



NATIONAL MEDIATION BOARD

WASHINGTON, DC 20572

(202) 692-5000

35 NMB No. 58

July 9, 2008

William B. Cowen
Solicitor
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570-001

Re: NMB File No. CJ-6933
Air Serv Corporation

Dear Mr. Cowen:

This responds to your request for the National Mediation Board's (NMB) opinion regarding whether Air Serv Corporation (Air Serv or Employer) is subject to the Railway Labor Act (RLA), 45 U.S.C. § 151, *et seq.* On March 21, 2008, the National Labor Relations Board (NLRB) requested an opinion regarding whether Air Serv's operations in Memphis, Tennessee (Memphis) are subject to the RLA.

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

I. PROCEDURAL BACKGROUND

This case arose out of a representation petition filed by Teamsters Local Union No. 984, affiliated with the International Brotherhood of Teamsters, (Local 984 or Union) on January 22, 2008, in NLRB Case No. 26-RC-8548. Local 984 seeks to represent Air Serv's drivers performing shuttle transportation services for Federal Express Corporation (FedEx) in Memphis.

On February 6, 2008, the NLRB held a pre-election hearing to obtain evidence on whether Air Serv was subject to the jurisdiction of the National Labor Relations Act or the RLA and on the proper scope of the bargaining unit. On February 22, 2008, the Regional Director for the NLRB's Region 26 issued a decision finding that the Employer was subject to RLA's jurisdiction and dismissing the petition. Subsequently, on March 11, 2008, the Regional

Director withdrew his decision, and on March 21, 2008, the NLRB requested an NMB opinion regarding NMB jurisdiction over Air Serv's Memphis operations.

On March 25, 2008, the NMB assigned Harry Jones to investigate. On April 8, 2008, Local 984 and the Employer each filed a position statement. On May 1, 2008, the case was reassigned to Maria-Kate Dowling.

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 submissions from the participants.

II. CONTENTIONS

Local 984 contends that neither part of the NMB's two-part jurisdictional test for non-carrier employers is satisfied. Local 984 states that Air Serv's shuttle bus drivers do not perform work traditionally performed by carrier employees. The Union also states that FedEx does not exert sufficient control over Air Serv's day-to-day operations to confer RLA jurisdiction. According to Local 984, Air Serv handles its own payroll and sets its wages and benefits. Local 984 also asserts that the Transportation Security Administration and the Department of Transportation, not FedEx, set the rules regarding drug screening and security measures. Local 984 also states that Air Serv hires and fires employees independently from FedEx and that Air Serv's own policy manual and not Fed Ex govern these employment actions. Finally, Local 984 also asserts that FedEx does not exercise any control over either the maintenance of Air Serv's equipment or the incentives paid to Air Serv's employees.

In its response, Air Serv states that the NMB has repeatedly held that airline service companies like Air Serv are subject to the RLA. Contrary to Local 984, Air Serv contends that its employees perform work traditionally performed by air carrier employees and that FedEx exerts significant control over its Memphis operations. Air Serv states that providing transportation of flight crew and other carrier employees is work traditionally performed by carrier employees. Air Serv also states that FedEx: controls the manner in which Air Serv conducts its business; has access to its records; influences its personnel decisions; supervises its employees; and controls its driver training.

III. FINDINGS OF FACT

Air Serv

Air Serv, a corporation headquartered in Atlanta, Georgia, provides airport-related services in 27 cities throughout the United States. These services include shuttle bus service, ticket counter operations, skycaps,

baggage handling, and wheelchair services. Since July 2003, under an agreement with FedEx, Air Serv provides shuttle bus transportation services for FedEx in Memphis. At its Memphis operations, Air Serv employs approximately 180 shuttle bus drivers, two shuttle bus groomers, three mechanics, seven team leaders and six managers.*

Nature of the Work Performed

Air Serv provides shuttle bus transportation for FedEx employees between FedEx parking areas and designated points at FedEx's Memphis Hub Complex (Hub). The drivers shuttle FedEx pilots to and from the aircraft and take other FedEx employees to and from the Hub where they sort packages and load and unload aircraft. The shuttle bus services were originally performed exclusively by FedEx employees before they were subcontracted. Prior to Air Serv's contract, another contractor performed the shuttle bus services. Currently, FedEx also uses its own employees for some shuttle driving.

