



NATIONAL MEDIATION BOARD

WASHINGTON, DC 20572

(202) 692-5000

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Jeffrey D. Wedekind, Esq.
Solicitor
National Labor Relations Board
1099 14th Street, NW.
Washington, DC 20570-0001

Re: NMB Case No. R-6774
NLRB Case No. 29-RC9837
DHL Worldwide Express, Inc.

Dear Mr. Wedekind:

This letter responds to your request for the National Mediation Board's (NMB) opinion regarding whether DHL Worldwide Express, Inc. (DHL) is subject to the Railway Labor Act (RLA).¹

For the reasons discussed below, the NMB's opinion is that DHL's operations and its employees are not subject to the RLA.

I. PROCEDURAL BACKGROUND

This case arose as a result of a representation petition filed by Local 804 of the International Brotherhood of Teamsters (IBT) with the National Labor Relations Board (NLRB). The IBT seeks to represent "courier guards" and "service agents" employed by DHL at its Long Island City, New York, facility. A hearing was held before an NLRB Region 29 Hearing Officer on May 29-31, 2002. At the hearing, counsel for DHL filed a Motion to Dismiss the IBT's petition or alternatively, refer the case to the NMB. On December 3, 2002,

¹ 45 U.S.C. § 151, *et seq.*

the NLRB forwarded the record to the NMB requesting an opinion as to whether DHL is covered by the RLA.

On December 10, 2002, the Board assigned Eileen M. Hennessey to investigate. The participants filed submissions with the Board on January 16, 2003. The Board requested additional information from DHL on March 3, 2003. DHL filed a response to the NMB's request on March 16, 2003. The IBT filed additional submissions on March 21, 2003, and April 1, 2003.

The NMB's opinion in this case is based upon the request and record provided by the NLRB including the hearing transcript and the position statements submitted by DHL and the IBT.

II. DHL'S CONTENTIONS

DHL argues that its employees are subject to the RLA. DHL states that until March 2001, the employees described in the petition for election pending before the NLRB worked directly for DHL Airways, Inc. (Airways), an air carrier covered by the RLA. Due to the March 2001 corporate restructuring, employees from Airways were transferred among three corporations: Airways (performing the actual flying for the DHL Worldwide network), DHL (performing the ground handling services for Airways Aircraft, and sorting, pick-up, and delivery of packages transported by air), and DHL Holdings (USA) Inc. (Holdings), (providing common administrative and support functions for Airways and DHL). DHL maintains that the work done by the Airways' employees prior to the restructuring is currently being done by the employees of all three companies. The restructuring has not altered employees' daily duties and responsibilities.

DHL argues that its "courier guards" and "service agents" remain an integral part of the air carrier operations of Airways and the air express operations of DHL Worldwide network. DHL states that Airways continues to exert pervasive control

over the work performed by DHL's ground support employees. DHL argues that on "at least ten occasions, the NLRB has determined that the employees covered by the pending petition are subject to the RLA and not the National Labor Relations Act (NLRA)."

DHL asserts that it is a "derivative carrier" and, therefore, the NMB should apply its two-part jurisdiction test. DHL states that it satisfies both prongs of the NMB's two-part jurisdiction test. First, DHL asserts that the work performed by DHL couriers and service agents at the Service Centers and Gateways is an integral part of Airways' operations. DHL argues that NMB precedent holds that the work performed by DHL couriers and service agents is airline work.

DHL states that Airways continues to be an air carrier subject to RLA jurisdiction and controls DHL. DHL cites as evidence of this control the following: Airways subjects DHL to and trains DHL employees regarding FAA-regulated duties; Airways directs daily tasks by DHL service agents and couriers; Airways audits DHL's compliance with Airways' standards; and Airways has the authority to recommend discharge of DHL couriers and service Agents who fail to meet Airways' standards.

DHL further maintains that it is under common control with a carrier because DHL, Airways, and Holdings are operating and holding themselves out to the public as a seamless network. DHL argues that both DHL and Airways operate under common policies and administration. DHL and Airways have jointly administered employee benefits and human resources functions as well as common standards and accountability.

Finally, DHL argues that it is an express company falling under the RLA and, therefore, not subject to the NLRB's jurisdiction.

