

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 90-83

November 8, 1990

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Joseph E. DeSio, Associate General Counsel

SUBJECT: Preparation of Jurisdictional Referrals to the
National Mediation Board

Attached is an outline which identifies and provides information concerning the criteria utilized by the National Mediation Board (NMB) in determining its jurisdiction over air and rail carriers under the Railway Labor Act, 45 U.S.C. § 151 (railroads); § 181 (air carriers). While the outline is not an exhaustive compendium nor intended to be legally binding on the NLRB or the NMB, it should be used as a guideline in the preparation of referrals to the NMB.

The NMB will assert Railway Labor Act jurisdiction in two situations: first, where the company in question is a common carrier engaged in interstate or foreign commerce; or second, where the company is directly or indirectly owned or controlled by or under common control of a rail or air common carrier and the services provided are those traditionally performed in the rail or air industry. This second situation is sometimes referred to as "the control and function test." In this respect, the outline is divided into two sections. Section I pertains to companies providing transportation by air or rail. Section II concerns those companies providing services to air or rail carriers and for which the "control and function test" is appropriately applied. A further division within those sections has been made based on whether the subject company is performing air or rail related services. In using this outline, all the questions in Section I A and B should be asked first. If there is doubt as to whether the Section I criteria have been satisfied, the questions in Section II A and B should be addressed.

If you have any questions regarding this memorandum, please contact your Assistant General Counsel.

J.E.D.

Attachment

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OUTLINE OF NMB JURISDICTIONAL CRITERIA

I. Company Provides Transportation by Rail or Air

A. Is it a "Common Carrier" (i.e. are transportation services publicly available) by air or rail?

1. Are the company's services "held out" to the public?

a. Do they advertise, even if only to a small specialized market? Zantop Airlines, 6 NMB 740 (1979).

b. Do they provide transportation for hire? (scheduled service not necessary).

c. Does the company provide railroad or airline work for only one customer? If no, enumerate the customers. See, Louis Dreyfus Canada, Ltd., 11 NMB 28 (1983); Columbia and Cowlitz Railway Company, 6 NMB 527 (1978).

2. Does the company have one or more established places of business? If so, where?

B. If the company is a "Common Carrier" is it also engaged in interstate or foreign Commerce?

1. Air Carriers

a. Do they cross state lines or U.S. national borders in the course of providing either cargo or passenger service? Note that there is no de minimis requirement for such interstate or foreign commerce. Jimsair Aviation, 15 NMB 25 (1988); But see, C&E Aero Service, 10 NMB 62 (1982).

b. Do they have interline or freight forwarding agreements with airlines? If so, with which airlines? Panorama Air Tours, 15 NMB 113 (1988).

c. Do they carry air cargo?

d. Do they carry the U.S. Mail? See, 45 U.S.C. § 181.

e. Do they have a contract to provide services for the U.S. government? See, 45 U.S.C. § 181.

- f. Do they have any substitute service agreements, and, if so, with which airlines?
- g. Are they certified by the FAA? If so, what type of certificate do they hold and can it be submitted into evidence.
- h. Note: Where other applicable criteria have been satisfied, commercial helicopter operations have been found subject to the Act. See, Papillion Helicopters, Ltd., 12 NMB 201 (1985); Offshore Logistics, 10 NMB 477 (1983); and Evergreen Helicopters, 8 NMB 505 (1981).

2. Rail Carriers

- a. Are they a rail "carrier" pursuant to the Interstate Commerce Commission definition (i.e. do they provide freight or passenger service by rail)? See, 45 U.S.C. § 151 referencing subtitle IV of Title 49.
- b. Does the company interact (exchange freight, passengers or have rights of way over another railroad's routes) with other railroads.
- c. Is its track used by other railroads?
- d. Does it provide freight service?
- e. Does the company make contributions to the Railroad Retirement Fund?
- f. Note: State owned railroads and railroad/port facilities may be subject to RLA jurisdiction provided other criteria are met. See, North Carolina Ports Railway Commission, 9 NMB 398 (1982); Cumbres & Toltec Scenic Railroad, 10 NMB 329 (1983). However, by specific Congressional legislation the Alaska Railroad which is state owned is not subject the RLA.