Carrier Control over Air Serv's Memphis Operations and Employees

Facilities and Equipment

Air Serv conducts its business from space provided by FedEx in FedEx's Bus Service Center (BSC) and FedEx's Air Operations Center (AOC). The Employer's day operations manager, night operations manager, safety manager and team leaders work out of an office in the BSC. The BSC also contains a breakroom that Air Serv employees share with FedEx employees. The AOC also contains a break area, or refreshment center, that Air Serv employees share with FedEx pilots. FedEx does not charge the Employer rent or any other fee for use of the BSC or the AOC facilities. FedEx also provides Air Serv with telephone equipment, internet service, electricity, cleaning and office cleaning at no charge. FedEx maintenance employees clean both buildings and the security is provided by FedEx security employees. FedEx also provides parking in FedEx parking lots for personal vehicles of Air Serv employees.

Air Serv employees must present FedEx issued identification badges and pass through a FedEx security checkpoint to gain access to certain areas of FedEx's property. FedEx also retains the right to search Air Serv's drivers, their belongings, and their vehicles at any time, and can deny Air Serv drivers access to FedEx property if the driver fails to present the proper identification badge.

* At the Memphis airport, Air Serv also provides baggage handlers, wheelchair attendants, and ticket checkers to Northwest Airlines. These employees are not in the petitioned-for bargaining unit and are not at issue in the NLRB case.

FedEx determines the number and type of buses that Air Serv will provide and must approve any changes in the quantity or style of bus. At the time of the hearing, the Employer used two styles of buses: a smaller “cutaway” style bus that seats between 17-25 passengers and a larger bus that seats 38 passengers. The buses are white and have an orange and purple FedEx logo on the side. Neither Air Serv’s name nor logo is displayed on any bus. The fuel for the buses is supplied by FedEx and is pumped at a FedEx facility referred to as the “fuel farm.” FedEx has a set mileage limit of 250,000 miles that the buses must not exceed. Air Serv is prohibited from using the buses for any other customer. Upon termination of Air Serv’s contract with FedEx, the buses become the property of FedEx.

The buses are equipped with two-way radios that allow drivers to communicate with the dispatchers. Air Serv’s contract with FedEx requires that these radios be purchased and maintained by Air Serv at its expense. All radios operate on a FedEx frequency. The buses are also equipped with a global positioning system (GPS) device that is linked to computers in the BSC and AOC that allows FedEx to monitor and track the location of the buses and Air Serv’s compliance with work schedules and the maximum waiting period for pickups set by FedEx. FedEx supplies Air Serv’s drivers with remotes and proxy cards that are programmed by FedEx and allow the drivers to open gates and access secure areas of the facility.

Performance Standards

In its contract with Air Serv, FedEx sets certain performance standards for Air Serv. For example, the Employer must meet certain standards regarding the maintenance and cleanliness of the buses, must maintain a set level of insurance for the buses and must ensure that no FedEx employee waits more than ten minutes for a bus. Air Serv must submit quarterly and annual reports to FedEx regarding its compliance with these performance standards. The contract also grants FedEx the right to fine the Employer for failing to meet these performance standards and other requirements such as having an insufficient number of buses operating, failing to maintain required records, and failing to comply with FedEx security and safety rules. According to Air Serv’s Senior Vice President Edwin Smith, the Employer has received fines for failing to meet these performance standards.

FedEx also requires the Employer’s drivers to comply with certain appearance standards, including a requirement to keep their uniforms neat and clean. Fines can be imposed on Air Serv for failure to meet this standard. Drivers wear a standard uniform issued by the Employer consisting of a gray and white vertically striped shirt and gray pants. The Employer also permits drivers to wear white caps with or without the Employer’s logo and uniform shirts with the Employer’s logo. The drivers must also wear a photo

identification badge that is issued by FedEx with FedEx's name in a hologram on that badge.

