



NATIONAL MEDIATION BOARD
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30 NMB No. 51
May 28, 2003

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1099 14th Street, NW
Washington, DC 20570-0001

Re: NMB File No. CJ-6782
NLRB Case No. 1-CA-40439
AvEx Flight Support

Dear Mr. Siegel:

This letter responds to your request for the National Mediation Board's (NMB) opinion regarding whether AvEx Flight Support (AvEx) is subject to the Railway Labor Act (RLA), 45 U.S.C. §§ 151, *et seq.*

For the reasons discussed below, the NMB's opinion is that AvEx's operations and its employees are subject to the RLA.

I. PROCEDURAL BACKGROUND

This case arose out of unfair labor practice charges filed by the Transportation Communications International Union, Allied Services Division, AFL-CIO (TCU or Union). The NLRB requested an NMB opinion regarding the NMB's jurisdiction over AvEx's operations on March 5, 2003.

The NMB's opinion in this case is based upon the request and record provided by the NLRB, and the position statements submitted by AvEx and the TCU at the NMB's request.

II. AVEX'S CONTENTIONS

AvEx states that it provides skycap services, wheelchair services, and security/document screening to 12 carriers at the T.F. Green Airport (Green Airport) in Warwick, Rhode Island. AvEx contends that its operations and employees should be subject to the jurisdiction of the RLA.

AvEx asserts that it meets both the function and control tests established by the NMB for determining jurisdiction. AvEx states that baggage handling, wheelchair assistance services, and skycap services are functions traditionally performed by employees in the airline industry and there is substantial evidence of carrier control. Specifically, AvEx argues that the carriers' control in this case is virtually identical to *Command Security Corp. d/b/a Aviation Safeguards*, 27 NMB 581 (2000).

According to AvEx, the carriers which it contracts with at Green Airport determine the staffing levels for AvEx employees and control the performance of AvEx's employees. AvEx also states that the carriers have access to AvEx's personnel files and retain the right to audit AvEx's employee records. Furthermore, AvEx asserts that if a carrier official observes an AvEx employee acting in an unsatisfactory manner, AvEx must take whatever steps are necessary to ensure that such performance is not repeated. For example, AvEx states, all disciplinary incidents involving AvEx's skycaps are reported to AvEx by the carrier. AvEx contends that in each instance, AvEx took corrective action and reported that action back to the carrier. AvEx also asserts that the carriers determine whether they will allow a particular employee to work for them.

AvEx notes that while its employees wear uniforms indicating they are AvEx employees, the uniforms are chosen by the airlines. Furthermore, AvEx contends, although AvEx employees are not held out to the public as carrier employees, this fact is outweighed by the factors listed above.

III. TCU'S CONTENTIONS

TCU contends that AvEx is not subject to the RLA. TCU does not contest that AvEx's work is in the nature of work traditionally performed by air carriers. Instead, TCU argues that AvEx is neither directly nor indirectly owned by, nor is it controlled by nor under common control with, a carrier. The Organization states that AvEx is analogous to the employers in *Ogden Aviation Servs.*, 23 NMB 98 (1996); *AIR BP*, 19 NMB 90 (1991); *Prospect Airport Servs., Inc.*, 15 NMB 70 (1988) and *Allied Maintenance Corp.*, 13 NMB 255 (1986) where the NMB determined that the employers were not subject to the RLA.

The Organization states that with the exception of hazardous materials training and training in the use of the airlines' computer systems, the only training provided to skycaps working for AvEx since October 2002 was provided by AvEx supervisors relating to AvEx's policies and procedures. TCU also states that AvEx supervisors, rather than airline personnel, assist skycaps in securing the necessary paperwork to get an identification badge required to work at Green Airport. Furthermore, TCU states, it is AvEx's responsibility to ensure that its employees return their ID badges upon termination. TCU asserts that AvEx supervisors must report missing identification badges to airport security as well as state and local law enforcement.

