



Judge Advises To Nix Ex-Cargo Exec's Price-Fixing Case

By **Ben James**

Law360, New York (December 09, 2011, 9:25 PM ET) -- A Florida magistrate judge said Friday that an indictment against an ex-Florida West International Airways Inc. executive accused of taking part in a conspiracy to fix rates on air cargo shipments should be dismissed because he was covered by a previous plea deal involving LAN Cargo SA.

U.S. Magistrate Judge Edwin Torres said the federal government's indictment should be thrown out with respect to former Florida West Vice President Rodrigo Hidalgo, and that he was covered under the 2009 plea agreement as an employee of LAN Cargo and its subsidiary South Florida Air Cargo.

However, Judge Torres also recommended denying a dismissal bid from Florida West, which he concluded was not a subsidiary of LAN Cargo and not covered by the 2009 deal. Both Hidalgo and Florida West sought to dismiss the December 2010 indictment that accused them of participating in a price-fixing conspiracy, arguing that the prior plea agreement with LAN immunized them.

The magistrate judge's recommendations will be adopted by the court if no objections are heard within 14 days.

"Rodrigo and I are just thrilled," David Oscar Markus of Markus & Markus PLLC, an attorney for Hidalgo, told Law360 on Friday. "We knew from the very beginning that he should have never been indicted. This is an across-the-board victory, so we're just very, very appreciative and thankful that Judge Torres examined this case carefully."

In a one-count indictment that was returned on Dec. 2, 2010, prosecutors charged Florida West, Hidalgo and two executives of a competing air cargo carrier with participating in a conspiracy to fix and coordinate certain components of air cargo shipments from Colombia to Miami.

The prior plea agreement at issue, executed on Jan. 21, 2009, stemmed from a probe into LAN Cargo and other carriers and their alleged roles in a price-fixing conspiracy. LAN Cargo pled guilty to violating the Sherman Act and paid a fine in exchange for immunity to certain employees and related corporations, Judge Torres' report said.

The government argued that neither Hidalgo nor Florida West was immunized by the 2009 plea agreement.

But Hidalgo said the deal covered three categories of workers, all of which could provide him immunity. Those categories were any current or former director, officer or employee of LAN Cargo; any current or ex-director, officer or employee of LAN Cargo's subsidiaries; and any current or former employee of LAN Cargo parent LAN Airlines SA, or its subsidiaries, whose primary duties related to the sale of air cargo services for LAN Cargo.

Hidalgo said that during the indictment period he was simultaneously an executive of LAN Cargo and its subsidiary SFAC as well as Florida West. He also claimed that his employment status with LAN Cargo was kept under wraps to maintain an appearance of distance between LAN Cargo and Florida West and avoid

raising suspicion about compliance with the Federal Aviation Act.

Additionally, he argued that Florida West was a subsidiary of LAN Cargo. Even if Florida West was found to be a subsidiary of parent LAN, and not LAN Cargo, he still qualified for the third category because his primary responsibilities related to the sale of air cargo services for LAN Cargo.

Judge Torres concluded that Florida West was not a subsidiary of LAN Cargo, noting that plain meaning of the word requires that the parent own a majority share of a subsidiary. LAN Cargo owned just 25 percent of Florida West, according to Friday's ruling.

Judge Torres was convinced that Hidalgo was, in fact, a LAN Cargo employee, and wrote that “the evidence he proffered demonstrates that Hidalgo indeed acted as an emissary between the decision-making LAN Cargo 'brain' and its functional Florida West 'body.’”

Judge Torres also said that Florida West's “imputation argument” was a jury issue. In addition to arguing that it was a LAN affiliate covered by the 2009 plea agreement, Florida West said that if Hidalgo did in fact have a simultaneous employment relationship with LAN Cargo, the indictment against Florida West should be dismissed because his conduct could not be imputed to Florida West.

“While we agree that Florida West may have a compelling defense to criminal liability based on this argument, this is not an appropriate ground to dismiss the pending indictment,” Judge Torres said.

In January 2009, the U.S. Department of Justice announced that LAN Cargo, Aerolinhas Brasileiras SA and El Al Israel Airlines Ltd. had each agreed to plead guilty and cough up a total of \$124.7 million in criminal fines for their alleged roles in a conspiracy to fix prices in the air cargo industry.

Representatives for the parties in the current matter declined to comment Friday.

Hidalgo is represented by David Oscar Markus of Markus & Markus PLLC. Florida West is represented by Kirby Behre and Jeremy Evans of Paul Hastings LLP.

The case is USA v. Florida West International Airways Inc. et al., case number 1:10-cr-20864, in the U.S. District Court for the Southern District of Florida.

--Editing by Andrew Park.

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