

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: November 25, 2003

TO : Earl L. Ledford, Acting Regional Director
Region 9

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Airline Pilots Association (ABX, Inc.) 177-3901-2500
Cases 9-CE-65 and 9-CC-1660 177-3925-2000
560-2575-6721
560-7520-7500
560-7520-7517
560-7540-4000
584-1200
584-1225
584-1275-6700
584-2583-3300

These cases were submitted for advice as to (1) whether Airline Pilots Association (the Union) is a Section 2(5) labor organization; (2) whether the Union's grievance and counterclaim in district court to compel arbitration of that grievance seeks to enforce a secondary work acquisition interpretation of the parties' scope clause, in violation of Section 8(b)(4)(ii)(A) and (B); and (3) whether the Board otherwise has no jurisdiction over this dispute because it involves only employees covered under the Railway Labor Act (RLA) and, arguably, is purely an RLA dispute.¹

We conclude that (1) the Union is a Section 2(5) labor organization because some statutory employees are members of and participate in the Union, which exists at least in part for the purpose of dealing with employers regarding terms and conditions of employees' employment; (2) the Union's grievance and related counterclaim violate Section 8(b)(4)(ii)(A) and (B) because they seek a secondary "work acquisition" interpretation of the scope clause in violation of Section 8(e); and (3) this dispute involves a union and employers covered under the Act and, therefore, is not a purely RLA dispute. Thus, the Region should issue complaint, absent settlement.²

¹ See Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969).

² The district court has stayed the parties' litigation pending the General Counsel's resolution of these issues.

FACTS

The Union represents approximately 62,000 pilots, first officers (co-pilots), and second officers (flight engineers) nationwide. All but 17 of these 62,000 represented employees are employed by air carriers covered by the RLA. The remaining 17 are Section 2(3) employees employed by Ross Aviation, an airport management company based in New Mexico. Neither Ross Aviation nor its employees are involved in these cases.³

In December 1998, DHL Airways (Airways), then engaged in the pick-up, sorting, delivery, and transport of air freight, entered into a collective-bargaining agreement with the Union as the exclusive bargaining representative of Airways pilots. The Union also entered into a related letter of agreement with DHL Worldwide Express, Inc. (Worldwide), Airways' parent company, wherein Worldwide agreed to be bound by the Airways/ALPA bargaining agreement. The bargaining agreement includes a "scope clause" that provides, in pertinent part:

1. [A]ll present and future flying performed on behalf of the Company⁴ or any affiliate, including but not limited to revenue flying, ferry flights, charters, and wet leases, shall be performed by pilots whose names appear on the Pilots' System Seniority List in accordance with the terms and conditions set forth in this agreement.
2. It is the Company's intent to handle permanent increases in volume through the acquisition of additional airlift capacity rather than subcontracting, and to use pilots on the Pilots' System Seniority List to the maximum extent possible.

The bargaining agreement also includes a successorship clause that provides:

³ Six years ago, the Union filed a Section 8(a)(5) charge against Ross Aviation, and Region 28 issued an 8(a)(1) and (5) complaint. The final disposition of that case is unknown.

⁴ The parties' bargaining agreement defines "The Company" as DHL Airways, Inc.

[The] Agreement shall be binding upon any successor, including without limitation, any merged company or companies, assignees, purchaser, transferee, administrator, receiver, executor, and/or trustee of the Company or DHL Worldwide Express, Inc., and shall require a successor to assume and be bound by all the terms of this Agreement as a condition of any transaction that results in a successor.

Worldwide was owned and controlled by the German Post Office, a private foreign monopoly. In March 2001, Worldwide reorganized as DHL Worldwide Express, B.V., to comply with federal laws that require domestic air carriers to be principally owned and controlled by United States citizens. Worldwide's reorganization created three separate but fully integrated subsidiaries: DHL Worldwide Express (DHL Ground), which was responsible for pick-up, sorting, and ground delivery of the subject freight; DHL Airways, which provided air transport to DHL Ground pursuant to an aircraft, maintenance, and insurance (ACMI) contract; and DHL Holdings, which provided administrative and clerical support to both DHL Ground and DHL Airways. As part of its reorganization, Worldwide sold to a private investor 55% of its equity interest and 75% of its voting interest in DHL Airways. As a result of this sale, neither Worldwide, Holdings, nor DHL Ground controlled DHL Airways.

