



NATIONAL MEDIATION BOARD
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46 NMB No. 17
June 25, 2019

Elizabeth Tursell
Associate to the General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570-0001

Re: NMB File No. CJ-7193
NLRB Case Nos. 05-CA-223787 and 05-CB-223808
Bombardier Transportation Services USA Corp.

Dear Ms. Tursell:

This responds to your request for the National Mediation Board's (NMB or Board) opinion regarding whether Bombardier Transportation Services USA Corp. (Bombardier) is subject to the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.* On October 16, 2018, the National Labor Relations Board (NLRB) requested an opinion regarding whether Bombardier is subject to the RLA.

For the reasons discussed below, the NMB's opinion is that Bombardier's operations and employees at the Brunswick and Camden Lines of the Maryland Area Regional Commuter Train Service (MARC) are subject to the RLA.

I. PROCEDURAL BACKGROUND

On July 16, 2018, Vincent Norment, an individual, filed unfair labor practice charges with the NLRB against Bombardier in Case 05-CA-223787 and against the International Association of Machinists and Aerospace Workers, District Lodge 19 (IAM) in Case 05-CB-223808. On October 11, 2018, the NLRB referred the cases to the NMB for a jurisdictional opinion.

The NMB assigned Andres Yoder to investigate. Bombardier, IAM, and Norment each submitted statements and documentation to the NMB. Bombardier and IAM both argued that Bombardier is subject to the RLA, while Norment argued that it is not. The NMB's opinion is based on the record provided by the NLRB as well as on the submitted statements and documentation.

II. FINDINGS OF FACT

Bombardier

In a January 11, 2019 affidavit, Bombardier's Acting Site General Manager Matthew Sturgeon stated that Bombardier "provides services related to the movement by rail of passengers in exchange for compensation." According to Bombardier's website, <http://us.bombardier.com>, Bombardier is a company that "cover[s] the full spectrum of rail solutions"

MARC and MTA

MARC is a commuter rail service that operates "under the auspices of" the Maryland Transit Administration (MTA). MTA, in turn, is a "modal administration" of the Maryland Department of Transportation, which is itself an agency of the State of Maryland.

Brunswick and Camden Lines

Since July 2013, Bombardier has operated two rail lines in the MARC system under a contract with MTA (Bombardier-MTA Contract). On the first line, the Brunswick Line, Bombardier transports passengers between Washington, DC, Maryland, and West Virginia. On the second line, the Camden Line, Bombardier transports passengers between Washington, DC and Maryland.¹

In a January 7, 2019 declaration, Bombardier Machinist Roger Greg Rawlings said that the Brunswick and Camden Lines "are not equipped to carry electric trains." Instead, "only diesel engines travel on those lines" "[N]o portion" of the Brunswick and Camden Lines, Sturgeon added, is "connected to any street, suburban or interurban electric railway."

In support of the operations at issue here, Sturgeon stated that Bombardier uses a number of physical assets that are owned by either MTA or CSX Transportation, Inc. (CSXT). Specifically, Bombardier uses MTA-owned rolling stock (including locomotives, coaches, and cab cars); rail yards and related facilities and equipment; platforms and platform buildings; and computers. Bombardier also uses CSXT-owned tracks; rail yards and related facilities and equipment; and platforms and platform buildings.

¹ The MARC system also has a third line called the Penn Line. According to Rawlings, "Amtrak and [Bombardier] share some of the responsibilities of servicing and repairing diesel engines that run on the Penn Line."

CSXT

The NMB has recognized CSXT as a carrier by railroad. *E.g.*, *CSX Transp.*, 37 NMB 144 (2010). CSXT provides “rail services across 21,000 railroad route miles in the eastern United States and two Canadian Provinces.” *Chef’s Warehouse Midwest, LLC v. CSX Transp., Inc.*, No. 1:17-CV-555, 2019 WL 339925, at *1 (S.D. Ohio Jan. 28, 2019).

Immediately before the Bombardier-MTA Contract went into effect, CSXT had a contract with MTA under which it transported passengers on the Brunswick and Camden Lines. Nevertheless, according to Rawlings, CSXT continues to use the Brunswick and Camden Lines to transport freight, alongside another freight carrier he identifies as “Norfolk Southern.”

IAM

IAM is a labor organization. On April 30, 2013, Bombardier agreed to voluntarily recognize IAM, under the RLA, as the representative of the Machinists it expected to employ at the Brunswick and Camden Lines (Bombardier-IAM Agreement). According to the terms of the Bombardier-IAM Agreement, an existing collective bargaining agreement between IAM and CSXT would continue in effect, except as modified by the Bombardier-IAM Agreement, and “until modified pursuant to the terms and conditions of the [RLA].”

III. DISCUSSION

RLA Jurisdiction

An entity is a “carrier” subject to RLA jurisdiction if it is a “railroad subject to the jurisdiction of the Surface Transportation Board” (STB). 45 U.S.C. § 151, First. STB jurisdiction, in turn, is defined in the Interstate Commerce Commission Termination Act of 1995 (ICCTA), 49 U.S.C. §10101 *et seq.*

According to ICCTA Section 10501(a), the STB has jurisdiction over certain types of “transportation” 49 U.S.C. § 10501(a). The term “transportation” includes physical assets “related to” the movement by rail of passengers, property, or both, “regardless of ownership or an agreement concerning use” 49 U.S.C. § 10102(9)(A). A physical asset may be “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind” *Id.* The term “transportation” also includes “services related to” the movement by rail of passengers, property, or both, “including receipt, delivery, elevation, transfer in

transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property” 49 U.S.C. § 10102(9)(B).

