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Re: NMB File No. CJ-6774
NLRB Case No. 29-RC-9837
*DHL Worldwide Express, Inc.*

Gentlemen:

This determination addresses the June 16, 2003 Motion for Reconsideration filed by DHL Worldwide Express, Inc. (DHL). DHL seeks reconsideration of the National Mediation Board's (NMB) June 12, 2003 determination that DHL is not controlled by or under common control with a carrier and, therefore, is not subject to the Railway Labor Act (RLA).[1] *DHL Worldwide Express, Inc.,* 30 NMB 368 (2003).

On June 25, 2003, Local 804, International Brotherhood of Teamsters (IBT) responded opposing DHL's motion. DHL filed a reply on July 2, 2003. The IBT filed a reply on July 8, 2003.

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[1] 45 U.S.C. § 151, *et seq.*

On July 25, 2003, DHL filed a supplemental brief with the NMB. DHL notified the NMB that DHL Airways, Inc. has been renamed ASTAR Air Cargo (ASTAR) and that DHL Holdings' (USA) Inc. (Holdings) sale of its interest in ASTAR "has fundamentally changed the relationship between the companies." On July 14, 2003, all of the shares of ASTAR were acquired by ASTAR's CEO, John Dasburg and two other independent investors. Holdings no longer has any ownership interest in ASTAR, nor does it have a representative on ASTAR's board of directors. Holdings and ASTAR terminated the Operating Protocal Agreement and ACMI agreement referenced in the NMB's jurisdictional opinion. *DHL*, *above*. As a result of this transaction DHL believes that portions "of its derivative carrier argument are no longer viable" and therefore, withdraws that portion of its Motion for Reconsideration. However, DHL maintains its Motion for Reconsideration based upon its express company argument and that the employees at issue are sufficiently supervised by ASTAR for purposes of RLA jurisdiction.

On July 29, 2003, ASTAR Chairman and Chief Executive Officer, John H. Dasburg, responded to DHL's Motion for Reconsideration. Dasburg states "[t]here are numerous misstatements contained in that letter, as well as in other submissions to the Board made in behalf of [DHL] Worldwide that have recently come to my attention, that I would like to correct." Dasburg states that DHL's assertion that it is covered by the RLA because DHL and Airways are under common control of Holdings "is absolutely not true today and I do not understand that it has ever been true." Dasburg states that while DHL and Airways shared certain services, "they no longer share those services today. Airways now called ASTAR . . . performs all of its own functions." According to Dasburg, "to the extent there was some sharing of services in the past, it was only intended to occur for a short period of time and never to yield any control over Airways to any other entity." Dasburg further states that "at no time was Airways controlled by Holdings. At no time was Airways under 'common control' with

[DHL] Worldwide." Finally Dasburg states that ASTAR does currently contract with DHL "for immaterial ministerial functions such as hosting for one unique software program and ground handling for certain charter flights." ASTAR also has certain requirements relating to the training and supervision of people who come into contact with ASTAR aircraft. However, Dasburg stated "the fact that those individuals must meet certain FAA and ASTAR standards in order to have contact with ASTAR's aircraft does not in any way mean that ASTAR (or Airways before it, for that matter) controlled [DHL] Worldwide or any of its operations. It did not."

For the reasons discussed below, the NMB grants reconsideration and denies relief.

I.

CONTENTIONS

DHL

DHL's Motion for Reconsideration claims that the NMB's determination in *DHL, above,* is inconsistent with well established NMB precedent and created a heightened test for carrier control. DHL states that prior to this decision, the NMB has not required that a carrier do more than recommend transfer or termination of the derivative carrier's employees, nor has the Board required a showing of substantial involvement in the derivative carrier's business operations. DHL argues that the limited case law cited by the NMB in its determination does not support the "dramatic departure" from NMB precedent.

DHL also contends that the NMB's determination is based upon an "erroneous finding" that DHL Airways, Inc.'s (Airways) control over DHL is applied to only a limited number of DHL employees. DHL asserts that the NMB impermissibly relied on non-record evidence in its determination when the NMB referenced the proposed sale of DHL Holdings (USA) Inc.'s

(Holdings) interest in Airways. DHL also argues that the NMB failed to properly consider RLA coverage of DHL as an express company.

In its July 2, 2003 submission, DHL argues that the NMB improperly restricted its analysis to those employees identified in the IBT's petition before the National Labor Relations Board (NLRB) and failed to analyze the appropriate RLA coverage over these employees on a system-wide basis.

