



NATIONAL MEDIATION BOARD

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33 NMB No. 2
October 13, 2005

Henry S. Breiteneicher
Acting Solicitor
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20571-0001

Re: NMB File No. CJ-6883
Empire Aero Center, Inc.

Dear Mr. Breiteneicher:

This letter responds to your request for the National Mediation Board's (NMB) opinion regarding whether Empire Aero Center, Inc. (Empire or Employer) is subject to the Railway Labor Act (RLA), 45 U.S.C. § 151, *et seq.* On June 3, 2005, the National Labor Relations Board (NLRB) requested an opinion regarding whether Empire's operations at its facility in Rome, New York (Rome), are subject to the RLA.

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

I. PROCEDURAL BACKGROUND

This case arose out of a representation petition filed by the United Steelworkers of America, AFL-CIO, CLC (Steelworkers), on March 28, 2005 with the NLRB seeking to represent all production and maintenance employees at Rome. Empire objected to the NLRB's jurisdiction on the ground that its Rome employees and operations are subject to the RLA.

A hearing was held in NLRB Region 3 on April 11, 2005. On June 3, 2005, the NLRB requested an NMB opinion regarding the NMB's jurisdiction over Empire's Rome operations. On June 8, 2005, the NMB assigned Maria-Kate

Dowling to investigate. The participants filed their respective submissions with the NMB on June 20 and June 22, 2005.

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

II. CONTENTIONS

Empire

Applying the NMB's two-part function and control test for determining jurisdiction of employers that are not owned by or under common ownership with an RLA carrier, Empire contends it is subject to the RLA. Empire notes that the Steelworkers concede that the work performed by Empire's employees satisfies the function part of the test. Empire further contends that it satisfies the control part of the test since the air carriers for whom Empire provides maintenance, repair and overhaul, exercise significant control over Empire and its employees during that process. Air carrier representatives remain at the Rome facility on a full-time basis during the repair and oversee Empire's work on the aircraft. Empire employees receive training from the carrier prior to the commencement of the project, perform the work according to the carrier's maintenance program and specifications, and utilize equipment provided by the carrier. The carrier has the right to approve and to remove the Empire employees who work on its aircraft, and regulates the hours worked by those employees on its project.

Steelworkers

The Steelworkers do not contest that the aircraft repair work performed by Empire's employees is work traditionally performed by employees in the airline industry. The Steelworkers contend, however, that between 50 and 80 percent of the repair work is performed on military aircraft over which the NMB has no jurisdiction. The Steelworkers further

contend that the air carriers have only a limited role in Empire's daily operations. The air carriers play no role in interviewing or hiring Empire employees and do not recommend applicants for hire. The Steelworkers assert that only a small amount of training is controlled by the air carriers and that it is the government not the air carriers that dictates what work must be done. Finally, the Steelworkers assert that Empire's employees are not held out to the public as carrier employees.

III. FINDINGS OF FACT

Empire

Empire, which commenced its Rome operation in January 2004, performs maintenance, repair, and overhaul (MRO) of aircraft. The Employer is commonly referred to in the industry as an MRO contractor. According to Giora Leitner, Empire's Senior Vice-President and Chief Financial Officer, the work is mainly performed for commercial air carriers but Empire also performs MRO work on private and military aircraft. Leitner stated that Empire performs "close to 80 percent" of its work on commercial aircraft and the remaining percent is on military aircraft. According to Jeffrey Story, Vice-President of Operations, during the six months preceding the NLRB hearing, Empire had 49 projects in house, of which 47 were commercial and two were military.

Empire's MRO work is regulated by the Federal Aviation Administration (FAA) and Empire holds an FAA Repair Station Certificate. The duration of the work performed depends on the type of aircraft and the MRO required, and can range from one to four days at the basic level to three months or longer at the highest level.