In March 2003,⁵ Holdings announced its intention to acquire the ground operations, but not the air operations of another company, Airborne, Inc. The acquisition was finalized on August 15, and Holdings thereafter operated Airborne, Inc.'s ground operations as a wholly owned subsidiary under the name Airborne (herein called "Airborne Express"). As a condition of the proposed acquisition, Airborne, Inc. spun off its air operations, which Holdings did not acquire, as a separate company operating as ABX, Inc. (ABX). Neither Worldwide nor any of its subsidiaries has any ownership interest in, or control over ABX.

In July, Holdings sold the remainder of its equity and voting interests in Airways to private investors who renamed the company ASTAR Air Cargo, Inc. (ASTAR). ASTAR continues to transport air freight for DHL Ground. ASTAR, as Airways' successor, has also honored the Union's bargaining agreement and the Union continues to represent ASTAR's pilots.

ABX exclusively transports air freight for Airborne Express. ABX pilots continue to be represented by the

⁵ All dates are in 2003 unless noted otherwise.

Teamsters' local that has represented them for several years. ABX also continues to use the aircraft and containers it had used when it operated as Airborne, Inc., continues to fly to the same hubs it had used when it operated as Airborne, Inc., and continues to use the same encoding system. ABX's aircraft, containers, hubs, and encoding system are all different than those used by ASTAR and its pilots.

When the Union learned that ABX was transporting freight for Airborne Express, the Union filed a grievance alleging that Airborne Express (as an affiliate of Worldwide and Holdings) was improperly using ABX to haul air freight. The grievance alleges that this work is covered by the scope clause of the bargaining agreement between the Union and Airways (now ASTAR) and Worldwide (via its letter of agreement).

Worldwide and Holdings refused to arbitrate the Union's grievance. Instead, they filed suit in United States District Court for the Southern District of New York seeking a declaratory judgment that Worldwide, Holdings, and Airborne Express are not bound by the collective-bargaining agreement. The suit alternatively alleged that Holdings' freight transport contract with ABX does not violate that bargaining agreement, or that the grievance otherwise encompasses a "representation dispute" under the RLA, under the exclusive jurisdiction of the National Mediation Board. The Union filed a counterclaim to compel Worldwide and Holdings to arbitrate the grievance.

ABX intervened in this litigation. ABX also filed the instant charges alleging that the Union violated Section 8(e) by enforcing the scope clause, and violated Section 8(b)(4)(ii)(A) and (B) by filing its grievance and suing to compel arbitration of that grievance. The Union defends against these charges on the grounds it is not a Section 2(5) labor organization and, alternatively, that the scope clause is a lawful work preservation agreement.

ACTION

The Region should issue complaint, absent settlement. The Union clearly meets the statutory definition of a Section 2(5) labor organization; the Union's grievance and counterclaim to compel arbitration seeks a secondary work acquisition interpretation of the scope clause, in violation of Section 8(b)(4)(ii)(A) and (B); and this dispute involves a union and employers covered under the

Act and is not a purely RLA dispute.⁶ However, because the Union has acted unilaterally to enforce an unlawful interpretation of the scope clause, there is no "agreement" that would violate Section 8(e); thus, the Region should dismiss the 8(e) allegation, absent withdrawal.

I. ALPA Is A Section 2(5) Labor Organization

Section 2(5) of the Act provides:

The term "labor organization" means any organization of any kind ... in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Congress intended the term "labor organization" to be defined broadly.⁷ A union need not have any minimum threshold number of employees either admitted to membership or participating in the union in order to qualify as a labor organization.⁸ "The status of the individuals involved in an organization's *dispute* is not one of the requirements set forth in the statutory definition of a labor organization."⁹ Section 2(5) merely requires that

⁶ Although ASTAR and ABX are air carriers under the RLA, Worldwide, Holdings, Airborne Express, and DHL Ground are all employers within Section 2(2) of the Act.

⁷ Electromation, Inc., 309 NLRB 990, 992 (1992), *enfd.* 35 F.3d 1148 (7th Cir. 1994). Thus, a group may meet this definition even if it lacks a formal structure, has no elected officers, constitution or bylaws, does not meet regularly, does not require payment of initiation fees or dues, and does not engage in collective bargaining with the employer. See Miller Waste Mills, Inc., 334 NLRB 466, 481 (2001), citing Electromation.