The Organization states that the day-to-day duties of AvEx skycaps are supervised by AvEx employees with the exception of circumstance where the skycap: (1) has difficulty with the carriers' computers; (2) has a problem with one of the carrier's passengers; (3) needs to obtain a wheelchair for a passenger; (4) needs to obtain flight information; and (5) needs to refer a passenger randomly chosen for security purposes who must check in at the counter rather than curbside.

The TCU asserts that AvEx's uniforms and badges identify the individuals as employees of AvEx, not the individual carrier.

TCU further asserts that the dollies used by AvEx skycaps are supplied by AvEx. The Organization also states that when a carrier has concerns about an individual skycap, that carrier brings its concerns to AvEx's attention rather than the carrier dealing directly with the individual.

IV. FINDINGS OF FACT

AvEx is a privately held company providing various skycap services to 12 airlines at Green Airport. AvEx began providing these services in October 2002. Prior to October 2002, these services were provided by Huntleigh Corporation (Huntleigh). AvEx hired approximately 33 skycaps, all formerly employed by Huntleigh, to perform this work. In *Huntleigh USA Corp.*, 29 NMB 121 (2001), the NMB found that Huntleigh and its employees were subject to the RLA.

AvEx submitted its agreement with US Airways (Agreement) and stated that it has identical contracts with each of the 12 airlines it services. The Agreement states that AvEx shall provide document-screening services, wheelchair services and other requested services. The Agreement provides that US Airways' personnel may audit AvEx's work in progress; observe and evaluate AvEx's operations and inspect its equipment. Furthermore, the Agreement states,

PROVIDER [AvEx] shall at all times keep complete and accurate books, records and accounts from which may be determined the basis for billings by it for SERVICES or materials provided under this Agreement. Such books, records and accounts shall be open for inspection, examination, and audit by CARRIER or its designated representative at all times during the course of this Agreement.

According to the record, AvEx hires, determines hours of work, makes work assignments, provides training on AvEx policies and procedures, keeps personnel records, and provides

uniforms for its employees. In addition, AvEx determines the wages, in conjunction with the carriers. The Agreements under which AvEx provides skycap services specify that AvEx must follow all Federal Aviation Administration (FAA) requirements and the requirements of any other government agency in the performance of their services for the carrier. For example, AvEx is required to conduct background checks including 10-year employment history and reference checks on the skycaps they employ. AvEx must also perform drug testing. In addition, the carriers have the right to audit AvEx's records to insure that all documentation for each employee is in order.

AvEx employs three supervisors at Green Airport to supervise all AvEx employees. The carriers provide free office space for these supervisors. Although AvEx employs supervisors to oversee the work of skycaps, if a skycap experiences any problems in checking in passengers, they bring those problems directly to the station manager for the particular airline involved, rather than to the AvEx supervisor. In addition, the carriers may observe and evaluate employee performance. For example, if a carrier observes an AvEx employee acting in an unsatisfactory manner, the Agreement specifies that AvEx must take whatever steps necessary to ensure that such performance is not repeated, and that all personnel perform at a satisfactory level. Carriers have exercised this right in the past. According to AvEx, on one occasion, Southwest reported to AvEx that a skycap was observed with body piercings, which Southwest prohibits. Southwest wanted the piercings removed. Because skycaps must follow the policies and procedures of the airlines they service, AvEx went to the skycap and had him remove the piercings and reported this action to Southwest.

AvEx cites another example on Delta Airlines. AvEx received a sexual harassment complaint about a skycap from two Delta Airline employees. AvEx spoke to the employee about the complaint and reported back to Delta. In addition, AvEx states, if a carrier does not want a particular skycap servicing its passengers, AvEx will comply with that request.¹

The carriers provide AvEx with the overall number of staff hours for each position based on each carrier's flight schedules. The Agreements between the carriers and AvEx set hourly, overtime, and holiday bill rates that may not be changed unilaterally. If flights are delayed, the carriers can request AvEx keep skycaps on duty until the flight departs or arrives. AvEx complies with these requests even if it results in overtime for the skycaps. Flight cancellations and weather delays may force the carriers to request that AvEx send skycaps home. Although AvEx is not contractually obligated to grant such requests, if AvEx decides not to send a skycap home, AvEx cannot bill the airline for the skycap's time.²

There is no evidence that there has been any training administered by the carriers since AvEx took over skycap operations at Green Airport. However, the skycaps hired by AvEx had already been trained by the carriers.