Nature of Work for Empire Employees

According to Leitner, Empire employees perform maintenance work that is identical to the maintenance work performed by aircraft employees employed by commercial

airlines. Empire has contracts with Atlas Air, Evergreen International Airlines, Kitty Hawk, Omni International, Midwest Airlines, Capital Cargo, Gemini Air Cargo, ATI, and Pegasus (referred to individually as “Carrier” or collectively as “the Carrier customers”). Each Carrier has its own maintenance manual which is derived from the aircraft manufacturer. The manufacturer supplies the Carrier with a basic maintenance program from which the Carrier develops a detailed maintenance program. The work performed by Empire is dictated by the Carrier, usually through a card detailing the specific inspections of its maintenance program. Using the card, Empire employees check the aircraft and perform the required maintenance. Empire has four classifications of employees: (1) exhibit air frame and power plant mechanic; (2) non-destructive test technician (NDT technician); (3) aircraft sheet metal technician; and (4) aircraft avionics and electrical mechanic.

Carrier Control over Empire’s Operations and Employees

Audits

According to John Kupiec, Empire’s Director of Human Resources, the Carrier customers audit Empire to make sure it is complying with the FAA’s requirements for maintenance providers.

Hiring and Discipline

Carrier representatives are not involved in interviewing or hiring Empire employees. Empire’s Human Resources department conducts the required background checks and carries out any required drug testing. Carrier representatives do not discipline Empire employees.

Supervisory Authority and Work Scheduling

Empire’s Carrier customers specify the time and manpower to complete the MRO. According to Jeffrey Story, Vice-President of Operations, the Carrier customers “tell me

basically okay I need my airplane worked on for three days . . . [and we] have to have it ready to deliver at 2.75 days,” since Empire allows a quarter of a day as a buffer. Empire’s planning department works directly with the Carrier’s planning department to determine the required number of employees to complete the job on schedule and how the work will be split between employee classifications. While Empire has some ability to negotiate an extended schedule, Empire is fined for failure to meet the agreed-upon maintenance schedule.

The Carrier customers also maintain at least one representative on site to oversee the MRO work and the required paperwork. Generally the Carrier will send two representatives: a technical representative, and a quality representative. These Carrier representatives are present at Empire’s facility from the time the aircraft is delivered until the time the aircraft is re-delivered. Empire provides the Carrier representatives with offices and dedicated computers, faxes and phones.

Storey stated that the Carrier’s technical representatives have directed Empire technicians to stop work and have reported problems to an Empire project manager. According to Storey: “[T]he project manager will bring it to the director of maintenance and then to my office and I end up sitting there with eight to 10 guys working our way through the issue so that the customer feels satisfaction on his part and we understand where we weren’t correct.” Storey added that the Carrier representatives are responsible for the maintenance work as the holder of the FAA Operations Specification.

The Carrier customers also have a right of refusal with regard to the Empire employees assigned to their projects. Before the project begins, Empire provides the Carrier with a list of employees qualified to work on their aircraft. The Carrier reviews the qualifications of each employee on that list and approves or rejects the Empire employee individually. If the Carrier is not satisfied with the qualification of a particular Empire employee on the list, the Carrier will notify Empire and

ask that the employee's name be removed and another qualified employee be provided.

Authority to Remove or Discipline Empire Employees

Once a project has begun, the Carrier customers have requested the removal of project managers and technicians. Empire has complied with those requests. According to Story, if a Carrier objects to an Empire employee assigned to its project, that employee will be removed from the project and reassigned. Story stated that he has reassigned both project managers and technicians in response to a Carrier's request. Story noted that while Empire wants to provide good quality service, the Carrier is responsible for the maintenance program of its aircraft.

Equipment

Empire's equipment must be maintained according to the specifications of its Carrier customers. If the equipment does not meet those specifications, the Carrier can require Empire to improve that equipment. For example, Story stated that Empire has the "capital and the asset as far as the tooling goes but they have to approve the tooling. If . . . they feel it doesn't meet the tooling requirements for their program, they can cause us to go out and spend more money on tooling or they can say I'm not bringing the aircraft until you get this tooling and I've had that problem." If a Carrier requires special equipment, the Carrier will send it to Empire to use on a project. Story stated that for one particular check, Evergreen brought four pieces of test equipment to the Rome facility so that Empire could provide the maintenance.