At the Brunswick and Camden Lines, Bombardier uses a number of physical assets related to the movement by rail of passengers, including rolling stock; rail yards and related facilities and equipment; platforms and platform buildings; computers; and tracks. Bombardier also provides services related to the movement by rail of passengers, such as the interchange of passengers. As a result, Bombardier’s operations meet the ICCTA’s definition of transportation.

That said, the transportation Bombardier provides at the Brunswick and Camden Lines will only be subject to STB jurisdiction if it meets two additional requirements, both of which are set out in ICCTA Section 10501(a). First, the transportation must be provided by a “rail carrier[,]” 49 U.S.C. § 10501(a)(1), defined as a “person providing common carrier railroad transportation for compensation” 49 U.S.C. § 10102(5). Second, the transportation must take place between certain places, including between states “as part of the interstate rail network” 49 U.S.C. § 10501(a)(2)(a).

The record shows that Bombardier’s operations at the Brunswick and Camden Lines meet the two additional requirements at ICCTA Section 10501(a). At those lines, Bombardier provides commuter rail services for compensation, and in so doing transports passengers between states. Moreover, those lines are part of the interstate rail network. Consequently, under ICCTA Section 10501(a), the STB has jurisdiction over the Bombardier operations at issue, making them subject to RLA jurisdiction as well. *See also Holland Am. Westours*, 29 NMB 140 (2002); *National R.R. Passenger Corp.*, 6 NMB 216 (1977); *Union Stock Yard & Transit Co. of Chicago*, 3 NMB 149 (1953).

There is no allegation that a jurisdictional exception applies in this case, and there is no evidence that such an exception applies. Notably, the ICCTA contains an electric-railway exception that excludes “street, suburban, or interurban electric railways not operated as part of the general system of rail transportation” 49 U.S.C. § 10102(5). The RLA contains a similar electric-railway exception. *See* 45 U.S.C. § 151, First. The record shows, however, that at the Brunswick and Camden Lines, Bombardier operates diesel locomotives on tracks that are part of the interstate rail network. As a result, neither the ICCTA’s nor the RLA’s electric-railway exception applies.²

² In 2005, the NMB determined that the electric-railway exception applied to a rail system that linked to John F. Kennedy International Airport, and that was operated by a company called Bombardier Transit Systems Corporation (BTSC). *See Bombardier Transit Systems Corp.*, 32 NMB 131 (2005). Bombardier asserts that it “is a separate legal entity from [BTSC].”

RRB Determination

On May 21, 2013, in *Bombardier Transp. USA Corp.*, B-2013-12 (R.R. Ret. Bd. May 21, 2013), the Railroad Retirement Board (RRB) considered whether Bombardier’s expected operations at the Brunswick and Camden Lines would make it an “employer” as defined in the Railroad Retirement Act (RR Act), 45 U.S.C. § 231 *et seq.* and in the Railroad Unemployment Insurance Act (RUI Act), 45 U.S.C. § 351 *et seq.*

Because both the RR Act and the RUI Act define an employer as a rail carrier subject to STB jurisdiction,³ the RRB considered whether, under the ICCTA, the STB would have jurisdiction over Bombardier’s expected operations. The RRB began with the baseline observation that the ICCTA “may” exclude “local government authorities”⁴ (LGAs) from STB jurisdiction.⁵ However, the RRB then found that LGAs are still subject to the RR Act and the RUI Act under ICCTA Section 10501(c)(3)(A)(iii) as “laws of the United States related to . . . employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers.”⁶ The RRB alternatively found that ICCTA Section 10501(c)(3)(B)⁷ – which identifies two exemptions to LGAs’ baseline exclusion from STB jurisdiction⁸ – would apply to Bombardier. As a result, the RRB found that Bombardier’s expected operations at the Brunswick and Camden Lines would make it an employer as defined in the RR Act and the RUI Act.⁹ *See id.*

The NMB, however, does not rely on RRB opinions when making determinations as to RLA jurisdiction. *See Southern Cal. Reg’l Rail Auth.*, 43 NMB 71, 82 (2016). In any event, whether a rail carrier is an LGA does not affect the issue of RLA jurisdiction. According to ICCTA Section 10501(c)(3)(A)(ii), labor laws like the RLA still apply to LGAs. *See* 49 U.S.C. § 10501(c)(3)(A)(ii).

³ *See* 45 U.S.C. § 231(a)(1)(i); 45 U.S.C. § 351(b).

⁴ The ICCTA defines the term “local government authority” at 49 U.S.C. §§ 5302(10) and 10501(c)(1)(A).

⁵ *See* 49 U.S.C. § 10501(c)(2)(A).

⁶ *See* 49 U.S.C. § 10501(c)(3)(A)(iii).

⁷ 49 U.S.C. § 10501(c)(3)(B).

⁸ ICCTA Section 10501(c)(3)(B) deals with ICCTA Sections 11102 and 11103, which give the STB the authority to require a rail carrier to allow another rail carrier to use its terminal facilities, and to require a rail carrier to install and operate switch connections. *See* 49 U.S.C. §§ 11102-11103. According to ICCTA Section 10501(c)(3)(B), LGAs are subject to the STB’s authority under ICCTA Sections 11102 and 11103 if the LGA “meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission that were in effect immediately before January 1, 1996.” 49 U.S.C. § 10501(c)(3)(B).

⁹ Because Bombardier began compensating some employees on April 1, 2013, the RRB determined that, on that date, it became an employer as defined in the RR Act and RUI Act.

CONCLUSION

Based on the record in this case and the reasons discussed above, the NMB's opinion is that Bombardier's operations and its employees at the Brunswick and Camden Lines of MARC are subject to the RLA.

BY DIRECTION OF THE NATIONAL MEDIATION BOARD.



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