Scheduling

Air Serv assigns drivers to one of three shifts, but FedEx determines the hours of the shifts and the number of hours of daily service that the Employer provides. FedEx also determines the hours of shifts for holidays and days when there is inclement weather. Air Serv can only change shift hours with FedEx's permission.

FedEx determines the drivers' routes and the number of drivers assigned to each route. During FedEx's peak season in December, FedEx frequently requests that Air Serv place additional drivers on the routes. According to Edwin Smith, Senior Vice President of Air Serv, if a FedEx driver is absent from work, it is FedEx that determines how the schedules of Air Serv drivers will be adjusted to cover the FedEx employee's absence. Smith also stated that while FedEx can unilaterally change the schedules, Air Serv cannot.

Supervision and Direction

Air Serv has one team leader per shift at each location, the BSC and the AOC during the day. At night, there are two Team Leaders at the BSC.

Drivers are dispatched by both FedEx and Air Serv dispatchers who work side-by-side at the AOC. Day Operations Manager Sara Bell stated that FedEx dispatchers dispatch Air Serv drivers to aircraft gates. Two of the third shift drivers testified that they are dispatched by a FedEx dispatcher while a second shift driver testified that she is dispatched by an Air Serv dispatcher. Bell also stated that FedEx managers have requested that Air Serv employees' shifts be changed.

When performing their work, Air Serv drivers are expected to follow certain rules established by FedEx regarding ramp and runway incursion, use of property and speed. For example, according to Bell, if an Air Serv employee forgets their identification badge, then FedEx security sends them home. If an Air Serv employee violates a FedEx safety rule, FedEx reports the violation to Air Serv.

Absences are reported and leave slips are submitted to Air Serv. If an employee wants a day off, they report that to their team leader. The Employer also requires that its drivers report work-related problems to Air Serv and not to FedEx. Bell stated that when there is bad weather, FedEx has asked that Air Serv drivers come in early and stay late.

Hiring

Applicants for the shuttle driver position are initially screened by Air Serv. Applicants complete Air Serv's application which is reviewed by Air Serv's Human Resources Department (HR Department) to see if the applicant meets certain minimum qualifications required by FedEx for the shuttle driver position. These minimum qualifications required by FedEx include one year's driving experience and possession of a commercial driver's license. Applicants approved by the HR Department are interviewed by Air Serv's managers.

If Air Serv determines that an applicant is a good fit for both Air Serv and FedEx, the applicant must take and pass a drug test that is administered by the same vendor that FedEx uses to test its own employees and complete two forms required by FedEx: the FedEx badge form and a background investigation consent form. The background checks are performed by a vendor, Blue Line, specified by FedEx.

For each applicant, Air Serv submits the two forms and Blue Line's background report to FedEx for review. FedEx has the authority to approve or reject an applicant based on these materials. If FedEx rejects the applicant, Air Serv terminates the hiring process. If FedEx has a problem with something in the Blue Line report, the applicant has 10 days to resolve the matter with FedEx security. If the problem is not resolved to FedEx's satisfaction, the Employer is required by FedEx to terminate the applicant and submit a personnel action form documenting the termination to FedEx.

If FedEx approves the applicant, that individual is invited to participate in Air Serv's three day orientation session. Individuals invited to the orientation are advised by Air Serv that they are conditionally hired pending the results of a fingerprinting process known as the security identification display area badge (SIDA) that is conducted by FedEx managers at the FedEx facility. FedEx can approve or reject the individual based on the SIDA results. FedEx does not disclose the SIDA results to Air Serv. It only notifies Air Serv that an employee is approved or disapproved. Once again, any individual who is rejected based on a problem discovered during SIDA is given two weeks to resolve the problem with FedEx security, and failure to resolve the matter results in Air Serv terminating the conditional employment and submitting documentation to FedEx verifying the termination. Office Manager/HR Manager Priscilla Diamante described an instance where FedEx directed Air Serv to terminate an applicant because of a problem with that individual's SIDA. Employees who successfully complete the SIDA process are issued an identification badge that allows them unescorted access to FedEx's high security areas.

