Aircraft Service International, Inc. *and* Communications Workers of America, Petitioner and Local 74, United Service Workers Union, International Union of Journeymen and Allied Trades. Case 12–RC–187676

June 9, 2017

ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

The National Labor Relations Board has carefully considered the Employer's request for review of the Regional Director's Decision and Direction of Election. The request for review is denied as it raises no substantial issues warranting review.

In denying review, we agree with the Regional Director that the Employer's operation at Orlando International Airport is not covered by the Railway Labor Act (RLA).[1] Although the Employer's Request for Review does not specifically argue that its Orlando operation meets the National Mediation Board's (NMB) two-part test for determining whether an employer is subject to the RLA, we find that with respect to the second part of that test—whether the employer is directly or indirectly owned or controlled by, or under common control with, a carrier or carriers—the Orlando operation is clearly subject to even less carrier control than in previous cases where the NMB has found an employer not covered by the RLA. See *Miami Aircraft Support*, 21 NMB 78 (1993). The Employer, in fact, has admittedly presented insufficient evidence to satisfy any of the six factors comprising that part of the test—extent of a carrier's control over the manner in which the employer conducts its business, access to the employer's operations and records, role in personnel decisions, degree of supervision exercised, control over training, and whether the employees in question are held out to the public as carrier employees. The Employer has also essentially stipulated that it has no such evidence. Accordingly, the evidence of carrier control in the instant case falls substantially short of the considerations relied upon by Member Geale in his dissents in *Airway Cleaners*, 41 NMB 262 (2014), and *Menzies Aviation*, 42 NMB 1 (2014).

This is hardly surprising, since the Employer's service contract is solely with the Greater Orlando Aviation Authority (a governmental body), not with any carriers. Our dissenting colleague fails to take note of the significance of this critical feature, which distinguishes this case from the cases he cites in which the NMB found that this Employer's operations at other airports were covered by the RLA.

We also reject the Employer's and our dissenting colleague's contention that previous NMB decisions finding that nationwide *units* of baggage handlers and other employees of this Employer are appropriate at other airport facilities are relevant to determining whether the NMB has *jurisdiction* over the Employer's operation in Orlando, Florida, at issue in this case. No party contested the NMB's jurisdiction in any of those cases, and the issue of unit appropriateness is addressed by the NMB (as by the NLRB) only after the threshold requirement of jurisdiction has been met. See, e.g., *Aircraft Service International Group,* 40 NMB 43, 45 fn. 2, 50 (2012). As our dissenting colleague acknowledges, in cases involving this Employer where the NMB had to determine whether a particular operation came within its jurisdiction, the NMB has consistently applied its two-part test for carrier control to the facility at issue. As he also agrees, under the application of any variant of that test in this case there is insufficient carrier control at the Orlando location to establish NMB jurisdiction.[2]

Moreover, although it is true that the RLA, by its terms, tends to favor common carrier bargaining units of a "class or craft," the question here is whether a noncarrier employer, more peripheral to the airline industry, falls under the coverage of the RLA, a determination that requires the case-by-case review the NMB established long ago. Under the NMB's respective criteria for jurisdiction and unit appropriateness, a petitioned-for operation at a particular airport might be found to be covered by the RLA but not to constitute an independent appropriate unit. There is no inconsistency in that possibility.

[1] We also agree with the Regional Director that even if the agreement executed on November 5, 2016 did not require ratification, or if ratification was required and did occur, the petition would still be timely, given the conflicting contract duration dates in that agreement. See *South Mountain Healthcare & Rehabilitation Center*, 344 NLRB 375 (2005).

[2] We have recently referred three other cases that implicate the NMB's two-part jurisdiction test—*Prime Flight Aviation Services, Inc.,* 2–RC–186447, *Aircraft Service International, Inc.,* 28–RC–195332, and *ABM Onsite Services—West*, 19–RC–44377—to the NMB for clarification on how to assign weight to the factors used in that test in the light of *ABM Onsite Services—West v. NLRB,* 849 F.3d 1137 (D.C. Cir. 2017).

Dated, Washington, D.C. June 9, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, dissenting in part.

Employer Aircraft Service International, Inc. (Aircraft Service) employs baggage handling encoder operators (operators) at the Orlando International Airport. Petitioner Communications Workers of America (CWA or Union) has filed an election petition with the National Labor Relations Board (NLRB) seeking to represent Aircraft Service's Orlando operators pursuant to the National Labor Relations Act (NLRA). However, the NLRA excludes from its coverage "any person subject to the Railway Labor Act"[1] (RLA), and the National Mediation Board (NMB) has found, in every prior NMB decision involving Aircraft Service, that Aircraft Service is subject to the RLA,[2] and that Aircraft Service employees can only be organized as part of a nationwide bargaining unit.[3] Similarly, in a prior NLRB case involving Aircraft Service, the NLRB denied review of an Acting Regional Director's decision that dismissed an NLRB representation petition seeking an election in a single-location bargaining unit.[4] In that case, the Acting Regional Director reasoned that the NMB had determined that Aircraft Service was subject to the RLA and that a unit limited to a single location was inappropriate.[5] The prior NMB cases involving Aircraft Service arose at locations other than the Orlando Airport; and in cases addressing jurisdiction, the NMB applied its two-part test at each location to determine whether Aircraft Service's operations at that location were sufficiently controlled by a carrier to be subject to NMB jurisdiction under the RLA.[6]

In the instant case, the NLRB considers another representation petition filed pursuant to the NLRA, in which the Union seeks to represent Aircraft Service employees in a single-location unit. Unlike the prior cases described above, the Regional Director here found that the NLRB has jurisdiction, not the NMB, and that a single-location bargaining unit is appropriate.

