the FAR provisions concerned with the well-being of the public.

After this decision, EJI now wears two faces: it is a "common carrier" under the FLSA but not a "common carrier" under the FAA’s current and proposed regulations. This dichotomy will allow EJI to benefit financially from lower safety and registration standards under Part 91, and yet be exempt from paying its employees overtime, even those that work exclusively under Part 91 of the FAR.

32 Gleimer, supra note 1, at 339-40.
33 Id. at 341 (recognizing that the FAA has proposed a new subpart to Part 91 to increase the standards for these programs but refused to move them under the Part 135 regulations).
34 Thibodeaux, 323 F.3d at 751 (citing Executive Jet Aviation, Inc. v. United States, 125 F.3d 1463, 1468-69 (Fed. Cir. 1997), a case in which the Federal Circuit concluded that EJA was in the business of transporting persons for hire and required EJA to pay transportation taxes as a commercial carrier).
35 Id. at 753.
36 See id. at 751.
37 See Gleimer, supra note 1, at 340-42.
38 Thibodeaux, 323 F.3d at 753-54.
An analysis of the language and policy of the Railway Labor Act clearly shows there is little justification for a finding inconsistent with the FAA to deny protection for EJI’s employees under the FLSA. In 1934, Congress expanded the definition of “carrier” under the Railway Act for numerous reasons. According to the Fifth Circuit in Thibodeaux, Congress sought to accomplish two goals: “‘(1) to avoid the possibility that certain employees could interrupt commerce with a strike, and (2) to prevent a carrier covered by the RLA from evading the purposes of the Act by spinning off components of its operation into subsidiaries or related companies.’” The Fifth Circuit correctly noted that this expansion has been applied to management information systems and catering companies that service commercial air carriers. EJI’s “Netjets” program, as a mere provider of operational and management services for fractional aircraft owners, is measurably different from these providers that service commercial airlines. Therefore, the stated purpose of the Railway Labor Act, “to keep transportation moving,” is not likely to be furthered by including EJI as a “common carrier” under the FLSA.

Not only does the Fifth Circuit’s ruling fail to further the Act’s policy, it creates an undesirable result by unnecessarily excluding employees from the protection of the FLSA provisions. It may be argued that the FAR and the test for “common carrier” under the FLSA and Railway Labor Act are not synonymous. Thibodeaux is an example, however, of the inconsistencies that can occur when the relationship between these two regulations, enforced to provide public transportation safely and efficiently, is ignored. Not only is EJI’s role in providing air service blurred, but the employees who work for EJI are left without protection from unfair employment practices.

The Fifth Circuit has viewed the issue with too narrow a lens, failing to reach a valid conclusion in light of the case’s complex-

39 Id. at 752.
40 Id. (quoting Verett v. SABRE Group, Inc., 70 F. Supp. 2d 1277, 1281 (N.D. Okla. 1999)).
42 Id. at 754.
43 See id. at 748-50.
44 Id. at 745; cf. id. at 754.
45 Id. at 746. Because EJA’s employees are unionized, EJA is protected through the collective bargaining of its union officials. Id.
ity.\textsuperscript{46} Despite the findings of a thorough investigation from the legislative and administrative powers of our government, which found that fractional ownership programs should not be regulated under the "common carrier" provisions of the FAR,\textsuperscript{47} the Fifth Circuit hastily concluded that EJI is a "common carrier" based solely on its solicitation to a segment of the population interested in owning a portion of an aircraft.\textsuperscript{48} Because EJI operates 98\% of its flights under Part 91 of the FAR,\textsuperscript{49} and will continue to do so under the proposed FAA guidelines,\textsuperscript{50} there remains little evidence that the policy on which the Railway Labor Act exemption stands would be harmed by a finding for Thibodeaux in this case.

The district court, in refusing to grant summary judgment to EJI, correctly recognized the importance of the FAR, which allows EJI to remain under Part 91, and acknowledged the need for further inquiry into the nature of fractional ownership programs.\textsuperscript{51} If the National Mediation Board, the organization with primary jurisdiction over the Railway Labor Act,\textsuperscript{52} determines that EJI is a "common carrier," the Fifth Circuit may have a more legitimate basis for its decision. If that occurs, however, Thibodeaux will be protected through a standard grievance process, and the unfair result reached in the present case will be diminished.

\textsuperscript{46}See Thibodeaux, 2001 WL 699653, at *2-3; see also Thibodeaux, 328 F.3d at 750.
\textsuperscript{47}See Gleimer, \textit{supra} note 1, at 340-41.
\textsuperscript{48}Thibodeaux, 328 F.3d at 753.
\textsuperscript{49}Id. at 745.
\textsuperscript{50}See Gleimer, \textit{supra} note 1, at 340-41.
\textsuperscript{51}Thibodeaux, 2001 WL 699653, at *2-3.
\textsuperscript{52}Thibodeaux, 328 F.3d at 746.
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