⁸ See, e.g., Masters, Mates, & Pilots (Chicago Calumet Stevedoring Co.), 125 NLRB 113, 131 (1959) (1½ % of union's membership was made up of statutory employees).

⁹ Id. at 132 (emphasis in original). Although none of the employees involved in the dispute in that case was a Section 2(3) employee, various sister locals did have employees as members; therefore the international was a 2(5) labor organization, and the local at issue was its agent). See also, NPWU, Local 707 (Checker Taxi), 283 NLRB 340, 341 (1987) (Board had jurisdiction over picketing involving independent contractors represented by union that represented statutory employees elsewhere); Masters, Mates,

"employees participate" in the organization.¹⁰ Thus, any organization in which statutory employees participate, regardless of the degree to which non-employees participate, is a Section 2(5) "labor organization."¹¹

The Union here has since at least 1972 represented 17 statutory employees of Ross Aviation, a Section 2(2) employer, and those employees "participate" as members in the Union. The Union has even sought and obtained the Agency's assistance to protect its status as a Section 9(a) representative labor organization. The Union thus fulfills the statutory definition of a labor organization.

The Union argues that its minimal statutory employee membership is insufficient to warrant finding it a labor organization. The above cases clearly indicate to the contrary.

In sum, since employees participate in the Union, which exists at least in part for the purpose of dealing with employers regarding employees terms and conditions of employment, the Union meets the clear statutory definition of a labor organization.

II. Union's Grievance And Related Counterclaim Violate Section 8(b)(4)(ii)(A) and (B).

A union violates Section 8(b)(4)(ii)(A) and (B) if it construes and seeks enforcement of an otherwise lawful collective-bargaining provision to accomplish an objective proscribed by Section 8(e).¹² Section 8(e) does not

& Pilots (Westchester Marine), 219 NLRB 26, 27 (1975) (union representing supervisors unlawfully picketed employer with object of forcing employer to replace deck officers with members of the union).

¹⁰ Cf. DiGiorgio Fruit Corp., 87 NLRB 720, 720 (1949) (farm union was not a labor organization under the Act; union represented only agricultural workers and did not act on behalf of larger parent union).

¹¹ Great Lakes Towing Co., 168 NLRB 695 (1967); Pacific Far East Line, Inc., 174 NLRB 1168, 1168 (1969). See also IBEW (B.B. McCormick 7 Sons), 150 NLRB 363, 371 (1964) (Board asserted jurisdiction in 8(b)(4)(i) and (ii)(B) case where Section 2(5) unions picketed a Railway Labor Act employer).

¹² Local 27, Sheet Metal Workers (AeroSonics, Inc.), 321 NLRB 540, 548 (1996) (citations omitted). See also, Elevator Constructors (Long Elevator), 289 NLRB 1095, 1095 (1988); Service Employees Local 32B - 32J (Nevins Realty

prohibit agreements to preserve bargaining unit work for bargaining unit employees.¹³ Rather, Section 8(e) prohibits only those agreements with a secondary purpose, i.e., agreements directed at a neutral employer or entered into for their effect on another employer.¹⁴ The relevant inquiry is "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [bargaining unit] employees, or whether the [agreement was] tactically calculated to satisfy union objectives elsewhere.... The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-à-vis his own employees."¹⁵

The two tests for determining the lawfulness of purported work-preservation agreements are 1) whether the agreement has as its objective the preservation of work traditionally performed by employees represented by the union, and 2) whether the contracting employer has the power to give the employees the work in question--the so-called "right of control" test.¹⁶ Although we initially conclude that scope clause is lawful on its face, we also conclude that the Union's grievance and district court counterclaim seek a secondary, work acquisition interpretation of that clause, in violation of Section 8(e).

When examining agreements under Section 8(e), the Board looks to the plain language of the particular clause.¹⁷ The scope clause refers to all flying performed

Corp.), 313 NLRB 392, 392 (1993); Teamsters Local 705 (Emery Air Freight), 278 NLRB 1303, 1305 (1986).

¹³ National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612, 635 (1967).