III. IBT'S CONTENTIONS

The IBT asserts that this is the first case in which the NMB will determine whether employees of the newly created DHL are subject to the RLA. Furthermore, the IBT states that the issue of jurisdiction over employees of DHL companies has not been litigated before the NMB since 1981.

First, the IBT argues that DHL falls within the trucking service exception set forth in Section 151, First, of the RLA. The IBT states that the RLA specifically exempts a company owned or controlled by a carrier, that also performs trucking services, unless it is integrally related to the rail or air transportation of the RLA carrier. In this case, the IBT states, DHL does not own or operate aircraft but forwards shipments by contracting with several air carriers that transport freight by air. Airways, according to the IBT, is only one of the airlines that provides air transport service to DHL. Thus, it is Airways that provides a service to DHL rather than the reverse.

In addition, DHL, through Holdings, controls Airways' flight schedules. These schedules are developed to meet the competitive requirements of the markets in which DHL competes. The IBT compares this relationship to that of United Parcel Service (UPS) where the NLRB, applying NMB precedent, determined that UPS's trucking operations are not an integral part of the air carrier operation but that the air carrier's operations exist as an adjunct to UPS's trucking service. The IBT states that DHL does not exist for the principal purpose of servicing the operations of Airways. Airways is a service provider utilized by DHL as part of its freight forwarding operations. Therefore, the NMB should find that DHL performs a trucking service and is not covered by the RLA.

The IBT contends that the NMB's two-part jurisdictional test is not appropriate in this case since DHL falls within the trucking service exception. Nonetheless, the NMB's two-part

test establishes that DHL employees are not covered by the RLA. The IBT maintains that DHL is related to Airways only through Holdings and Holdings maintains only a minority, 45 percent ownership in Airways. Airways owns no interest in DHL, which is a wholly-owned subsidiary of Holdings. The IBT states that the Operating Protocol Agreement and the Services Agreement between DHL, Holdings, and Airways “allows Airways to exercise autonomy over its airline operations as an independent company.” Thus, the IBT argues that DHL does not meet the control standard of the NMB’s two-part test, and while the RLA may continue to apply to Airways and other airlines DHL has contracts with to ship freight, it does not apply to DHL.

The IBT also argues that the Board should consider that since the NLRB hearing, DHL commenced or is about to commence a new non-expedited ground service and has announced the acquisition of the ground operations of Airborne Inc. (Airborne). The IBT states that DHL’s acquisition of Airborne’s ground operations “further confirms that DHL does not exist principally to serve Airways but rather that Airways is one of several airlines that DHL utilizes as part of its freight forwarding service.”

IV. FINDINGS OF FACT

Airways Restructuring in March 2001

In March 2001, DHL Holdings (USA) (Holdings) became the 100 percent owner of the newly created DHL Worldwide Express, Inc. (DHL). Also as a result of the March 2001 corporate restructuring, Holdings became the 45 percent owner of DHL Airways, Inc. (Airways). As part of this restructuring, the employees at issue in the IBT’s election petition were transferred to DHL. Prior to this restructuring, “DHL Airways” was a wholly-owned subsidiary of DHL Corporation.²

² DHL Corporation was renamed “DHL Worldwide Express, Inc.” in 1998.

According to testimony provided by Bill Roure, Treasurer, DHL Holdings (USA), there were two reasons for the restructuring. First, “to raise capital for the US part of DHL” and second, “to ensure that DHL Airways would continue to maintain their statutory required airline ownership requirement.” Roure stated that the remaining 55 percent of Airways is owned by a single individual who “prior to the restructuring, was . . . one of the owners of DHL Worldwide Express, Inc. . . . the parent company.” As part of the restructuring, this individual “swapped” his share of ownership in the parent company for a larger stake in the airline. Roure also testified that DHL was “newly created in the restructuring.”

Roure testified that the Board of Directors of DHL and Holdings are identical. The Chairman of the Board of Holdings is one of the four members of Airways’ Board of Directors.

Both the Operating Protocol Agreement and the Services Agreement state:

WHEREAS, William Robinson³ (“Robinson”) has made an investment in Airways and by reason of such investment, Robinson will own stock representing 75% of the voting stock of Airways and [Holdings] will own stock representing 25% of the voting stock of Airways.

