



**NATIONAL MEDIATION BOARD**

WASHINGTON, DC 20572

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31 NMB No. 91

June 18, 2004

Hank Breiteneicher  
Acting Solicitor  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, DC 20571-0001

Re: NMB File No. CJ-6848  
International Cargo Marketing Consultants  
d/b/a Alliance Air

Dear Mr. Breiteneicher:

This letter responds to your request for the National Mediation Board's (NMB) opinion regarding whether International Cargo Marketing Consultants d/b/a Alliance Air (Alliance) is subject to the Railway Labor Act (RLA), 45 U.S.C. § 151, *et seq.* On April 14, 2004, the National Labor Relations Board (NLRB) requested an opinion regarding whether Alliance's operations at JFK International Airport (JFK) in Jamaica, New York, are subject to the RLA.

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

I. PROCEDURAL BACKGROUND

This case arose out of a representation petition filed with the NLRB by Local 295, International Brotherhood of Teamsters, AFL-CIO (IBT or Organization) on December 15, 2003. The representation petition led to an election by secret ballot held January 23, 2004 among, "all full-time and regular part-time warehouse cargo agents" employed at Alliance's

facility at JFK. After the election, Alliance raised the issue of jurisdiction -- specifically contending that the NLRB did not have jurisdiction over the dispute and that the NMB was the appropriate adjudicating agency.

On March 12 and 15, 2004, hearings were held in NLRB Region 29. On April 14, 2004, the NLRB requested an NMB opinion regarding the NMB's jurisdiction over Alliance's JFK operations. On April 16, 2004, the NMB assigned Cristina A. Bonaca to investigate. The participants did not file additional submissions with the NMB.

The NMB's opinion in this case is based upon the request and record provided by the NLRB, including the hearing transcripts and exhibits, and the post-hearing briefs submitted by Alliance and the IBT.

## II. ALLIANCE'S CONTENTIONS

Alliance contends that it satisfies both the "function" and "control" parts of the two-part test established by the NMB for determining jurisdiction of employers that are not owned by or under common ownership with an RLA carrier. As to the "function" portion of the test, Alliance argues that cargo handling is work traditionally performed by air carrier employees. See *North Am. Aviation Serv. PHL, Inc.*, 28 NMB 155 (2000); *Aeroground, Inc.*, 28 NMB 510 (2001). Alliance also contends that it meets the "control" portion of the test since its airline customers directly and indirectly control its JFK operations and employees. Alliance also notes that in every case where the NMB has considered the carrier status of airline service companies, like Alliance, it has found such companies to be sufficiently under airline control so as to subject them to RLA jurisdiction. See *John Menzies PLC d/b/a Ogden Ground Servs., Inc.*, 30 NMB 463 (2003).

Alliance argues that the International Air Transport Association (IATA) ground handling agreements with each of its six airline customers at JFK contain a variety of provisions demonstrating the control the airline customers have over all

phases of Alliance's operations, including most significantly, the right to terminate the agreement with or without cause. Alliance contends that its customer airlines control, oversee, and coordinate its daily activities, and have full access to Alliance work areas and records. The carriers establish and modify their flight schedules which form the basis for the Alliance employees' schedules. The airline customers determine which shipments will go on which flights, the number of pallets to be built and how the pallets will be built -- and supervise the Alliance employees in the performance and priority of these tasks. All of the carriers have representatives on the warehouse floor and in the documentation offices, who oversee and supervise Alliance employees. Airline customers provide: equipment including pallets, nets, straps and pallet tags; computer equipment, and software; telephones and telephone lines, and; forms of documentation used by Alliance employees.

Alliance contends that its airline customers meet regularly with Alliance management over service and related issues. Alliance further contends that the carriers control the manner in which Alliance employees perform their duties, since Alliance employees are trained according to specific carrier and Federal Aviation Administration (FAA) procedures. Alliance argues that its airline customers are integrally involved in employment decisions, identifying persons for hire, recommending persons for promotions, and requesting that certain employees be removed from their accounts. Alliance also argues that the carriers influence staffing and scheduling, and work with Alliance managers on a daily basis to reschedule employees because of changed flight schedules, changed shipment priorities, or changed hours of operations.

Finally, Alliance argues that public policy is best served by finding NMB jurisdiction because application of the RLA will minimize possible disruptions to the operation of the carriers, which are providing critical air carrier cargo handling services.