I concur with my colleagues' finding that, if the Board applies the NMB's two-part jurisdictional test to Aircraft Service's operations in Orlando, there would be insufficient carrier control at that location to establish NMB jurisdiction.[7] However, in *ABM Onsite*, where the D.C. Circuit Court of Appeals denied enforcement of an NLRB order that found the NLRB had jurisdiction rather than the NMB, the court's denial of enforcement stemmed from the NLRB's reliance on recent NMB jurisdictional rulings that were inconsistent with prior NMB decisions, where neither the NLRB nor the NMB provided a reasoned explanation for the inconsistency.

Here, I believe the request for review raises substantial issues regarding a different kind of inconsistency—an inconsistency within the NMB's own decisions relating to Aircraft Service, and between those decisions and the Regional Director's findings in this case. As noted above, numerous NMB decisions have concluded that the RLA applies to Aircraft Service and that Aircraft Service employees may only be organized as part of a nationwide bargaining unit. Yet, in prior cases, the NMB appears to examine the extent of carrier control at a single location, not at all locations.[8] The Regional Director here likewise

[1] NLRA Sec. 2(2).

[2] See, e.g., *Aircraft Serv. Int'l Group, Inc.*, 33 NMB 258 (2006) (Employer's Albuquerque Airport operations are subject to the RLA); *Aircraft Serv. Int'l Group, Inc.*, 33 NMB 200 (2006) (the Employer's Pittsburgh Airport operations are subject to the RLA); *Signature Flight Support/Aircraft Serv. Int'l Inc.*, 32 NMB 30 (2004) (Employer's LaGuardia Airport operations are subject to the RLA); *Aircraft Service International Group, Inc.*, 31 NMB 361 (2004) (the Employer's Detroit Airport operations are subject to the RLA).

[3] See, e.g., *Aircraft Service Int'l Group*, 40 NMB 43 (2012); *Aircraft Service Int'l Group*, 31 NMB 508 (2004).

[4] *Aircraft Service Int'l, Inc.*, 31–RC–100047 (Oct. 22, 2013) (denying review of Acting Regional Director's April 2, 2013 Decision and Order).

[5] Id. (citing *Aircraft Service Int'l Group*, supra, 40 NMB at 43).

[6] The RLA originally applied only to common carriers. However, Congress expanded the RLA to cover any employer who "is directly or indirectly owned or controlled by or under common control with any carrier" and "operates any equipment or facilities or performs any service" related to transportation. RLA Sec. 1, 45 U.S.C. § 151 (quoted in *ABM Onsite Services – West, Inc. v. NLRB*, 849 F.3d 1137, 1142 (D.C. Cir. 2017) (*ABM Onsite*)). When the employer is involved in airline operations, it is subject to NMB jurisdiction under the RLA if (1) there exists the requisite direct or indirect carrier ownership or control, and (2) the employees do work "'that is traditionally performed by employees of . . . air carriers.'" *ABM Onsite*, 849 F.3d at 1142 (quoting *Air Serv. Corp.*, 33 NMB 272, 284 (2006)).

[7] In this case, the Regional Director, applying NLRA principles, also found that Aircraft Service's collective-bargaining agreement did not bar the petition. To the extent the NLRA applies to the Employer, I agree that the collective-bargaining agreement did not operate as a bar to the petition.

[8] Compare *International Total Services*, 20 NMB 537 (1993) (finding employer's Logan Airport skycap and pre-board screening operations subject to the RLA, relying on evidence that those operations were "substantially similar" to the employer's operations at other air-

engaged in a single-location analysis, resulting in his findings that the RLA does *not* apply to Aircraft Service, and a single-location bargaining unit limited to Orlando was appropriate. If the prior NMB decisions have correctly found that Aircraft Service is an RLA-covered employer subject to NMB jurisdiction and that its employees may only be organized in nationwide bargaining units, it would appear incongruous to conclude, at least without further analysis, that the NMB lacks jurisdiction over Aircraft Service in Orlando based on an evaluation of carrier ownership or control at only a single location. I believe the Board must grant review to provide a "reasoned explanation" regarding these issues, or the Board should refer this matter to the NMB for such an explanation. *ABM Onsite*, 849 F.3d at 1146 (citations omitted). Accordingly, as to these issues, I respectfully dissent.

Dated, Washington, D.C. June 9, 2017

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Philip A. Miscimarra, Chairman

NATIONAL LABOR RELATIONS BOARD

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ports where NMB asserted jurisdiction as well as evidence "that airlines assert control over ITS's daily operations and the manner in which ITS does business.").

My colleagues treat the NMB decisions rejecting a single-location unit of Aircraft Service employees as irrelevant here because no party contested the NMB's jurisdiction in any of those cases. Nonetheless, they acknowledge that the RLA's statutory scheme, which Congress extended to cover certain non-carrier employers, see above fn. 6, favors bargaining units of a "class or craft" regardless of work locations, yet they fail to resolve the tension between NMB decisions applying the two-part test for determining jurisdiction at a single location and NMB decisions finding a single-location unit inappropriate. Neither do they point to any NMB decision resolving that tension.

The majority also posits that the numerous prior NMB cases involving the Employer are distinguishable because in those cases the Employer provided services under contracts with carriers, whereas in this case the Employer's contract is with the Greater Orlando Aviation Authority, a governmental agency that operates the Orlando Airport. My colleagues, however, cite no case in which the NMB has attached jurisdictional significance to this distinction. In these circumstances, I believe the Board should allow the NMB, in the first instance, to make that determination.