



Judge recommends clearing air cargo exec of US cartel charges

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A US federal judge has recommended striking down US Department of Justice charges against former air cargo executive Rodrigo Hernan Hidalgo, finding that Hidalgo should have been shielded from prosecution by a plea agreement with his employer.



David Oscar Markus,
counsel to Rodrigo Hidalgo

In a strongly worded 65-page opinion, Magistrate Judge Edwin Torres found that the DoJ's case clashed with considerable evidence that Hidalgo was employed by LAN Cargo during the four years the government alleged the air cargo cartel was in operation.

LAN struck a plea agreement with the DoJ in 2009, offering to pay a fine and assist with the ongoing investigation in exchange for the government declining to prosecute its past and present employees, and subsidiary airlines. Under that agreement, Torres found, Hidalgo should have been protected from the price fixing charges.

The ruling may well end the government's pursuit of Hidalgo, who had at one time faced criminal charges in two separate air cargo price fixing cases but has since been cleared of both.

"Rodrigo and I are thrilled that these cases are over," says David Markus, partner at Markus & Markus PLLC and counsel to Hidalgo. "They never

should have been brought in the first place, as Judge Torres recognised in a lengthy and thoughtful order."

The DoJ says it will appeal against Torres's decision to the district court judge in southern Florida, who will ultimately decide whether to approve Torres's opinion.

Hidalgo and Florida West were indicted in December 2010 for allegedly colluding with the airline's competitors on rates and surcharges on shipments from Miami to Bogotá from 2002 until 2006.

Hidalgo had argued that at the time he was working for Florida West, he was also employed by LAN to essentially act as LAN's contact inside Florida West, and should be immunised from prosecution according to the government's plea agreement with LAN.

The government said that because Florida West was only partially owned by LAN – the company held a 25 per cent stake in Florida West – both the airline and Hidalgo should be vulnerable to prosecution.

Judge Torres ruled that the evidence Hidalgo presented in the hearing backed up his claims that he was employed by both LAN Cargo and Florida West during the time the cartel was in operation, and that the immunised LAN Cargo directly controlled Florida West.

Not only did the government fail to present evidence to rebut Hidalgo's claims, but the government's witnesses partially corroborated his position, Judge Torres said in the ruling.

What's more, Judge Torres said, the government declined to call witnesses with direct knowledge of the airlines and of Hidalgo's position at both LAN and Florida West, even though those witnesses or their representatives were in the courtroom during the evidentiary hearing.

"After considering the entire record, the overwhelming weight of evidence supports the finding that Hidalgo was a LAN Cargo executive and LAN Cargo controlled Florida West," he said.

Judge Torres was just as harsh about the government's case against Florida West, which the DoJ contended was a separate company from the immunised LAN and was therefore open to prosecution.

Over the course of the two-day hearing, Florida West called multiple witnesses who confirmed that although LAN only owned a 25 per cent stake in Florida West, that was simply to comply with US airline ownership regulations. In reality, the witnesses confirmed, LAN controlled almost all major and minor business decisions at Florida West, and those in the industry understood that doing business with Florida West was the same as doing business with LAN.

Although critical of the government's case, Judge Torres found that because LAN did not own a majority share in Florida West, Florida West was not a direct subsidiary and should not be protected from prosecution. That part of the government's case will continue.

It remains unclear what impact Judge Torres's ruling will have on the government's pursuit of Florida West. Many of the airline's alleged actions in the price-fixing scheme were attributed to Hidalgo – who was in fact acting on behalf of LAN, according to evidence presented to Judge Torres.

Kirby Behre, partner at Paul Hastings in Washington, DC, and counsel to Florida West, says that if the district court does follow Torres's opinion, "the government's case against Florida West has weakened considerably, and it may not be a viable case for them to try."

Both parties have 14 days to file their objections with the district court. While the government says it will fight Judge Torres's opinion, lawyers for the defendants say that Judge Torres was the only judge to hear the evidence in the case, and his extensive opinion should be upheld.

"We believe the 65-page order is bulletproof," Markus says. "It is time for this litigation to end."

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