### III. IBT'S CONTENTIONS

The Organization argues that Alliance is not sufficiently controlled by its airline customers to establish RLA jurisdiction, as Alliance retains exclusive control over the hiring, compensation, benefits, supervision, scheduling, promotion, transferring, and discipline of its employees. IBT contends that the only instance when an airline customer can direct an Alliance employee is when a pallet needs to be rebuilt due to safety concerns. IBT also asserts that while airline customers may recommend that Alliance hire a particular person, Alliance makes the ultimate decision after independently interviewing and assessing the person's qualifications.

IBT contends that although the carriers' representatives stationed at JFK oversee Alliance's overall operations, they do not actually supervise Alliance employees. Further, Alliance provides uniforms for its warehouse and office employees with the Alliance logo, and all airline customers must receive approval from Alliance before displaying their own signage. Alliance rents space at JFK, buildings 21 and 23, which it leases to many of its airline customers. Finally, IBT points out that the automated telephone system first identifies a caller that they have reached Alliance, and then prompts the caller to dial a number for a particular airline.

### IV. FINDINGS OF FACT

#### Alliance

For 18 years, Alliance has been providing cargo ground handling services to domestic and international airlines at four U.S. airports, including JFK for the last three to four years.<sup>1</sup> Alliance is 100 percent owned by Robert L. Jones, Jr., and neither directly or indirectly owned by an airline or railroad.

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<sup>1</sup> Operations in buildings 21 and 23 began in the summer of 2003.

Alliance is commonly-owned with Kenosha Aero, an on-demand cargo charter company certified by the FAA under Part 135. Another commonly-owned company, Tri-Express, is a 48-state common truck broker that transfers cargo, on an interline basis, between gateways and inland cities. Alliance does not employ any truck drivers but where import airline customer freight requires trucking to an inland city, it will use Tri-Express or other truck companies to provide that service. Alliance has six customers at JFK -- El Al Israel Airlines (El Al), Lan Chile, LOT Polish Airlines (LOT), Varig Brazilian Airlines (Varig), Kalitta Air (Kalitta), and Polar Air (collectively carriers or airline customers). Alliance employs approximately 725 employees nationwide, including 150-160 at JFK. At JFK, Alliance services approximately 37 inbound and outbound passenger flights, as well as approximately 24 inbound and 16 outbound freighters per week.

#### Nature of Work of Alliance Employees

Alliance employees perform a variety of duties for the carriers at JFK. Generally, warehouse agents and leads are dedicated to work on specific airline accounts. All office staff for the carriers have specifically assigned Alliance employees; when they are not busy working for their assigned carrier, they do no work for other carriers.

Alliance's cargo agents, lead agents, and supervisors handle all facets of outsourced cargo handling services for Alliance's airline customers including: for export cargo, receipt of the cargo and documentation, staging the cargo in the warehouse, building the cargo on pallets for carriage to the customer airline, preparing carrier cargo documentation, transporting the cargo and documents to the aircraft, and; for import cargo, transporting cargo from the aircraft to the warehouse, breaking down the pallets, staging the cargo in the warehouse, handling the incoming documentation, and delivering the cargo to companies that pick it up at the warehouse.

In addition to the physical handling of its airline customers' freight, Alliance handles all aspects of customer service and documentation for the carriers, including preparation of flight manifests, breakdown of airline airway bills, dangerous goods documentation, tracking and tracing shipments, data input in airline customers' computer systems, and telephone customer service.

#### Carrier Control over Alliance's Operations and Employees

Alliance has standard IATA ground handling agreements with each of its six airline customers at JFK, and bills them monthly for handling services and office space. These agreements differ depending on the airline customer, but generally they:

- Provide that Alliance serves as the handling agent for, and, effects payments on behalf of, the carrier;
- List the functions Alliance is to perform for the carrier;
- Require storage and handling techniques per the carrier's requirements;
- Require immediate notification of the carrier in the event of any irregularities and in a method specified by the carrier;
- Require that messages be received, processed and sent as required by the carrier;
- Require that documents be checked to ensure that shipments are carried in accordance with the carrier's requirements;
- Require cooperation with the carrier's designated representatives;