Air Serv's Day Operations Manager, Sara Bell, and Night Operations Manager, Wayne Hollie, were both previously employed by FedEx and were

recommended for jobs with Air Serv by FedEx. According to Office Manager/HR Manager Diamante, Air Serv has hired all employees that FedEx has recommended to Air Serv.

Discipline

Air Serv has its own code of conduct and disciplinary standards of conduct that are contained in its employee handbook. Under those policies, there are two levels of offenses: those subject to immediate termination and those that are not. The policy also states that Air Serv has the right to alter disciplinary action as needed.

FedEx can and has made recommendations to Air Serv regarding employee discipline. According to Air Serv's Day Operations Manager Bell and Office Manager/HR Manager Diamante, the Employer has never refused a request by FedEx to discipline and/or terminate an Air Serv employee. In one instance, when FedEx learned that a part-time Air Serv employee was involved in an altercation with a FedEx vendor on airport property, FedEx barred the driver from entering FedEx property for two weeks and subsequently requested that Air Serv terminate the employee. In another instance, FedEx recommended the immediate termination of an Air Serv driver who was accused of carrying a weapon and threatening another driver. FedEx security searched the driver's belongings and discovered a knife. In the final instance, FedEx security asked Air Serv to discipline a driver who, while trying to enter the facility, falsely reported that his badge had expired. In each of these instances, Air Serv followed FedEx's recommendations.

Air Serv also imposes its own discipline on its drivers. A driver testified that he was written up by an Air Serv manager for reporting to work 30 minutes late, and that Air Serv terminated other drivers for attendance problems and violating the Air Serv policy prohibiting its drivers from going to FedEx with work-related problems. Another driver testified that he received a suspension from Air Serv for hitting a guidepost with his shuttle bus. Diamante also stated that Air Serv has terminated employees for violations of the code of conduct without input or recommendation from FedEx.

According to Bell and Diamante, FedEx has also directed Air Serv to remove certain drivers from its property and has prohibited other Air Serv drivers from working in certain areas of its facility. In 2007, for example, FedEx removed an Air Serv driver who entered the property smelling of alcohol. FedEx, together with airport security, also removed an Air Serv employee who had become involved in an altercation with another employee. Finally, FedEx prohibited an Air Serv driver from driving into the ramp area after FedEx's investigation disclosed that the driver had a disagreement with a FedEx employee.

FedEx also reports safety rule infractions committed by Air Serv drivers to the Employer and requests that Air Serv investigate and advise FedEx of the results of the investigation and any resulting discipline. FedEx's corporate safety team together with Air Serv investigates all accidents that occur on FedEx property to determine whether an Air Serv employee or FedEx employee was at fault. FedEx also requires the Employer to prepare and submit an accident report, conduct remedial training with the driver before the driver is allowed to return to work and advise FedEx of the discipline it imposed. FedEx also requires Air Serv to participate in weekly safety review board meetings with FedEx where all accidents and resulting discipline are discussed.

Pay, Benefits, and Evaluations

FedEx pays Air Serv a fee that is based on the number of hours the shuttle buses operate per week. Air Serv, however, establishes its drivers' hourly wage rates, benefits and raises. Air Serv pays the workers compensation insurance for its employees. Air Serv uses its payroll system and an outside vendor to process payroll, and drivers' paychecks are generated by Air Serv's Corporate office in Atlanta and distributed to drivers by Air Serv in Memphis.

Air Serv conducts performance evaluations of its drivers. In preparing these evaluations, Air Serv considers input from FedEx including commendations, complaints, and work rule infractions that FedEx has reported to Air Serv. Employee pay raises are based on these evaluations. Air Serv also considers FedEx's comments and input when determining if a driver will receive a reward or other recognition.