II. The Company is Not a Common Carrier by Air or Rail Engaged in Interstate or Foreign Commerce; however it is:

- A. Directly or indirectly owned or controlled by or under common control of, a rail or air carrier engaged in interstate or foreign Commerce.

1. Ownership by an Air or Rail Carrier.
 - a. Is the subject company directly owned by an airline or railroad?
 - b. Is the company indirectly owned by an airline or railroad? Subsidiaries owned by a group of carriers may be subject to the RLÅ. See, Delpro v. NMB, 559 F. Supp. 842 (D. Del 1981); 679 F.2d 960 (3rd Cir. 1982) (rail car repair and maintenance facility owned by group of railroads).
2. Factors Indicating Direct Control.
 - a. The airline or railroad for which the subject company performs services has the authority to:
 - 1) Hire or fire employees.
 - 2) Impose or effectively recommend discipline, discharge, or screening of new hires.
 - 3) Set wages and benefits.
 - 4) Make assignments or transfers of personnel.
 - 5) Directly supervise the employees' work.
 - 6) Set staffing levels.
3. Factors Indicating Indirect Control.
 - a. Employees are trained by airline or railroad or follow airline or railroad's training procedures.
 - b. Employees are subject to the same hiring profile as at carrier.
 - c. Employees wear the airline or railroad carrier's uniforms.
 - d. Airline or railroad provides equipment or space to company.
 - e. Percentage of company's work which is for airline(s) or railroad(s).
 - f. Employees are held to same performance standards as similarly situated individuals at carrier.

B. Not Only is the Company Controlled by a Common Carrier by Air or Rail (see foregoing Section designated "A") But the Company also Performs Services in Connection with Air or Rail Transportation Which Are Services Traditionally Performed in the Industry.

1. Airline Industry (this listing excludes the obvious jobs of pilot, mechanic, flight attendant, ramp service agent, customer service agent, office clerical employee etc.)
 - a. Fuelers and re-fuelers, See, Jimsair Aviation Services, 15 NMB 85 (1988); Tri-State Aero, 9 NMB 356 (1982).
 - b. Aircraft cleaners, ramp workers, See, Ground Handling, 13 NMB 118 (1988).
 - c. Skycaps, baggage runners, wheelchair attendants. See, New York Interstate Service, Inc., 14 NMB 439 (1987).
 - d. Security guards, security screeners. See, Allied Maintenance, 13 NMB 255 (1986).
 - e. Maintenance of airline ground equipment. See, General Aviation, 15 NMB 256 (1988).
 - f. Bus drivers - (transport of airline employees or passengers usually on Airport grounds). See, ARA Environmental Services, 9 NMB 37 (1981).
 - g. Airline catering.
 - h. Pick-up or delivery of air freight. See, Air Cargo Transport, Inc., 15 NMB 202 (1988).
2. Railroad Industry (again this listing excludes the obvious categories such as locomotive engineers, firemen, carmen, clerks, conductors, trainmen, laborers, maintenance of way employees, signalmen, yardmasters, etc.)
 - a. Repair or maintenance of rail cars. See, Delpro, Inc., 8 NMB 6 (1980).
 - b. Trucking unless ICC certified as a "motor carrier". See, 45 U.S.C. §151 and Southern Region Motor Transport, 4 NMB 298 (1975); But see, Chicago Truck Drivers v. National Labor Relations Board, 559 F.2d 816 (8th Cir.1979):

and Chicago Truck Drivers v. National
Mediation Board, 673 F.2d 1334 (7th Cir.1981).

c. Intermodal loading and unloading.