³ Robinson became Chairman of Airways in late 2000. In April 2003, Charles Dasburg became Chairman and CEO of Airways. In May 2003, Dasburg announced that he would acquire the 75 percent of voting stock owned by Robinson as well as the 25 percent of voting stock-owned by DHL’s parent company, Deutsche Post. Also in May 2003, Airways announced that it will change its name to “Astar Air Cargo” in order to “reinforce the reality that Astar is not a corporate affiliate of [DHL].”

Agreements Between Holdings, DHL, and Airways

Holdings has an ACMI (aircraft, crew, maintenance, and insurance) contract with Airways. This contract obligates Airways to provide ACMI services to Holdings over a period of ten years.

As part of the restructuring, DHL, Holdings, and Airways entered into an Operating Protocol Agreement and a Services Agreement, which describes the relationship between DHL Holdings, and Airways.

Both Agreements state:

WHEREAS, prior to the date hereof, the DHL air express package delivery business in the United States (hereinafter referred to as “the Business”) has been carried on by Airways as a wholly-owned subsidiary of DHL Worldwide Express, Inc. and the Business has comprised an integrated air and ground express delivery operation;

WHEREAS, DHL Worldwide Express B.V. has decided to invest in and capitalize the Business in a structure where Airways continues to meet the United States Department of Transportation regulatory requirements concerning ownership and citizenship of a United States airline, and allows Airways to exercise autonomy over its airline operations as an independent company;

WHEREAS, in order to meet these requirements, Airways has divested itself of all assets, facilities, equipment and personnel except those engaged primarily in airline operations. . . .

[Holdings] will operate an integrated express ground and air support delivery system through the services of [DHL] and Airways, respectively,

which will allow [Holdings] to provide the customers of the DHL Worldwide Express network, a seamless air and express ground transport network. . . .

The Services Agreement states:

INDEPENDENT CONTRACTOR. The services contracted for herein shall be conducted by [Holdings] and [DHL], and neither [Holdings] or [DHL], nor any of their respective employees, agents or subcontractors, shall be deemed employees for any purpose. . . .

The Operating Protocol Agreement, the Services Agreement, and the ACMI agreement may be terminated by any party subject to the terms of the respective agreements.

Signs, Logos, Uniforms, and Schedules

According to the Operating Protocol Agreement, all signs, logos, and uniforms used by DHL Holdings, and Airways “will bear the ‘DHL Worldwide Express’ identity.” The Operating Protocol Agreement also states that, “in order to display the integrated business, the Parties will publicize themselves as an integrated corporate entity.” Holdings sets the delivery schedule for the “DHL network.” Holdings also publishes this schedule. Both Airways and DHL work with Holdings to create and maintain the schedule.

Services Provided by Holdings and DHL to Airways

DHL, Airways, and Holdings operate under common policies and administration. DHL and Airways both obtain shared administrative functions from Holdings including but not limited to: finance, human resources, legal services, and information services. Under the terms of the Services Agreement:

COMPENSATION. In return for the above service, Airways agrees to pay [Holdings] or [DHL] as appropriate, at the rate and in the amount specified in Attachment A. . . . [Holdings] and [DHL] shall invoice Airways monthly.

According to Attachment A of the Operating Protocol Agreement:

[Holdings], through the services and facilities of [DHL], will provide the services of qualified airline operations personnel, fueling personnel, and weight and balance personnel, to Airways. The [DHL] operations personnel who provide such services will be trained, directly or indirectly, by Airways trainers. The [DHL] airline operations support will be performed according to Airways' airline operations specifications. Airways will have the right to request the transfer or discharge of any [DHL] airline operations support employee whose work is substandard. Airways management will have the right to oversee daily operations.

Percentage of Airways Cargo Handled by DHL

Approximately 95 percent of the cargo handled by DHL travels by air. A total of 72 percent of the shipments travel by Airways. Approximately 28 percent of the shipments travel by ground or are handled by carriers other than Airways.

Labor, Employee Relations, and Training

The Airline Pilots Association (ALPA) is the certified collective bargaining representative of pilots at Airways. The IBT is the certified collective bargaining representative for dispatchers at Airways. DHL's employees are not represented for collective bargaining purposes. According to the Operating Protocol Agreement, Holdings, DHL, and Airways- except as required by its collective bargaining obligation- will "use best

efforts” to maintain uniform employment policies. Charles Thomson, Vice President of Human Resources and Labor Relations for Airways, stated that his counterpart at DHL and Holdings is “the same person for both the Holding company and Worldwide Express” and is a Senior Vice President of Human Resources. Thomson stated that management for Airways was located in Barrington, Illinois, and the management offices for DHL and Holdings are in San Francisco, California.