Training

FedEx requires Air Serv to ensure that all drivers, including new hires, receive FedEx safety training and follow operating rules established by FedEx. Air Serv conducts training that familiarizes drivers with FedEx and its standards and rules pertaining to SIDA, bus routes, ramps and operations of buses. When conducting this training, Air Serv uses safety training materials provided by FedEx including ramp and runway incursion videos and DVDs and two PowerPoint presentations. Air Serv is required to submit documentation to FedEx certifying that the safety training was provided.

FedEx also provides training to Air Serv's drivers. Within the past year, FedEx's corporate safety officer met with Air Serv's drivers and conducted a safety review after an Air Serv driver breached the safety rules by passing a prohibited item through the fence surrounding the Memphis facility.

Records and Audits

FedEx requires Air Serv to maintain and make available for inspection records regarding maintenance, personnel, bus operations, and affirmative action. Air Serv is also required to complete and submit various records to FedEx including a monthly termination list, new hire paperwork, accident reports, maintenance records, and payroll data. The Employer must also complete and maintain “field sheets” that list Air Serv’s drivers by name, their assigned bus number, and route assignment.

FedEx conducts audits of the Employer’s records including field sheets, drug test records, runway incursion records, yearly motor vehicle release records, SIDA records, and GPS data. FedEx has the authority to audit field sheets at any time. The most recent field sheet audit was conducted in the summer of 2007. During this audit, according to Day Operations Manager Sara Bell, FedEx discovered that the Employer had an insufficient number of drivers on some shifts and fined Air Serv for its conduct.

To comply with FedEx’s maintenance requirements, Air Serv uses a maintenance system to track and keep a daily record of all maintenance repairs, mileage, parts, and maintenance schedules. These maintenance records are available to FedEx on a daily basis and have been audited by FedEx on numerous occasions. According to Office Manager/HR Manager Priscilla Diamante, FedEx has general access to Air Serv’s business records beyond those records and documents that Air Serv provides to FedEx on a regular basis. Upon termination of Air Serv’s contract with FedEx, all maintenance records become the property of FedEx.

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. *Swissport USA, Inc.*, 35 NMB 190 (2008); *Dobbs Int’l Servs. d/b/a Gate Gourmet*, 34 NMB 97 (2007). 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. *Swissport USA, Inc.*, *above*. See also *Dobbs Int’l Servs. d/b/a Gate Gourmet*, *above*.

Work Traditionally Performed by Carrier Employees

The employees at issue perform shuttle bus transportation services for FedEx in Memphis. The NMB has found that providing shuttle transportation for airline crew is work traditionally performed by employees in the airline industry. Air Serv's employees shuttle FedEx crew to and from aircraft and transport other FedEx employees to the Hub where they sort packages and load and unload aircraft. In *Milepost Industries*, 27 NMB 362 (2000), the Board found that transportation of flight crews was an integral part of a carrier's business and therefore a function traditionally performed by airline employees. *See also Security '76, Inc.*, 5 NMB 234 (1976) (finding that security and shuttle bus service was work traditionally performed by carrier employees). Since Air Serv's Memphis employees perform a variety of duties that have traditionally been performed by carrier employees, the first part of the NMB's jurisdictional test has been satisfied.

Air Serv is not directly or indirectly owned by a carrier. Therefore, to determine whether Air Serv is subject to the RLA, the NMB must consider the degree of direct or indirect control exercised over Air Serv's Memphis operations by FedEx.

Carrier Control of Air Serv's Operations

The standard for satisfying the control part of the NMB's jurisdictional test is the degree of influence that a carrier or carriers has over discharge, discipline, wages and working conditions. To determine whether there is sufficient carrier control over a company, the NMB looks to several factors, including: extent of the carrier's 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; whether employees are held out to the public as carrier employees; and control over employee training. *Dobbs Int'l Servs. d/b/a Gate Gourmet, above*; *Aircraft Servs. Int'l Group, Inc.*, 33 NMB 200 (2006); *Signature Flight Support*, 32 NMB 214 (2005); *John Menzies PLC, d/b/a Ogden Ground Servs. Inc.*, 30 NMB 405 (2003).