- Require the handling of a variety of administrative functions according to the carrier's requirements, including establishing and maintaining procedures, acting on communications addressed to carriers, preparing reports, manual maintenance, and invoices;
- Require that: "Dangerous Goods will be accepted by . . . [Alliance] . . . trained personnel in accordance with the latest edition of the IATA 'Dangerous Goods Regulations,' the Carrier's special instructions and any and all FAA and TSA<sup>2</sup> regulations" (Exhibit 7, IATA Standard Ground Handling Equipment between Lan Chile and Alliance, Sec. 1.1.3);
- Provide that a carrier may use its own signage;
- Require the use of carrier computer systems;
- Require carrier coordination on all training requirements, and;
- Provide termination procedures which allow the carrier to terminate the agreement without cause, or for unsatisfactory performance by Alliance. Paragraph 10.2 of Lan Chile's IATA agreement provides: "[E]ither party may terminate the Agreement at any time prior to the termination date, with or without cause, by providing sixty (60) days written notice of termination to the other."

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<sup>2</sup> Transportation Security Administration.

In addition, the carriers' freighters are parked on ramp space leased by Alliance. All of the carriers at buildings 21 and 23<sup>3</sup> have offices within space leased by Alliance (El Al leases its space directly, other carriers reimburse Alliance for the cost of the office space), and in some cases, the carriers are adjacent to Alliance offices. Each carrier has a dedicated phone line, and Alliance employees answer the phone in the name of the carrier they are servicing. However, the automated telephone system first notifies the caller that they have reached Alliance and then prompts the caller to dial a particular number for a particular airline. Alliance staff generate documentation in the name of the carrier to which they are assigned, interact with airline flight crews when delivering documents and getting document signatures, and maintain carrier files and inventory records of carrier property.

#### Hiring Procedures

Alliance hires and promotes its employees. However, airline customers effectively hire Alliance employees when they identify persons for hire, for both managerial and agent positions, and suggest suitable pay. Alliance regularly accommodates these requests, and has hired approximately 10 employees at the recommendations of its airline customers. Robert T. Jones, Jr., President and CEO of Alliance, testified that the following employees were hired at the recommendation of airline customers: El Al recommended the hire of Sylvain Kahana, Amy Perez, Claudia Leon, Hilda Leon, Flabia Henry, Deanne Hamilton; LOT recommended the hire of Pat Egan and Neil O' Sullivan, and; Lan Chile recommended the hiring of Mauricio Bianco, Elsy Saramiento, and Jimme Revueitas.

Alliance will conduct its own screening to ascertain the qualifications of an individual, and will not hire a person based on a carrier recommendation alone. However, some airline customers, like El Al, will require that Alliance's new hires

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<sup>3</sup> Kalitta, LOT, and Varig are in building 21, and El Al and Lan Chile are in building 23. Polar Air has its own facility.



undergo their own security check before accepting them as suitable to work on their staff. Customer airlines also make recommendations for promotion and request that certain Alliance employees are assigned to their accounts, and such requests have been accommodated.

#### Authority to Remove or Discipline Alliance Employees

Alliance fires and disciplines its employees. Airline customers, however, also effectively recommend discipline and re-assignment of Alliance employees, and Alliance has accommodated these requests. Robert T. Jones, Jr. testified that per an El Al supervisor's request, Alliance assigned other employees to the afternoon shift so as to minimize contact with an Alliance employee with whom the El Al supervisor had issue. In addition, airline customers provide regular input regarding staffing issues.

#### Work Scheduling

The schedules of the airline customers effectively dictate the hours worked by Alliance employees. The airlines establish and often modify their flight schedules, which in turn form the basis for Alliance work schedules and modifications to those schedules. At all stations, there is daily communication with carrier managers regarding cargo activities, late departures, and cargo handling irregularities. Alliance regularly works with its customer airlines in rescheduling employees to accommodate changed flight schedules or changed hours of operation, and to set quality and performance standards for Alliance employees.

#### Supervisory Authority

While Alliance has responsibility for supervising its employees, the carrier representatives supervise Alliance employees in the building of pallets and in the priority of work assignments. Alliance employees must follow airline work specifications in manuals distributed and created by the airline customers. Further, carrier representatives in the warehouses

and documentation offices oversee and coordinate the daily work of the Alliance employees assigned to them, including the handling of dangerous or specialized cargo.

### Training and Uniforms

Airline customers require that the Alliance employees assigned to them undergo specific training. For example, Lan Chile assigned its own employees (transferred from Miami and Santiago for a month) to train the Alliance employees assigned to its account. El Al brought in employees from Tel Aviv to train Alliance employees, and Varig and LOT have also trained Alliance staff. El Al also requires special training for the handling of dangerous goods.

