



NATIONAL MEDIATION BOARD

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33 NMB No. 45

July 6, 2006

Richard A. Siegel
Associate General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20571-0001

Re: NMB File No. CJ-6892
Air Serv Corporation

Dear Mr. Siegel:

This letter responds to your request for the National Mediation Board's (NMB or Board) opinion regarding whether Air Serv Corporation (Air Serv) is subject to the Railway Labor Act (RLA), 45 U.S.C. §151, *et seq.* On January 23, 2006, the National Labor Relations Board (NLRB) requested an opinion regarding whether Air Serv's operations at the San Francisco International Airport (SFO) are subject to the RLA.

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

I. PROCEDURAL BACKGROUND

This case arose out of an unfair labor practice charge against Air Serv filed by Machinists and Aerospace Workers Air Transport Employees, Lodge 1781, International Association of Machinists and Aerospace Workers, AFL-CIO (IAM) in NLRB Case No. 20-CA-32791. During the course of the NLRB's investigation into the charge, Air Serv asserted that it is subject to the RLA and the jurisdiction of the NMB. On January 23, 2006, the NLRB requested an NMB opinion regarding the NMB's jurisdiction over Air Serv's SFO operations. On January 23, 2006, the NMB assigned Eileen M. Hennessey to

investigate. Air Serv filed submissions with the Board on February 3, 2006, March 28, 2006, May 16, 2006, and May 30, 2006. The IAM filed submissions with the Board on January 30, 2006, February 25, 2006, and May 16, 2006.¹

The NMB's opinion in this case is based upon the request and record provided by the NLRB and the position statements submitted by Air Serv and the IAM.

II. AIR SERV'S CONTENTIONS

Air Serv argues that the NMB has consistently held that airline service companies such as Air Serv are subject to the RLA. At SFO, Air Serv employees perform cabin cleaning and lavatory services for United Airlines (United or Carrier). Air Serv argues that the NMB has held in multiple cases that this work is traditionally performed by air carrier employees.

Air Serv further contends that United exerts significant control over Air Serv's operations at SFO. In support of this contention, Air Serv cites to the following: United provides it with office space at SFO rent-free; United provides and repairs all of the equipment used by Air Serv; United provides Air Serv with provisions used to stock the aircraft; United approves all cleaning chemicals used by Air Serv; United dictates how Air Serv must service the aircraft; United dictates specific levels of staffing and influences Air Serv employee schedules at SFO; United requires Air Serv to keep records documenting the cabin and lavatory operations and may access these records at any time; United controls the training that the cabin cleaning and lavatory services employees receive; United directs the work of

¹ In August 2004, Region 9 of the NLRB was presented with the issue of whether Air Serv's cabin cleaning and lavatory service operations at Greater Cincinnati Northern Kentucky International Airport are subject to the RLA. (NLRB Case No. 9-RC-17935). The NLRB conducted a hearing on the issue. On March 17, 2006, the Regional Director of Region 9 issued a Decision and Order which dismissed the petition for lack of jurisdiction due to Air Serv's status as an RLA employer.

Air Serv employees; and United influences Air Serv's personnel decisions.

Air Serv argues that the NMB's determinations in *SkyValet* and *John Menzies* are controlling. Furthermore, Air Serv states that the facts in this case are clearly distinguishable from the facts in *Signature Flight Support*, a recent Board determination finding that Signature Flight Support's operations at Westchester County Airport are not subject to the RLA.

III. IAM'S CONTENTIONS

The IAM asserts that it is the exclusive collective bargaining representative of Air Serv's aircraft and lavatory cleaners assigned to United at SFO.² The IAM states that the NLRB has jurisdiction over Air Serv. The IAM states that there is neither common ownership nor control between Air Serv and "any RLA direct carrier." The IAM states that Air Serv is independently owned and it hires, fires, sets wages, hours and working conditions for its employees. The IAM argues that a letter from United responding to a series of questions from an NLRB Investigator demonstrates that the Carrier fails to exert substantial control over Air Serv's operations at SFO.

