



NATIONAL MEDIATION BOARD
WASHINGTON, DC 20572

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In the Matter of the
Application of the

OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL
UNION

alleging a representation dispute
pursuant to Section 2, Ninth, of
the Railway Labor Act, as
amended

involving employees of

NORTH MEMORIAL HEALTH
CARE d/b/a AIR CARE

50 NMB No. 3

CASE NO. R-7606
(NMB File No. CR-7232)

FINDINGS UPON
INVESTIGATION -
AUTHORIZATION OF
ELECTION

October 18, 2022

FINDINGS UPON INVESTIGATION

This determination addresses the application of the Office and Professional Employees International Union (OPEIU or Organization) alleging a representation dispute pursuant to the Railway Labor Act (RLA),¹ 45 U.S.C. § 152, Ninth (Section 2, Ninth), among “Pilots” at North Memorial Health Care d/b/a Air Care (NMHC). At the time the application was filed, these employees were not represented by any organization or individual. In its initial position statement, NMHC asserted that the National Mediation Board (NMB or Board) lacks jurisdiction over this dispute and requested that OPEIU’s application be dismissed.

1 45 U.S.C. § 151, et seq.

For the reasons discussed below, the NMB finds that the air transportation component of NMHC's Air Care operation is a discrete operation within the NMHC medical system and its pilots are subject to the RLA. Accordingly, the NMB authorizes an election among the pilots at NMHC.

PROCEDURAL BACKGROUND

On April 25, 2022, the OPEIU filed an application alleging a representation dispute involving the pilots at NMHC. The application was given NMB File No. CR-7232 and Josie G. M. Bautista was assigned as the Investigator. On May 24, 2022, NMHC filed its initial position statement asserting that the NMB lacks jurisdiction over this dispute. On the same date, the OPEIU also filed its initial position statement. It asserted that NMHC is a common carrier by air and requested the opportunity to file a response to NMHC's position statement. NMHC subsequently requested the opportunity to file a reply to the OPEIU's response. The Investigator granted both participants' requests. OPEIU filed its response on June 7, 2022. NMHC filed a reply on June 17, 2022. On June 27, 2022, the Investigator requested additional information from NMHC and requested that OPEIU file a rebuttal to NMHC's reply. NMHC filed its response to the request for additional information on July 7, 2022 and the OPEIU filed its rebuttal the same day.

CONTENTIONS

NMHC argues that the NMB lacks jurisdiction over this dispute because it is not a common carrier under the RLA. It asserts that NMHC is a multi-billion-dollar health care network that operates hospitals, primary care clinics, urgent care clinics, and urgency centers comprised of a total of 25 clinics. The helicopter pilots OPEIU seeks to represent are part of NMHC's helicopter transport operation commonly referred to as "Air Care." NMHC argues that its Air Care operation accounts for an insubstantial amount of NMHC's overall principal business operations and revenue: 2.6 % of NMHC's total gross revenue in 2020 and 3.5 % in 2021. Thus, NMHC asserts that its Air Care operation engages in *de minimis* interstate air operations which are not sufficient to deem it a common carrier under the RLA. Further, NMHC argues that the fact that it holds a Part 135 operating certificate from the Federal Aviation Administration (FAA) is not dispositive in determining whether it is subject to NMB jurisdiction. It asserts that its Air Care operation is *de minimis* when viewed against its primary line of business, which is health care. It also argues that being subject to two statutory schemes would be problematic because its employees are organized under the National Labor Relations Act (NLRA). Accordingly, it requests that the Board dismiss the OPEIU's application.

The OPEIU argues that NMHC's Air Care operation is a common carrier by air as defined by the RLA because it holds a valid Part 135 FAA operating certificate and is authorized to operate as an "air carrier and conduct common carriage operations." NMHC is registered as an "Air Taxi Operator" under Part 298 of the Department of Transportation's (DOT) Regulations to operate air ambulance services. The OPEIU argues that NMHC holds itself out to the general public as an air ambulance carrier providing services to hospitals, other public safety agencies, and to the general public. The OPEIU vigorously disputes NMHC's contention that its revenues from its Air Care operation --totaling over \$131 million in revenue in a two-year period -- are *de minimis*. Further, the OPEIU argues that NMHC's Air Care operation responds to more than 6,000 air service requests per year and as such, cannot be deemed "sporadic or negligible" common carriage activities. The helicopter pilots it seeks to represent are directly controlled by Air Care management personnel and are covered under Section 201 of the RLA. Lastly, the OPEIU argues that NMHC has consistently denied paying its helicopter pilots overtime pay under the Federal Labor Standards Act (FLSA) by telling them they are exempt because the pilots are subject to the RLA. OPEIU asserts that NMHC cannot be allowed to claim it is not subject to the RLA when it comes to this NMB matter while simultaneously claiming it is subject to the RLA in order to deprive its helicopter pilots of overtime pay under the FLSA.