Courier Guards and Service Agents

According to DHL testimony, a courier guard primarily drives a vehicle to and from the airport or picks up and delivers packages to and from customers. Service agents, according to DHL, sort packages – “their primary function is in the warehouses.”

DHL courier guards and service agents are hired, trained, evaluated, and disciplined by DHL managers and supervisors. Steve Elkins, Director of Airport Operations for Airways, testified that each time Airways requested that a courier be discharged, DHL complied with the request.

Elkins testified that Airways has an “Airport Operations Manual” (Manual) and “the objective of the Manual is to provide a standard of reference regarding basic operating procedures for DHL Airways.” The Manual states “this manual was developed for the use of the DHL employees and the contractors assigned to work our aircraft. A DHL Worldwide Express (contractor) is the primary company that serves as a contractor for DHL [Airways].” Airways trains and certifies DHL trainers who, in turn, train DHL employees on the procedures in the Manual.

William Deering, Regional Service Director for DHL, is responsible for 12 service centers in the New York/New Jersey area including the Long Island City facility. Deering testified that his responsibilities include the following: “ensure the

service to our customers, both in and out of the New York metro area, coordinate the movement of those packages to and from the aircraft, the expeditious delivery of those packages and to follow up to consigning on the far end, responsible for hiring and placing couriers, clerical people, development and management people. . . .”

Deering stated that 70 to 80 percent of the employees at the Long Island City facility do not go to the airport consistently and only six go to the airport on a daily basis. Deering testified that he is also familiar with the operations of other DHL service centers. In a small service center approximately 17-19 percent of the couriers go to the airport. Deering stated “the rule of thumb is, the flow of the service center.” At smaller service centers “a higher percentage of individuals would go, [to the airport] not necessarily a pure number but a larger percent. The larger the service center, the smaller the percentage, because there is specialized jobs.”

Deering testified that at the Long Island City facility, eight to ten of the 143 couriers and service agents are trained in the loading and unloading of aircraft. However, at a small service center, which might have 20 couriers and service agents, 50-60 percent would be involved in loading and unloading aircraft and probably 100 percent would have to be trained in order to cover for absences.

Eleven couriers in the Long Island City facility have airport badges to JFK airport and “a couple” have Newark airport badges. According to Deering, those individuals go regularly to these airports.

V. DISCUSSION

Applicable 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 332 (2002); Globe Aviation Servs., 28 NMB 41 (2000). 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. The NMB also determines whether the nature of the work is that traditionally performed by employees of rail or air carriers -- the “function” test. Both parts of the test must be satisfied for the NMB to assert jurisdiction. Globe Aviation, above. See also Ogden Aviation Servs., 23 NMB 98 (1996).

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

Carrier Control Over DHL and Its Employees

The issue of carrier control over ground sorting and transportation of freight has been addressed recently by the NMB in Emery Worldwide Airlines, Inc., 28 NMB 216 (2001). In Emery, the NMB concluded that Emery Worldwide Airlines (EWA) did not have the authority to supervise and direct truck drivers at EWA’s Priority Mail Processing Center (PMPC) and, therefore, PMPC employees were not covered by the RLA.

The NMB in Ogden, above, concluded that Ogden was not controlled by a carrier or carriers. The NMB stated that “[w]hile some carriers who contract with Ogden impose certain requirements on Ogden’s performance of services, these requirements are in the nature of those necessary to ensure the carriers’ efficient operations rather than an imposition of control over Ogden’s operation.” Ogden at 106.

Similarly, in TNT Skypak, Inc., 20 NMB 153 (1993), the NMB determined that while the RLA applied to the airlines contracted by Skypak, the RLA did not apply to Skypak because the carriers did not have supervisory control over

Skypak personnel. The NMB determined that Skypak was an independent entity not under direct or indirect control of a carrier. TNT Skypak, above.