Alliance's warehouse and office employees wear t-shirts or polo shirts with the Alliance logo. However, Polar Air plans to have its Alliance employees wear the Polar Air logo on their uniforms, as they currently do at their Chicago operation.

### Audits

Airline customers have the right to audit Alliance. Robert T. Jones, Jr. testified that Alliance recently accommodated a request by Lan Chile for a reworking of all their documentation and an audit. Specifically, the IATA ground handling agreements provide that airline customers have the right to review documents created by Alliance employees to ensure that shipments are conducted in the manner instructed by the specific carrier. In addition, the carriers require Alliance to maintain an inventory of records on carrier property, and have utilized their right to audit and access documentation prepared on their behalf.

### Equipment

Airline customers supply computer hardware and software, and in some cases provide phone systems. The carriers also provide equipment and forms for the Alliance employees' use, including pallets, straps, and pallet tags.

Alliance provides equipment and office and warehouse space for some of its customers, excluding Polar Air (which has its own building) and El Al (which leases the space directly rather than through Alliance).

## 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. *Aircraft Serv. Int'l Group Inc.*, 31 NMB 361 (2004); *Signature Flight Support of Nevada*, 30 NMB 392 (2003); *AvEx Flight Support*, 30 NMB 355 (2003). 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. *Id.*

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

#### 1. Alliance Employees Perform Work Traditionally Performed by Employees of Air Carriers

Alliance's employees perform cargo handling services at JFK (receiving and staging cargo, pallet buildup, transporting cargo from aircraft to the warehouse, pallet breakdown, staging and delivery to consignees, and related documentation and customer service), all of which is work traditionally performed by air carriers. *See North Am. Aviation Serv.*, 28 NMB 155, 159 (2000) ("It is well established that cargo handling is work traditionally performed by air carrier employees."); *Aeroground*,

*Inc.*, 28 NMB 510, 514 (2001); *Evergreen Aviation Ground Logistics Enterprises, Inc.*, 25 NMB 460, 462 (1998). Therefore, the NMB finds that Alliance employees perform functions which have been traditionally performed by airline employees.

2. Carrier Control Over Alliance and Its Employees

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 the company's operations and records; role in personnel decisions; degree of supervision of the company's employees, and; control over employee training. *Aircraft Serv. Int'l Group, above*; *Signature Flight Support of Nevada, above*; *John Menzies PLC d/b/a Ogden Ground Servs., Inc.*, 30 NMB 405 (2003); *Aeroground, Inc., above*; *Miami Aircraft Support*, 21 NMB 78 (1993).

The airline customers exercise substantial control over Alliance's operations and employees at JFK. The carriers are Alliance's only customers at JFK. Carrier schedules dictate staffing levels and hours for Alliance employees. Carriers require Alliance employees to follow their manuals and training procedures. Carriers effectively supervise Alliance employees in the building of pallets and the priority of work projects, and provide equipment for Alliance's use, including pallets, nets, straps, pallet tags, as well as computer equipment, software, and documentation forms. Carriers can audit and access all Alliance records prepared on their behalf. Carriers have effectively hired, promoted, and re-assigned Alliance employees.

Although Alliance currently provides uniforms for its employees, Polar Air's plan to require its own uniform demonstrates a willingness by Alliance to accommodate its airline customers' uniform preferences. Finally, Alliance's IATA ground handling agreements with its airline customers grant the carriers considerable control over all phases of its operations, including: specifying methods of storage and handling techniques; requiring cooperation of Alliance staff with carrier representatives; requiring specific performance of

various administrative tasks, and; giving the carriers the right to terminate the agreement with or without cause.

The record shows that the airline customers exercise sufficient control over Alliance's employees to support a finding of RLA jurisdiction.

CONCLUSION

Based on the record in this case and for the reasons discussed above, the NMB's opinion is that Alliance and its employees at JFK are subject to the RLA. This opinion may be cited as *International Cargo Marketing Consultants d/b/a Alliance Air*, 31 NMB 396 (2004).

By direction of the NATIONAL MEDIATION BOARD.

A handwritten signature in cursive script that reads "Mary L. Johnson".

Mary L. Johnson  
General Counsel

Copies to:  
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Larry Cary, Esq.