Training

Empire trains employees on general maintenance manual and procedures, but the Carrier customers provide additional training on their techniques and the manner in which their aircraft are to be inspected and repaired. Each Carrier provides trainers who come to Empire's Rome facility at

least once a year to provide carrier specific training for Empire employees. Each of the Carriers provide between 20 and 60 hours of their own training per Empire employee per year. According to Story, the Carrier customers “come in and train my guys to run their aircraft.” According to Vice-President Leitner, even if an employee is trained to work on a 747 for one Carrier, he cannot work on a 747 for another Carrier unless he has received specific training from that Carrier.

IV. 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. *Signature Flight Support*, 32 NMB 214 (2005). First, the NMB determines whether the nature of the work is that traditionally performed by employees of rail or air carriers. Second, the NMB determines whether the employer is directly or indirectly owned or controlled by, or under common control with a carrier or carriers. Both parts of the test must be satisfied for the NMB to assert jurisdiction. *Signature Flight Support*, above; see also *Signature Flight Support/Aircraft Serv. Int’l, Inc.*, 32 NMB 30 (2004).

Empire does not fly aircraft and is not directly or indirectly owned by an air carrier. The Steelworkers concede that aircraft MRO performed by the unit employees at issue is work traditionally performed by employees in the airline industry. Therefore, to determine whether Empire is subject to the RLA, the NMB must consider the degree of direct or indirect control exercised over its operations by its Carrier customers. *

To determine whether there is carrier control over a company, the NMB looks to several factors, including: the

* Contrary to the Steelworkers’ contention, the record establishes that a significant percentage of its MRO work is performed for common carriers by air.

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 of the company's employees; whether employees are held out to the public as carrier employees and control over employee training. *Signature Flight Support, above; Signature Flight Support/Aircraft Serv. Int'l, Inc., above; Signature Flight Support of Nevada, 30 NMB 392 (2003); John Menzies PLC, d/b/a Ogden Ground Servs., Inc., 30 NMB 405 (2003); Aeroground, Inc., 28 NMB 510 (2001).*

Carrier Control over Empire and Its Employees

The record in the instant case establishes that Empire's Carrier customers exercise substantial control over the manner in which Empire conducts its MRO operation. Each Carrier specifies the time and the manpower for completion of its MRO. Empire is subject to fines if the project is not completed on schedule. Although Empire hires its own employees, the Carrier customers can effectively recommend employee assignment and reassignment. Before a project begins, Empire provides the Carrier with a list of employees selected for the Carrier's project and the Carrier investigates each employee's training and qualifications and individually approves or rejects the Empire employees. Carrier representatives maintain offices at Rome, use dedicated equipment provided by Empire, and monitor the MRO work on their aircraft. During a project, the Carrier can and has requested the removal and reassignment of Empire employees. The Carrier customers require and provide specific training for Empire employees. The Carrier customers also require that Empire maintain equipment to their specifications and can require Empire to pay for improvement to that equipment. When required for MRO, the Carrier will provide special equipment for Empire to use. The Carrier customers also audit Empire to ensure that it meets FAA maintenance requirements.

In *Globe Aviation Services, 28 NMB 41 (2000)*, the NMB found RLA jurisdiction where the carriers required specific training, including the right to review and approve training

materials and attend classroom training. The carriers also gave specific directions regarding the manner in which the Globe employees performed their job and possessed the right to remove specific employees from their service.

Similarly, in the instant case, Empire's Carrier customers: not only require specific training but provide the annual training and trainers; review the training of Empire employees before approving their assignment to a project; and participate in the planning of MRO projects including setting the time limits for completion of MRO, and the manpower and assignment of work between employee classifications. The Carriers also audit Empire's records and assign Carrier representatives to oversee the entire MRO project. The substantial control exercised by the Carrier customers over Empire's day to day performance of MRO work is not diminished by the fact that Empire hires its own employees and that its employees do not hold themselves out as Carrier employees.

In sum, the record shows that Empire's Carrier customers exercise sufficient control over Empire's operations 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 Empire and its employees at Rome are subject to the RLA. This opinion may be cited as *Empire Aero Center, Inc.*, 33 NMB No. 3 (2005).

By direction of the NATIONAL MEDIATION BOARD.



Mary L. Johnson
General Counsel

Copies to:
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