

## 7th Circ. Says Airline Privacy Fights Must Be Arbitrated

By Celeste Bott

Law360 (June 14, 2019, 7:36 PM EDT) -- Disputes over whether Southwest Airlines Co. and United Airlines Inc. violated Illinois law when they used timekeeping systems requiring workers to clock in and out with their fingerprints must be settled by an adjustment board, because their unions may have consented to the practice on the employees' collective behalf, the Seventh Circuit held Wednesday.

Illinois' Biometric Information Privacy Act provides that a worker or authorized agent can consent to the collection of biometric information, the panel found. The question of whether Southwest or United's unions consented to that collection, or granted authority through a management rights clause, is a matter that must be resolved in arbitration and not before a judge, per the Railway Labor Act, the court said.

"We reject plaintiffs' contention that a union is not a 'legally authorized representative' for this purpose," the panel said. "Neither the statutory text nor any decision by a state court suggests that Illinois wants to exclude a collective bargaining representative from the category of authorized agents."

The retention and destruction schedules for biometric data, and whether air carriers may use third parties to implement timekeeping and identification systems, are all topics for collective bargaining between unions and management, the panel said.

"That biometric information concerns workers' privacy does not distinguish it from many other subjects, such as drug testing, that are routinely covered by collective bargaining and on which unions give consent on behalf of the whole bargaining unit," according to the ruling.

The Seventh Circuit panel drew on a "unique wrinkle" in BIPA that could effect how unionized employees can use the law to go after their employers, said Benesch Friedlander Coplan & Aronoff LLP attorney Mark Eisen, who was not involved in the case. Eisen said the court focused on the fact that BIPA's requirements for consent and for notice don't just apply to employees, but can also apply to the employee's legally authorized representative.

He told Law360 he thinks the ruling is likely to limit BIPA class actions brought by unionized workers.

The appellate court consolidated two BIPA class actions — one against Southwest and one against United. Also in its Thursday decision, the Seventh Circuit held that its conclusion that it would be impossible to litigate under the state statute without examining what the union knew and agreed to meant United was entitled to remove the suit to federal court under the federal question jurisdiction.

United baggage handler David Johnson first filed suit in Illinois state court in November 2017 amid a wave of litigation under BIPA, Illinois' unique law regulating the use of biometric identifiers such as fingerprints, facial geometry or retina scans. It was later removed to federal court by United, and **sent back to state court** in March.

Jennifer Miller, Scott Poole and Kevin Englund started working for Southwest at the Chicago Midway International Airport as either ramp workers or operations agents in 2005. They filed their own BIPA

suit in January 2018.

In September, **their claims were tossed** by an Illinois federal judge who said the dispute must be arbitrated or settled according to union terms.

Both lawsuits allege that the airlines violated the privacy law by requiring them to scan their fingers to sign in and out of work without first getting their permission or publishing a policy about how that data would be stored or destroyed.

Representatives for the parties didn't immediately respond to requests for comment Friday.

Judges Diane Wood, Frank Easterbrook and William Bauer sat on the panel for the Seventh Circuit.

The workers in the Johnson case are represented by Paul T. Geske and Jad Sheikali of McGuire Law PC.

United is represented by Thomas E. Ahlering and Ada W. Dolph of Seyfarth Shaw LLP.

The workers in the Miller case are represented by Steven A. Hart and John S. Marrese of Hart McLaughlin & Eldridge LLC.

Southwest is represented by Melissa A. Siebert, Jonathon Studer and Matthew C. Wolfe of Shook Hardy & Bacon LLP.

The cases are Jennifer Miller et al. v. Southwest Airlines Co., case number 18-3476, and David Johnson et al. v. United Airlines Inc. et al., case number 19-1785, in the U.S. Court of Appeals for the Seventh Circuit.

--Additional reporting by Lauraann Wood, Dave Simpson and Christopher Crosby. Editing by Stephen Berg.

*Correction: An earlier story misspelled the name of one of United's attorneys. The error has been corrected.*