FINDINGS OF FACT

NMHC is a multi-billion dollar health care network that operates hospitals, primary care clinics, urgent care facilities, and urgency centers. It is headquartered in Robbinsdale, Minnesota and operates an air ambulance service under the trade name (doing business as) "Air Care." NMHC holds a valid FAA Part 135 operating certificate and is authorized to operate as an "air carrier and conduct common carriage operations." NMHC is registered as an "Air Taxi Operator" under Part 298 of the DOT's regulations to operate air ambulance services. NHMC's Air Care operation follows an extensive General Operations Manual (GOM) as required by its FAA certificate.

Air Care provides air ambulance services to hospitals, public safety agencies, and to the general public. It is an integral part of NMHC's medical transportation services. Air Care operates more than 6, 000 flights per year and generates millions in revenue. In 2020, Air Care generated \$55,714,000.00 in gross revenue, and \$76,212,000.00 in gross revenue in 2021. Air Care maintains helicopter bases at six Minnesota locations and one base in Siren, Wisconsin. Air Care's website publishes a map showing its service areas in the states of Minnesota, Wisconsin, Iowa, North Dakota and South Dakota. Employees of Air Care consist of nurses, paramedics, maintenance staff, and pilots.

Air Care's fleet consists of nine Augusta 109 helicopters, which can reach speeds of 180 miles per hour. Air Care plans on adding two new Airbus H135S helicopters to its fleet in the near future. Air Care promotes that its flight program provides a "highly trained, accredited team, state-of-the art equipment and regional bases to provide expert, timely emergency transport" and that no other air service offers the level of quality of service that it provides to the general public. In order to request Air Care's services, it advertises a phone number to the general public.

All Air Care flight and medical crewmembers must meet rigorous standards to provide the highest level of care for customers of all ages. The crews continually enhance their skills, techniques, and teamwork within its advanced simulation center. According to its website, Air Care's flight simulator is the only one of its kind in Minnesota and offers an unmatched degree of realism for training pilots. Air Care's simulation center also provides hands-on setting for the medical crew to practice different trauma and critical care scenarios while pilots prepare for adverse weather and challenging flight conditions year-round.

Pursuant to Federal Aviation Regulation (FAR) 119.69d, Air Care's transportation system is operated under qualified management and technical personnel to ensure the safety of its operations. Air Care employs a Director of Operations, a Chief Pilot, and a Director of Maintenance. Reporting to the Chief Pilot is the Aviation Training Coordinator and two Assistant Chief Pilots. The two Assistant Chief Pilots directly supervise Air Care's 27 pilots. On the maintenance side, there are two Maintenance Supervisors who report to the Director of Maintenance. Air Care's mechanics report directly to the Maintenance Supervisors.

Approximately 90% of Air Care's flights transport patients in need. The remaining 10% are pilot training flights and ferry flights, which move a helicopter from one base to another.

DISCUSSION

Common Carrier Covered Under The RLA

Section 201 of the Railway Labor Act provides that:

All of the provisions of subchapter 1 of this chapter except section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service. 45 U.S.C. § 181. (Emphasis added)

In numerous cases, the NMB has exercised jurisdiction over air taxi operations engaged in interstate commerce. *See TriState CareFlight, LLC*, 41 NMB 55 (2014); *Rocky Mountain Holdings, LLC d/b/a Eagles Airmed of Arizona*, 26 NMB 132 (1999); *York Aero, Inc.*, 17 NMB 498 (1990); *Jimsair Aviation Servs., Inc.*, 15 NMB 85 (1988); *Evergreen Helicopters, Inc.*, 8 NMB 505 (1981); *Elliot Flying Serv., Inc.*, 9 NMB 146 (1981). Similar to the operations provided by those carriers, Air Care's operation provides air ambulance services to the public and holds itself out to the public as an air carrier.