IV. FINDINGS OF FACT

Air Serv

Air Serv provides the following services to commercial air carriers: ramp service, aircraft cabin cleaning, baggage handling, cargo acceptance and handling, airport

² Air Serv states that the Airport Commission's Rules and Regulations require it to recognize a union that meets the card check provisions of Airport Commission's "Labor Peace/Card Check Rule." Because the NMB had not previously determined that Air Serv is an RLA employer and the IAM disputes Air Serv's status as an RLA employer, Air Serv states that it "was forced" to enter into the Card Check Agreement notwithstanding its belief that it is subject to the RLA.

transportation, wheelchair service, boarding pass verification and skycap service. Air Serv maintains its corporate headquarters in Atlanta, Georgia.

In March 2003, Air Serv entered into a Services Agreement (Services Agreement) with United to provide cabin cleaning and lavatory service to United aircraft at airports throughout the country, including SFO. On March 29, 2005, United amended the Services Agreement to provide additional standards for performing cabin cleaning and lavatory services at SFO (SFO Agreement). The Services Agreement can be cancelled upon 30 days notice of continuous failure to adhere to any of its terms.

Nature of Work Performed

Air Serv employs approximately 518 employees at SFO. Approximately 314 of these employees provide cabin cleaning and lavatory services. Cabin Cleaners clean and stock United aircraft. The employees begin their shift by stocking an assigned United service vehicle with provisions and cleaning supplies, most of which are either provided by United or must meet United's specifications as set forth in the SFO Agreement or regulations published by United. Cleaners are dispatched to inbound United aircraft. Once at the aircraft, the Air Serv employees await authorization from a United employee to board the plane. Once inside the plane, Cabin Cleaners clean the cabin and lavatories and stock the galley. After servicing the aircraft, the Cabin Cleaners are dispatched to another incoming flight or, at United's request, perform "callback" services on a previously serviced aircraft.

Lavatory Service employees empty sewage from United aircraft. At the start of a shift, Lavatory Service employees stock a United lavatory vehicle with United approved supplies and are dispatched to an assigned zone to service the lavatories. Like the Cabin Cleaners, Lavatory Service employees may perform "callback" services on previously serviced aircraft.

Carrier Control over Air Serv's Operations and Employees

Under the Services Agreement, Air Serv must provide liability insurance, comply with all applicable laws governing the employment relationship, including workers' compensation and employer's liability, and make required employee payroll deductions and withholdings. With regard to staffing, under the Services Agreement, Air Serv must provide a local manager, an on-site safety coordinator, a cabin/shift planner, and an on-site trainer, and must maintain an adequate supervisor-to-employee ratio to meet the service needs under the Services Agreement. The Services Agreement also requires Air Serv to designate one primary and one alternate individual to serve as United's central point of contact for all performance-related issues resulting from services provided under the Services Agreement.

Air Serv supervises all work performed under the Services Agreement. All services provided must be performed in accordance with United's Aircraft Appearance Policies and Procedures and Standards, Series 55 (Series 55).³

The Services Agreement provides that if services are to be performed at an airport or other premises under Federal Aviation Administration (FAA) jurisdiction, Air Serv must conduct background investigations on each of its employees who have access to any secure or restricted area. Each background investigation must be in writing and verified by Air Serv as having been completed upon request by United or the applicable government authority. United reserves the right to independently verify and to terminate the Services Agreement without further notice upon discovery of a materially inaccurate investigation conducted by Air Serv.

³ United regards the Series 55 regulations as confidential and proprietary business information and for this reason, although Air Serv referenced the Series 55 regulations, it did not submit the actual regulations with its position statement.

Audits

The Services Agreement provides that United will perform random cabin interior audits to ensure that Air Serv's performance meets quality standards in accordance with Series 55. If Air Serv scores below 75 on more than 14 percent of the audits conducted in a 30-day period, then it must complete a Performance Improvement Plan and it is subject to a "vendor assessment" which may result in termination of the contract.