DHL requests that the NMB reconsider and reverse its determination. In the alternative, DHL requests "complete review by the full Board, as this matter raises fundamental legal and policy questions going to the scope of the Railway Labor Act and the jurisdiction of the National Mediation Board."[2]

IBT

The IBT states that DHL's motion should be denied because it merely reasserts arguments previously presented and this is insufficient to obtain relief. The IBT states that the NMB did not impermissibly rely on non-record facts. The IBT refers to the NMB's Representation Manual (Manual) Section 8.3 and states that the NMB routinely conducts its own investigation to supplement the record developed by the NLRB and argues that DHL does not cite any authority precluding the NMB from taking notice of relevant information and documentation. The IBT argues that the sale of Holdings' interest in Airways "is pertinent not merely for what may happen, but also for the present status of Airways (as well as the Company's credibility)."

The IBT notes that DHL contends for the first time in its July 2, 2003, reply that the NMB's analysis is restricted to

[2] The full Board has reviewed this Motion for Reconsideration as well as the jurisdictional determination issued on June 12, 2003.

those employees working for DHL at the Long Island City, New York, facility, and the IBT argues that "even a cursory review of the NMB's opinion reveals that the NMB did not restrict its analysis to the courier guards and service agents in the petitioned-for unit."

Finally, the IBT refers to its January 16, 2003, submission and reiterates its point that DHL has not cited a single case in which any company has been found to be covered under the RLA as an express company. The IBT argues that it is not "unreasonable for the NMB to require the Company to show that Congress contemplated an extension of the statute to cover 'alleged modern day express company[ies].'"

The IBT requests that the NMB expedite consideration of the motion. IBT states that "employees in the petitioned – for unit should now be permitted to choose Local 804 as their bargaining agent, among other reasons, so that they may benefit from collective bargaining before the Company finalizes its merger with Airborne."

II.

DISCUSSION

The Standard for Motions for Reconsideration

The NMB finds that DHL has stated sufficient grounds to grant reconsideration pursuant to Manual Section 11.0.

Manual Section 11.0 states, in part:

> The motion must state the points of law or fact which the participant believes the NMB has overlooked or misapplied and the grounds for the relief sought.

The Board grants relief on Motions for Reconsideration in limited circumstances. Manual Section 11.0 further states:

> Absent a demonstration of material error of law or fact or under circumstances in which the NMB's exercise of discretion to modify the decision is important to the public interest, the NMB will not grant the relief sought. The mere reassertion of factual and legal arguments previously presented to the NMB is insufficient to obtain relief.

The Board does not reverse prior decisions on reconsideration except in the extraordinary circumstances where, in its view, the prior decision is fundamentally inconsistent with the proper execution of the NMB's responsibilities under the RLA. *Mesa Airlines Inc./CCAir, Inc.,/Air Midwest, Inc.,* 30 NMB 65 (2002); *Virgin Atlantic Airways,* 21 NMB 183 (1994).

Carrier Control

DHL argues that the NMB departed from well-established precedent and created a "heightened test for carrier control." DHL states that prior to this decision, the Board has not required that a carrier do more than recommend transfer or termination of the derivative carrier's employees, nor has the Board required a showing of substantial involvement in the derivative carrier's business operations.

To determine whether there is carrier control over a company, the NMB looks to several factors, including: the extent of the carriers' control over the manner in which the company conducts its business; access to company's operations and records; role in personnel decisions; degree of supervision over the company's employees; control over employee training; and whether company employees are held out to the public as employees of the carrier. *Signature Flight Support of Nevada,* 30 NMB 392 (2003); *Aeroground, Inc., 28* NMB 510 (2001); *Miami Aircraft Support*, 21 NMB 78 (1993); *Ogden Aviation Servs.*, 20 NMB 181 (1993); *Sapado I (Dobbs Int'l Servs., Inc.)*, 18 NMB 525 (1991). DHL cites these factors

in its motion and argues that the NMB "has simply ignored this well-established test."

DHL's characterization of these factors as a "well-established test" is misleading. The NMB has a two-part test for determining jurisdiction: function and control. However, the Board does not have a control test per se. The factors listed above provide guidance as to the facts which the NMB may consider when analyzing carrier control over an employer that is not a rail or air carrier engaged in the transportation of freight or passengers. These factors are not an all-inclusive "test". Contrary to DHL's assertion, the NMB did consider facts relating to "the extent of the carriers' control over the manner in which the company conducts its business; access to company's operations and records; role in personnel decisions; degree of supervision over the company's employees; control over employee training; and whether company employees are held out to the public as employees of the carrier." The NMB made findings of fact regarding each of these issues in its determination. Based upon these findings, the NMB determined that Airways' does not have sufficient input into DHL's business operations to constitute control by a carrier. This is not a new "test." It is the conclusion the NMB reached after evaluating the factors DHL characterizes as a "well-established test."