NMHC is a licensed Part 135 air taxi operator and is authorized to operate as an air carrier and conduct common carriage operations. Its Air Care operations provide air transport emergency services using its own aircraft and its FAA-certified pilots. Its Air Care operations are held out to the public as available to anyone to utilize its services. NMHC asserts that its Air Care operation is not a common carrier by air because it does not sufficiently engage in interstate commerce to justify coverage by the RLA.

Section 201 makes the RLA applicable to every common carrier by air in interstate or foreign commerce. In a limited number of cases, the NMB has exercised its discretion to decline jurisdiction where the common carrier activities were "sporadic and negligible" when viewed against its primary business. *See C&E Aero Servs., Inc. d/b/a Tumbleson & Payne Aero Service*, 10 NMB 62 (1982). For the reasons set forth below, the Board finds that NMHC's Air Care operation is subject to the RLA.

In *C&E Aero Servs., above*, the carrier engaged in air taxi work only 25 to 30 times per year and its primary business was aircraft sales and service for private aircraft, as well as aircraft rental and flight instruction. In the instant case, Air Care responds to more than 6,000 service requests per year, which equates to more than 16 flights per day and 500 flights per month. Unlike the air taxi service at issue in *C&E Aero Servs.* and contrary to NMHC's assertion, Air Care is an integral part of NMHC's primary business of healthcare and its medical transport services that it provides to the general public.

Further, the amount of flying conducted by Air Care is significant and consistent with past NMB determinations involving air taxi operations engaged in interstate commerce. In *Jimsair Aviation Servs., above*, for example, the Board determined that 25 flights per month provided by the carrier's air taxi and charter service were significant. In addition, in *York Aero, above*, the Board determined that the carrier's interstate air taxi and charter service that provided up to seven flights per week was a significant portion of its operations. In the instant case, Air Care exceeds the flying done in both *Jimsair* and *York Aero*, averaging 115 flights per week and 500 flights per month.

The millions of dollars in revenue that Air Care generates also requires the NMB to reject the NMHC's *de minimis* argument. In *Rocky Mountain Holdings, above*, the NMB determined that the \$53 million in revenue that Rocky Mountain generated from its air transport operations is "significant and not negligible and sporadic." Thus, the Board in that case determined that Rocky Mountain and its employees are subject to the RLA. In the instant case, the revenue generated by Air Care exceeds that of Rocky Mountain, generating over \$55 million in revenue in 2020 and over \$76 million in 2021. The revenue generated by Air Care is also a far cry from the \$30,000 in revenue which led the Board to conclude that the air taxi operation in *C&E Aero Servs.* is "sporadic and negligible." Thus, the NMB finds that the revenue generated by Air Care is significant and not negligible or sporadic. Accordingly, Air Care is a common carrier by air subject to the RLA.

Employees Covered Under The RLA

The RLA defines an employee of an air carrier includes "every pilot or other person who performs any work as an employee or subordinate official of such carrier...subject to its continuing authority to supervise and direct the manner or rendition of his service." *Federal Express Corp.*, 23 NMB 32, 71 (1995). The Board, however, has recognized that the limit on that coverage is whether the carrier has the "continuing authority to supervise and direct the manner and rendition" of the employee's service. *Id.*, at 72; *see also Emery Worldwide Airlines, Inc.*, 28 NMB 216 (2001) (NMB declined to assert jurisdiction over Emery Worldwide Airlines because carrier did not have the authority to supervise and direct employees at issue). In the instant case, Air Care has a management structure directed solely to the air transport operation. Most notably, on the flight operations side, Air Care employs a Director of Operations, and a Chief Pilot. Two Assistant Chief Pilots directly supervise the pilots. On the maintenance side, Air Care employs a Director of Maintenance and two maintenance supervisors who directly supervise the mechanics that perform maintenance related work to Air Care's fleet of helicopters. Consequently, it is

clear that the pilots perform work that is supervised and directed by Air Care's management personnel.