Twice a year United completes a formal evaluation of Air Serv's performance. United's Corporate Aircraft Appearance and Provisioning Department may also conduct periodic assessments to ensure adherence to standard operating procedures, training and record keeping requirements.

Work Scheduling

The Services Agreement states that Air Serv will "perform the Services during the hours designated by United and will, in any event, perform the Services, where possible, in such a manner as to avoid inconvenience to United and its personnel and interference with United's operations."

Supervisor Authority and Daily Interaction with the Carrier

United has the right to inspect all services provided by Air Serv and has full access at all times to all spaces provided or used by Air Serv. The Services Agreement requires Air Serv to invoice United for fixed price services bi-weekly upon the completion and approval of such services and provide invoices which are "itemized to reflect the man hours provided and the associated charges at the rate(s) specified in this Agreement." Under the Services Agreement, and upon United's request, Air Serv must make available records of time sheets, payroll registers, cancelled payroll checks, and any other work records of all personnel regarding all work included in any Air Serv invoice.

Air Serv is required to employ “competent” persons to perform the services specified in the Services Agreement. The Services Agreement provides that “all such employees will at all times be employees of [Air Serv] and not of United”, and that Air Serv is an independent contractor with complete responsibility for all of its employees and subcontractors. The Services Agreement also provides that Air Serv will employ and direct such personnel as it requires to perform the contracted for services and it will exercise full and complete authority over its personnel. Air Serv has the sole right under the Services Agreement to hire and discharge its employees.

The frequency and type of cabin cleaning and lavatory services are described in the Services Agreement and must be performed in accordance with United’s Series 55 regulations. There are also provisions in the Services Agreement governing the service requirements for the placement and monthly change out of literature aboard the aircraft and a definition of “mission failure” with regard to this service requirement. As an added security measure instituted since the September 11 terrorist attack, United will randomly hide security placards in aircraft cabins and Air Serv is required to locate the placards while servicing the plane.

On a daily basis, United meets with the Air Serv Account Manager who oversees performance of cabin and lavatory services. At these meetings United addresses, among other issues, any complaints it has with the service provided by Air Serv. United’s auditors also meet regularly with the Air Serv Regional Manager to discuss Air Serv’s performance and what modifications Air Serv should make to its current procedures.

If a flight attendant or other United employee is dissatisfied with an Air Serv employee’s performance, they may “call back” Air Serv employees to provide additional service. United requires Air Serv to place a Cleaning Notification and Contact form in the aircraft galley after each “heavy clean.” If a flight attendant determines that an aircraft has not been cleaned or provisioned properly, United requires the flight

attendant to fill out the form and return it to a United Representative.

Authority to Remove or Discipline Employees

According to Air Serv, United has the authority to recommend that Air Serv take disciplinary action against an Air Serv employee. United states that it “has occasionally brought to the attention of Air Serv management any known actions by their employees that may need to be investigated and/or might require disciplinary action.” If Air Serv is notified of misconduct, it will investigate the incident and impose the appropriate discipline. Air Serv provided the Board with five recent occurrences when it complied with requests from United regarding employee discipline or assignments.

The Services Agreement also includes provisions for performance penalties that United may assess against Air Serv for flight departure delays caused by Air Serv, as well as for lavatory service failures, vacuum service failures, magazine change-out failures, and for failure to find the security placards. United may also assess penalties against Air Serv when it receives poor ratings on its vendor evaluations. These penalties range from \$20 to \$1,000. United charged back to Air Serv over \$15,000 for service failures that occurred between October 2005 and December 2005. In addition, any security-related fines levied against United by the government or airport authorities resulting from work performed by Air Serv employees are the responsibility of Air Serv.

Equipment and Supplies

The Services Agreement provides that United will supply and service United equipment used by Air Serv employees. United provides and maintains the trucks used by Air Serv to service the aircraft. These trucks bear a United logo.