Although AvEx provides uniforms to its employees, the uniforms must be approved by the carriers. Skycaps at Green Airport wear identification badges issued by the Airport Authority identifying them as AvEx employees. The badges make no reference to the carrier the skycap services.

¹ AvEx states that no such request has ever been made.

² AvEx states that this has not been a problem because skycaps generally request to leave if they do not have any work.

V. DISCUSSIONAPPLICABLE LEGAL STANDARD

When an employer is not a rail or air carrier engaged in the transportation of freight or passengers, the NMB applies a two-part test in determining whether the employer and its employees are subject to the RLA. *Argenbright Security, Inc.*, 29 NMB 340 (2002). First, the NMB determines whether the nature of the work is that traditionally performed by employees of rail or air carriers -- the “function” test. Second, the NMB determines whether the employer is directly or indirectly owned or controlled by, or under common control with a carrier or carriers -- the “control” test. Both parts of the test must be satisfied for the NMB to assert jurisdiction. *Argenbright Security, above*. See also *Ogden Aviation Servs.*, 23 NMB 98 (1996).

AvEx does not fly aircraft and is not directly or indirectly owned by an air carrier. Therefore, to determine whether AvEx is subject to the RLA, the NMB must consider the nature of the work performed and the degree of control exercised by its air carrier customers.

1. AvEx Employees Perform Work Traditionally Performed by Employees of Air Carriers

AvEx provides skycap services, wheelchair services, and security/document screening for 12 carriers at Green Airport. The NMB has found that skycap and wheelchair services and security/document screening is work traditionally performed by employees in the airline industry. *Globe Aviation Servs.*, 28 NMB 41 (2000); *Command Security Corp. d/b/a Aviation Safeguards*, 27 NMB 581 (2000); *International Total Servs.*, 26 NMB 72 (1998); *International Total Servs.*, 20 NMB 537 (1993); *Globe Sec. Sys. Co.*, 16 NMB 208 (1989); *International Total Servs., Inc.*, 16 NMB 44 (1988); *New York Interstate Serv., Inc.*, 14 NMB 439 (1987). Therefore, the NMB finds that AvEx employees perform functions which have been traditionally performed by airline employees.

2. Carrier Control Over AvEx and Its Employees

The Agreements between AvEx and the carriers provide that carrier personnel may audit AvEx's work in progress, observe and evaluate AvEx's operations, and inspect its equipment. Carriers exercise substantial control over AvEx's operations and have the right to audit AvEx's records to insure that all documentation for each employee is in order. Carriers who observe an AvEx employee acting in an unsatisfactory manner may effectively recommend discipline. Although AvEx employs supervisors to oversee the work of its employees, if a skycap experiences any problems in checking in passengers, they bring those problems directly to the station manager for the particular airline involved rather than to the AvEx supervisor. The carriers provide free office space for these supervisors. In addition, the carriers provide AvEx with the overall number of staff hours for each position based on each carrier's flight schedules. AvEx's employees' hourly, overtime, and holiday bill rates are outlined in the Agreements and may not be changed unilaterally. Although AvEx provides the uniforms to its employees, the uniforms must be approved by the carriers.

The NMB finds that the record and submission establish that the carriers exert sufficient control over AvEx and its employees to satisfy the second part of the NMB's two-part test.

VI. CONCLUSION

Based on the record in this case and for the reasons discussed above, the NMB's opinion is that AvEx and its employees are subject to the RLA. This opinion may be cited as *AvEx Flight Support*, 30 NMB 355 (2003).

By direction of the NATIONAL MEDIATION BOARD.



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