

## Southwest Escapes Privacy Claims Over Fingerprint Clock-Ins

By Celeste Bott

*Law360 (May 13, 2020, 4:34 PM EDT)* -- An Illinois federal judge on Tuesday tossed claims that Southwest Airlines violated the state's landmark biometric privacy law by requiring workers to use their fingerprints to clock in and out of work, saying the dispute must be settled by an adjustment board because their union may have consented to the practice on the employees' collective behalf.

Though the named plaintiffs are ramp supervisors who are not represented by the Transportation Workers Union of America, AFL-CIO Local 555, three of the four began their careers as ramp agents — whose duties include loading bags and cargo and directing airplanes in and out of the gate — and were covered by the collective bargaining agreement the union had with Southwest before they were promoted, said U.S. District Judge Steven C. Seeger.

"Southwest has raised a non-frivolous question whether the collective bargaining agreement authorized the union to consent on behalf of all employees, even if some of them later left the bargaining unit. So the answer must come from the adjustment board, not this court," Judge Seeger said.

The fourth named plaintiff began his career at Southwest as a ramp supervisor, and was not represented by the union, but he agreed to arbitrate when he accepted Southwest's Alternative Dispute Resolution Program, according to the opinion. If the other plaintiffs didn't have to press their claims before an adjustment board in light of the Railway Labor Act, they'd have to head to arbitration too, the judge said.

The workers' claim that the proposed class is limited to non-union members doesn't hold water, the judge said, saying they are asking to represent a class of all workers whose fingerprint data was allegedly collected by Southwest, union members or not.

They also can't avoid arbitration by narrowing their complaint, because Southwest contends that the union consented to the use of their biometric data when three of the named plaintiffs were still ramp agents, and that consent is effective for all time, regardless of whether an employee changed roles within the company, Judge Seeger said.

"That argument necessarily requires an interpretation of the collective bargaining agreement, and thus is the domain of an adjustment board," the judge said. "Maybe plaintiffs have an argument that the collective bargaining agreement did not authorize the union to give once-and-for-all consents. And maybe plaintiffs can construct an argument that BIPA requires re-notice and re-consent, even if an

employee changes roles within the company. But the punchline is the same – the proper forum to hear that argument is an adjustment board, not this court."

The ramp supervisors first filed suit in February 2019, accusing Southwest of violating the BIPA, an Illinois state law requiring employers to get informed consent before collecting, using and storing biometric information like fingerprints.

The dismissal of their case comes in the wake of the Seventh Circuit's 2019 finding that because BIPA provides that a worker or authorized agent can consent to the collection of biometric information, the question of whether an airlines' 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.

"This decision represents the second time a federal court in Illinois has ruled that Southwest's arbitration agreement with non-union employees is enforceable and that current, or former union-represented employees of Southwest, may only pursue claims under the Biometric Information Privacy Act through Southwest's internal grievance process pursuant to the Railway Labor Act," Southwest Airlines told Law360 Wednesday in a statement.

Representatives of the proposed class did not immediately respond to requests for comment.

The proposed class is represented by James B. Zouras, Ryan F. Stephan and Andrew C. Ficzkof of Stephan Zouras LLP.

Southwest Airlines is represented by Melissa Anne Siebert, Erin Bolan Hines and Jonathon M. Studer of Shook Hardy & Bacon LLP.

The case is Crooms et al v. Southwest Airlines Co. et al, case number 1:19-cv-02149, in U.S. District Court for the Northern District of Illinois.

--Editing by Amy Rowe.