In *Kannon Serv. Enterprises Corp.*, 31 NMB 409 (2004), for example, the NMB found sufficient carrier control based on the carrier's ability to determine how many employees would work a given shift, to dictate the number of hours worked each month, to dictate the type of training employees received and to establish grooming standards. The carrier also provided the office space and equipment used by employees. In *Aeroground, Inc.*, 28 NMB 510 (2001), the NMB found RLA jurisdiction where the carrier provided the employer with communication equipment and office space, established appearance standards,

mandated specific training, required specific record keeping, and made effective recommendations regarding hiring, discipline, and firing.

Similarly, the record in the instant case establishes that FedEx exercises substantial control over Air Serv's Memphis operation. FedEx provides Air Serv with both office space and employee break areas but does not charge Air Serv any rent or other fee for the use of these facilities. FedEx also provides Air Serv with telephone equipment, internet service, electricity, and security and cleaning services at no cost to the Employer. Air Serv's employees park their personal vehicles in the FedEx parking lot. Air Serv employees are issued security badges with a FedEx logo and are subject to searches, of their cars and personal belongings, at any time, by FedEx security. FedEx determines the number and types of buses that Air Serv will use and must approve any change in the quantity or style of bus. Fuel for the buses is also supplied by FedEx and is pumped at FedEx's fuel farm. The buses contain GPS devices that are linked to FedEx computers and allow FedEx to monitor and track the location of each bus as well as Air Serv's compliance with work schedules and wait times for pickups that are established by FedEx.

Air Serv assigns drivers to shifts but FedEx determines the hours of the shifts and the number of hours of daily service provided by Air Serv. FedEx can unilaterally adjust Air Serv's schedule. FedEx frequently requests Air Serv to place additional drivers on a shift and has required Air Serv employees to cover for the absence of a FedEx shuttle driver. FedEx has also asked Air Serv employees to come in early and stay late. FedEx sets performance standards for Air Serv; and it can and has fined Air Serv for failure to meet these requirements. Air Serv employees are dispatched by both FedEx and Air Serv dispatchers, who work side-by-side.

Air Serv has hired all the employees that FedEx has recommended for employment. Although applicants are initially screened by Air Serv, FedEx has the final authority to approve or reject an applicant based on the results of FedEx's security process. Air Serv has complied with all FedEx's requests to terminate applicants. Air Serv has its own code of conduct and disciplinary standards and has imposed its own discipline on employees, but it has also never refused a request by FedEx to discipline or terminate an employee.

Finally, FedEx requires Air Serv to conduct FedEx-specific training of all employees, both new hires and current drivers. Within the past year, FedEx's corporate safety officer has met with Air Serv's drivers and conducted safety reviews after a safety breach occurred at Memphis. FedEx also conducts frequent audits of Air Serv's records and has specific requirements regarding the records that Air Serv must maintain and the documentation that must be submitted to FedEx on a regular basis. In addition, Air Serv's maintenance records are made available for FedEx's review on a daily basis and, upon termination of Air Serv's contract, these records become the property of FedEx.

Although Air Serv employees wear their own uniforms, the contract with FedEx dictates grooming standards.

The NMB has previously found Air Serv's operations to be subject to the RLA. In *Air Serv. Corp.*, 33 NMB 272 (2006), the NMB determined that Air Serv's operations at the San Francisco International Airport were subject to the RLA. The determination in the instant case that Air Serv's Memphis operation is subject to the RLA is consistent with this prior determination.

CONCLUSION

Based on the record in this case and for the reasons discussed above, the NMB's opinion is that Air Serv's operations and its employees at Memphis are subject to the RLA. This opinion may be cited as *Air Serv Corporation*, 35 NMB 201 (2008).

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:
Tanja L. Thompson, Esq.
O. John Norris, III, Esq.
Samual Morris, Esq.