System-wide Analysis

DHL contends that the Board should grant its motion because the NMB "improperly restricted its analysis to those employees identified in the NLRA petition and failed to analyze the appropriate RLA coverage over these employees on a system-wide basis." In its motion, DHL argues that the "couriers perform these [airport operations] functions on a system-wide basis."

DHL's argument suggests that all couriers throughout the system consistently perform all or most of the functions listed by DHL on a regular basis. However, the record does not

support this argument. The NMB made its determination on the entire record and relied, in part, on testimony from DHL's witness, William Deering, Regional Service Director for DHL. Deering testified about operations at DHL's facilities including the "petitioned-for" Long Island City facility. The NMB referred to this testimony in its findings of fact. Deering testified regarding the numbers of employees at the Long Island City facility who go to the airport and the training these employees received in loading and unloading planes. Deering compared the Long Island City operations with operations at smaller service centers. For example, Deering stated that 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 [sic] specialized jobs." According to Deering's testimony, the courier guard primarily drives a vehicle to and from the airport or picks up and delivers packages to and from customers. Service agents sort packages - "their primary function is in the warehouses." There is no basis for DHL's argument that the Board restricted its analysis only to the DHL's Long Island City employees.

Holdings' Sale of its Interest in Airways

DHL argues that the NMB erred by referencing the sale of Holdings' interest in Airways because the NMB "impermissibly relies on facts that are not only absent from the record, but have not even occurred." The NMB did not "rely" on the sale of Holdings' interest in Airways as the basis for its finding of no jurisdiction. On the contrary, in its determination, the NMB explicitly stated "**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." *DHL Worldwide Express, Inc.,* 30 NMB 368, 380 n.4 (2003). (emphasis added).

DHL's Express Company Argument

In its brief, DHL advanced the argument that it is a carrier as defined by Section 151 of the RLA because it is a "modern day express company." DHL acknowledges that "the RLA does not specifically define the term" and based this argument on the Board's determination in *REA Express, Inc.,* 4 NMB 253 (1965), as well as "characteristics of an express company" set forth in decisions by the Interstate Commerce Commission (ICC) from the period 1955-1970.

DHL argues that the NMB failed to properly consider its argument that it is a "modern day express company" and therefore is a carrier under the RLA. DHL states that the NMB's "opinion is based on the improper assumption that DHL is required to 'prove' RLA jurisdiction." In *DHL,* the NMB stated that DHL had not "proven that it is an express company within the meaning of the RLA." A*bove* at 382. DHL interprets this to mean that the NMB improperly shifted a burden of proof from the IBT to DHL. This is a misinterpretation of the NMB's determination. The NMB did not shift a burden of proof from IBT to DHL. Rather, the NMB evaluated DHL's argument and found that it provided no basis for finding it is covered by Section 151 as a "modern day express company."

The NMB considered DHL's argument that it is a "modern day express company" and determined the following: the RLA does not define the term express company; and the NMB in *REA Express* does not define the term express company for jurisdictional purposes. DHL does not cite any NMB jurisdictional determinations where a company has been found to be covered by the RLA because it is an express company. In short, DHL provides no definition for its own term "modern day express company." Nonetheless, DHL argues in its motion that it "submitted ample record evidence that it meets each and every element of an express company as that term is used under the RLA," and the NMB is obligated to analyze why DHL's operations do not meet the standards for an express company under the RLA or provide an alternative definition of a

"modern day express company." DHL is incorrect. While there are no definitions for "express company" or "modern day express company" in the RLA, the NMB analyzes each case on its facts and applies the RLA. The NMB analyzed the facts of this case and found DHL's "express company" argument unpersuasive. DHL's argument that the NMB provide its own definition of a "modern day express company" improperly puts the NMB in the position of arguing DHL's case.

The NMB finds that DHL's claims are insufficient to obtain relief pursuant to Manual Section 11.0.

CONCLUSION

The NMB has reviewed DHL's and the IBT's submissions. DHL has failed to demonstrate a material error of law or fact or circumstances in which the NMB's exercise of discretion to modify the decision is important to the public interest. Therefore, relief upon reconsideration is denied.

By direction of the NATIONAL MEDIATION BOARD.

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