The record establishes that Airways does not exercise sufficient control over DHL nor is DHL under common control with Airways. DHL maintains that former Airways employees should remain covered by the RLA because “nothing has changed in their daily duties and responsibilities,” the carrier has only undergone a “restructuring.” This argument ignores the “control” prong of the NMB’s two-part test.

According to DHL’s own witness, Roure, the restructuring created a new company, DHL; it did not merely modify the existing structure of Airways. As a result of the “restructuring,” Airways’ employees at issue, “courier guards” and “service agents,” became DHL employees. DHL hires and supervises its own employees. While Airways can recommend transfer or termination of certain DHL ground operations employees, it is only a recommendation and it is only for a limited number of DHL employees. Airways contracts and pays for certain services with DHL and Holdings. As in Ogden, above, there is no evidence that Airways has input into Holdings and DHL’s business operations.

Airways does not control DHL, nor does Holdings control both Airways and DHL. While DHL is a wholly-owned subsidiary of Holdings, Holdings is a minority stake holder in Airways. Holdings has only one seat on Airways Board of Directors.⁴

⁴ The NMB makes its findings in this case on the current status of DHL, Holdings, and Airways. However, the NMB notes that the proposed sale of Holdings’ interest in Airways to Airways current Chairman and CEO and Airways announcement that it is changing its name to Astar Air Cargo, further emphasizes the diminishing common control by or with Airways.

By agreement, Airways divested itself of all assets and facilities, equipment, and personnel except for those engaged in air operation. The agreement between DHL, Holdings, and Airways “allows Airways to exercise autonomy over its airline operations as an independent company.” Airways and Holdings “restructured,” dramatically altering Airways control over the employees at issue here, who are now DHL employees. This divestiture of control is not a trivial consequence of the “restructuring.” On the contrary, it is one of the primary purposes of the “restructuring” as stated in the Operating Protocol Agreement and the Service Agreement. Therefore, the control prong of the NMB’s jurisdictional test is not satisfied, and the NMB finds that DHL Worldwide Express, Inc. is not subject to the RLA.

Because DHL does not satisfy the control prong of the test, it is unnecessary for the Board to address the issue of whether DHL employees perform work traditionally performed by employees of air carriers. It is also unnecessary for the NMB to address the IBT’s argument that DHL falls under the “trucking services” exception to the RLA.

DHL’s Express Company Argument

DHL argues it is a “modern day express company” under the meaning of the RLA and, therefore, not subject to the NLRB’s jurisdiction. Under 45 U.S.C. §151, First, the term “carrier” includes “any railroad . . . any express company that would have been subject to subtitle IV of title 49, United States Code as of December 31, 1995.”

DHL acknowledges that the RLA does not specifically define the term “express company.” However, DHL argues that it is covered by the RLA because it is within the definition of an express company the NMB set forth for jurisdictional purposes in REA Express, Inc., 4 NMB 253 (1965). DHL is in error. The NMB did not address the issue of its jurisdiction in REA Express; the NMB’s jurisdiction was not in dispute. In REA Express, the Board addressed the issue of the appropriate craft

or class for certain Clerical, Office, Station and Stores Employees. The NMB stated “express companies from REA on back to the days of Wells Fargo, American and Southeastern Express, have always provided cartage, pick-up and delivery service to their customers.” REA Express, above at 266-67. The NMB provided this description in part “to show that there has never been a craft or class of clerical, office, station and stores employees on REA or its predecessors.” REA Express, above at 266. The NMB’s general description of the express business was not a definition of an “express company” for jurisdiction purposes, and DHL’s reliance on this description is misplaced. Therefore, DHL has not proven that it is an express company within the meaning of the RLA.

VI. CONCLUSION

Based on the record in this case and for the reasons discussed above, the NMB’s opinion is that DHL is not controlled by or under common control with a carrier. Therefore, the control prong of the NMB’s jurisdictional test is not satisfied, and the NMB finds that DHL Worldwide Express, Inc., is not subject to the RLA. This opinion may be cited as DHL Worldwide Express, Inc., 30 NMB 368 (2003).

By direction of the NATIONAL MEDIATION BOARD.

Benetta M. Mansfield

Benetta Mansfield
Chief of Staff

Copy to:
Ronald C. Henson, Esq.
Peter J. Petesch, Esq.
Frank Laquidara
Richard N. Gilberg, Esq.
Richard Brook, Esq.