¹⁴ Id. at 632.

¹⁵ Id. at 644.

¹⁶ NLRB v. Longshoremen ILA, 447 U.S. 490, 504 (1980)

¹⁷ "If the meaning of the clause is clear, the Board will determine forthwith its validity under 8(e); and where the clause is not clearly unlawful on its face, the Board will interpret it to require no more than what is allowed by law. On the other hand, if the clause is ambiguous, the Board will not presume unlawfulness, but will consider extrinsic evidence to determine whether the clause was intended to be administered in a lawful or unlawful manner. In the absence of such evidence, the Board will refuse to

by Airways (or its successors), as defined by the terms and conditions of the contract. We initially conclude that the scope clause, on its face, is a lawful work preservation agreement narrowly tailored to ensure that only bargaining unit employees perform bargaining unit work.¹⁸ However, we also conclude that the Union's grievance and counterclaim to compel arbitration violate Section 8(b)(4)(ii)(A) and (B) because they seek a secondary work acquisition interpretation of this otherwise lawful clause.¹⁹

The Union is attempting to obtain an interpretation of the scope clause that would require Worldwide and Holdings to cease doing business with ABX, and assign that ABX work to the Union. If the ABX work is not "fairly claimable" by the Union, the Union seeks to transform the scope clause from a lawful work preservation clause to an unlawful work acquisition clause.

"Fairly claimable work is work that is identical to or very similar to that already performed by the bargaining unit and that bargaining unit members have the necessary skill and are otherwise able to perform."²⁰ The Board has found work to be fairly claimable when it was traditionally performed by bargaining unit employees, for the employer, at the employer's facility.²¹ On the other hand, the Board

pass on the validity of the clause." General Teamsters Local 982 (J. K. Barker Trucking Co.), 181 NLRB 515, 517 (1970), affd. 450 F.2d 1322 (D.C. Cir. 1971).

¹⁸ See, e.g., Carpenters (Mfg. Woodworkers Assn), 326 NLRB 321, 326 (1998); Painters District Council 51 (Manganaro Corp., Maryland), 321 NLRB 158, 164-165(1996). See also, Food & Commercial Workers Local 367 (Quality Food Centers), 333 NLRB 771, 772 (2001). Cf. Carpenters District Council of Northeast Ohio (Alessio Construction), 310 NLRB 1023, 1025 (1993) (clause was facially unlawful because it required the extension of the agreement to the employer's affiliates, regardless whether the work in question was fairly claimable bargaining unit work).

¹⁹ See Quality Food Centers, above, 333 NLRB at 772; Long Elevator, above, 289 NLRB at 1095; Emery Air Freight, above, 278 NLRB at 1305; Nevins Realty, above, 313 NLRB at 392.

²⁰ Newspaper and Mail Deliverers' Union (Hudson County News Co.), 298 NLRB 564, 566 (1990).

²¹ See Retail Store Employees Local 876, 174 NLRB 424, 425 (1969) (in-store shelving and servicing work within employer's supermarkets was fairly claimable as unit work);

has found work not fairly claimable where it has historically been performed by other employees,²² requires additional skills or is performed on different equipment,²³ or is performed outside the bargaining unit's traditional work sites. We conclude that the Union cannot fairly claim the flying work performed by ABX.

The flying performed by ABX is the result of Holdings' acquisition of Airborne, Inc.'s ground operations, and is not an expansion of work performed by DHL Ground. By definition, this is acquired work rather than unit work that was siphoned off to non-unit employees. The work at issue also was historically performed by Teamsters represented pilots, flying different planes, along different routes, to different hubs. We thus conclude that the work at issue is not "identical to or very similar to that already performed by the bargaining unit" or is work that ASTAR pilots "have the necessary skill and are otherwise able to perform."²⁴ Since the Union seeks a secondary work acquisition interpretation of the scope clause, the Union's grievance and district court counterclaim violate Section 8(b)(4)(ii)(A) and (B).²⁵

Thus far the Union has acted alone to obtain, and ultimately enforce, its unlawful interpretation of the

Hudson County News, above, 298 NLRB at 568 (distribution of newly added publications within specific geographic area was fairly claimable under work preservation clause).