The same cannot be said for the nurses and other NMHC employees that provide patient care services at the hospitals and clinics throughout NMHC's healthcare system. The record demonstrates that the duties of the Director of Operations, Director of Maintenance, Chief and Assistant Chief Pilots, and Pilots are clearly defined in Air Care's GOM as required by the FAA. None of the duties outlined in the GOM require any of those individuals to supervise and direct the manner in which the nurses render medical services to patients. The record also lacks any evidence that those management personnel are required to have the same medical training or license that would enable them to supervise and direct the manner in which the nurses render their services to their patients. Thus, the NMB's discretion in exercising jurisdiction over Air Care's pilots does not impact the bargaining status of the nurses organized under the NLRA or any other employee group within NMHC's health care system. The NMB's jurisdiction covers only the air transportation system operated by Air Care and the employees who perform the transportation functions under the supervision and direct control of Air Care's management personnel as defined by the FAA and its GOM. Air Care's authority to supervise and direct the pilots under Section 181 of the RLA renders the Air Care pilots subject to the jurisdiction of the RLA.

This is not the first instance where the NMB has asserted jurisdiction over a portion of an employer's operation. *Offshore Logistics, Inc., Aviation Servs. Div., d/b/a Air Logistics*, 10 NMB 477 (1983), involved Offshore Logistics Inc., a Louisiana corporation engaged in the business of providing marine and air transportation services to over 50 major oil companies with drilling and production facilities in the Gulf of Mexico and adjacent waters. Its operations were divided into two divisions: Marine Services Division and Aviation Services Division. The NMB specifically excluded the Marine Services Division from its determination and only asserted jurisdiction over the corporation's Aviation Services Division doing business under its trade name "Air Logistics." The Board noted that Air Logistics was authorized by the FAA to conduct air taxi operations as a charter air carrier engaged in air transportation using helicopters and fixed wing aircraft and that the FAA regulated Air Logistics' flight operations and exercised jurisdiction over the aircraft, ground facilities, and other technical aspects of the flight operations.

With this determination, the NMB is asserting jurisdiction over Air Care's flight operation and those employees that perform the flight transportation functions regulated by the FAA. The determination excludes NMHC's operations pertaining to the medical services of its hospitals, clinics, urgent care centers and urgency centers and those employees who work in those facilities. The

Board finds that RLA jurisdiction is properly invoked here with respect to the Air Care pilots who have a direct connection to the air carrier and air transportation functions. The medical operations of NMHC, in contrast, is work normally covered by the NLRA. Congress has enacted two distinct bodies of federal labor law, the RLA covering airline and railroad employees and the NLRA covering most other private employers and their employees. By limiting its decision to the employees who perform the air transportation function, the Board strikes the proper balance between the two statutory schemes.

Finally, the NMB finds no merit in NMHC's argument that being subject to two statutory schemes would be problematic. The NMB previously addressed and rejected a similar argument in *Emery Worldwide Airlines, above. Id.* at 240. Since the NMB finds that only the Air Care flight operations are subject to the RLA there will be no disruption to the settled labor relations of employee groups covered by the NLRA at NMHC. Further, having employees represented under the NLRA and potentially under the RLA is no more burdensome than having both represented and unrepresented employee groups.

CONCLUSION

Based upon the facts and evidence presented, the NMB finds that NMHC's Air Care operation and its pilots are subject to the RLA. Accordingly, NMB File No. CR-7232 is converted to NMB Case No. R-7606.

Based on the authorization cards submitted by OPEIU, the Board further finds that a dispute exists regarding the representation of the Pilots craft or class, and the Board authorizes an election among the craft or class of Pilots, employees of North Memorial Health Care d/b/a Air Care, using a cut-off date of April 24, 2022. Pursuant to Manual Section 12.1, the Carrier is hereby required to furnish within five calendar days, 1 X 2 5/8", peel-off labels bearing the alphabetized names and current addresses of those employees on the List of Potential Eligible Voters. The Carrier must print the same sequence number from the List of Potential Eligible Voters beside each voter's name on the address label. The Carrier must also provide to the Board the name and sequence number of those potential eligible voters on military leave who are serving in foreign countries or who reside outside of the United States.

The Carrier must use the most expeditious method possible, such as overnight mail, to ensure that the Board receives the labels within five calendar days.

By direction of the NATIONAL MEDIATION BOARD.

A handwritten signature in black ink that reads "Maria-Kate Dowling". The signature is written in a cursive style with a large, looped initial "M".

Maria-Kate Dowling
General Counsel