²² Nevins Realty, above, 313 NLRB at 392 (cleaning work historically performed by outside contractors); Sheet Metal Workers Local 27, above, 321 NLRB at 540 (prefabrication of certain equipment always performed by others); Emery Air Freight, above, 278 NLRB at 1304 (drayage work always performed by others; union never had contract covering work at issue).

²³ Quality Food Centers, above, 333 NLRB at 772 (baking work was sufficiently different from baking performed by unit employees, and performed on different equipment).

²⁴ Because the work at issue is not fairly claimable, whether Worldwide or Holdings has the right to control the work is irrelevant. Quality Food Centers, above, 333 NLRB at 772.

²⁵ Newspaper and Mail Deliverer's Union (New York Post), 337 NLRB No. 91, slip op. at 1 (2002) (distribution routes were outside unit's traditional jurisdiction, and was historically performed by others).

scope clause. As a matter of law, *solely unilateral* conduct by a union to enforce an unlawful interpretation of a facially lawful contract clause does not violate Sec. 8(e) because such conduct does not constitute an "agreement."²⁶ Thus, the Region should dismiss the 8(e) allegation, absent withdrawal.

III. This Is Not a purely RLA Dispute.

The Union argues that because it is acting on behalf of ASTAR pilots, who are subject to the Railway Labor Act, this case is not subject to the NLRA, citing Brotherhood of Railroad Trainmen v. Jacksonville Terminal, *supra*. There, "traditional railroad unions" picketed a railroad employer after the parties had exhausted each of the remedial procedures required by the RLA. Seeking to vacate a state court injunction of the picketing, one of the unions argued that because it represented Section 2(3) employees elsewhere, the dispute was governed by the NLRA and, therefore, within the exclusive jurisdiction of the NLRB. The Court rejected the union's arguments, noting that it was "not disputed that [the unions], the [employer] and its employees, and the railroads . . . [were] subject to the Railway Labor Act. . . . The [unions were] composed predominantly and overwhelmingly of employees subject to the Railway Labor Act; [²⁷ and] all pickets were members of local lodges composed solely of such employees[.]" The Court concluded that the matter was a "railroad dispute, pure and simple" because "traditional railway labor organizations [were] act[ing] on behalf of employees subject to the Railway Labor Act in a dispute with carriers subject to the Railway Labor Act, [therefore] the organization must be deemed, pro tanto, exempt from the National Labor Relations Act."

Unlike the unions in Jacksonville Terminal, all of the Union's non-RLA members are 2(3) employees.²⁸ Moreover, as

²⁶ See Sheet Metal Workers, above, 321 NLRB at 540, fn.3 (emphasis in original, citations omitted).

²⁷ At footnote 8 of its decision, the Court notes the percentages of employees in each of the picketing unions that "are 'employees of employers who are not subject to the Railway Labor Act.'" The Court, however, does not state what percentage of these "non-RLA" employees were employees within the meaning of Section 2(3) of the Act.

²⁸ The Court did not specifically address whether any of the non-Railway Labor Act employees were employees within the meaning of Section 2(3). Rather, the Court held that the mere fact that some of the union's members may be subject

noted above, the Union has actively maintained its role as a 2(5) labor organization, and asked the Board to protect that role, and its Ross Aviation members' Section 7 rights.²⁹ Finally, it is undisputed that the Union's grievance and counterclaim to compel arbitration are intended to enforce an agreement with Worldwide and Holdings, each of whom are employers within the meaning of Section 2(3). Thus, our cases do not present an air carrier dispute which would be subject to the Railway Labor Act; our cases address a Section 2(5) labor organization's coercion of a 2(2) employer to enter into an 8(e) agreement and to cease doing business, all in clear violation of the Act.

In these circumstances, the Region should issue an 8(b)(4)(ii)(A) and (B) complaint, absent settlement, and dismiss the 8(e) allegation.

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to the Act was not sufficient to transform the dispute from a railway dispute to one subject to the Board's jurisdiction.

²⁹ See, e.g., Chicago Calumet Stevedoring, above, 125 NLRB at 131 (union composed primarily of 2(11) supervisors found a labor organization; union had previously conceded it was a labor organization and had sought the Board's assistance in previous disputes involving statutory employees. The Board specifically rejected the union's argument that it could be a statutory labor organization in some circumstances, but not others.).