The SFO Agreement states that:

United will maintain ownership and responsibility for all cabin amenity and provisioning supplies. United local management is responsible for the ordering, stocking, storing and auditing of all provisioning supplies and materials. United local management will issue all provisioning supplies, including cabin and amenity products to the Contractor in order to meet the flight schedule requirements and service level expectations.

Those items, which United will provide at no cost to the Contractor, are:

Garbage Bags for the Ship Stores Kit and Flight Deck, Galley and Lavatory Paper Towels, Trash Compactor Boxes, Cleaning Chemicals, Soap and Disinfectants, Passenger Lavatory Supplies, All Passenger Amenities identified in Series 55-4, Extended Delay Kits and Universal Ship Stores Kit.

Cleaning Chemicals

United's Maintenance Engineering Department must approve all chemicals used on United aircraft. Only those chemicals listed in Series 55-02-11 may be used in servicing United aircraft. **NOTE: Use of chemicals not listed in Series 55 without prior written consent from United Air Lines Director of Aircraft Appearance & Provisioning is prohibited.** United will provide the Contractor with all chemicals required to perform the contracted services, and shall make available all applicable Material Safety Data Sheets (MSDS). Contractor is responsible for providing all daily disposable and/or reusable supplies used in the actual cleaning of the aircraft. . . .

(Emphasis in the original).

Facility

United provides Air Serv with rent-free office space at SFO. The employees at issue report to this office at the start of their shift and store personal belongings in lockers provided by United. Air Serv also has a separate office, which is not provided by United, located near SFO in Burlingame, California.

Training

Under the Services Agreement, Air Serv agrees to provide one individual who is primarily responsible for training employees at each location; and United trains this trainer. United provides all applicable new employee training materials, and Air Serv schedules and provides the training as required to meet the Service Agreement's performance expectations. All training must be in accordance with United's Series 55 regulations. Air Serv is required to retain all training records, including qualifications or certifications of employees performing services under the Services Agreement. Under the Services Agreement, Air Serv agrees to make such records available upon request to United and forwards the records to United when the Services Agreement terminates.

Uniforms

Air Serv employees wear uniforms provided by Air Serv. These uniforms bear the Air Serv logo.

United's January 19, 2006 Letter

On December 20, 2006, an NLRB Investigator contacted United by letter and requested that the Carrier assist in the investigation by providing answers to 32 questions. The December 20th letter stated:

This letter also confirms my understanding that United will not voluntarily supply a copy of the service contract that it has with Air Serv at SFO

and that United will provide a letter response in lieu of the affidavit that I requested to take from a United representative at SFO.

On January 19, 2006, United responded to the NLRB's questions. The Carrier's responses to certain questions were as follows:

Q5: Does United provide hiring standards for any Air Serv employees, including cabin cleaners and lav cleaners? Please describe.

Answer: United requires in its contract with Air Serv that it employ "competent persons" to perform the required services and that background investigations are required if the services are to be performed at an airport.

Q6: Does United screen the hires of Air Serv? Does United do drug testing, fingerprinting, etc. on such hires? Please describe.

Answer: No. Air Serv is responsible for all of these functions.

Q7: Does United provide service performance standards for any Air Serv employees or managers? If it does, please describe.

Answer: United does not provide any service performance standards for any Air Serv employees on any individual level. United requires overall performance standards which include periodic evaluations and weekly audits.

Q8: Has United ever directed Air Serv to discipline or terminate an Air Serv employee? Please describe.

Answer: No. United has occasionally brought to the attention of Air Serv management any known actions by their employees that may need to be investigated and/or might require disciplinary action.

Q11: Does United decide the number of Air Serv cabin cleaners and lav cleaners working on United planes at SFO?

Answer: No. United does have a recommended minimum staffing level and expects Air Serv to meet the terms of its contract which includes certain performance standards.

Q12: Does United provide any kind of daily supervision over Air Serv employees? Please describe.

Answer: No. United does not directly supervise Air Serv employees. United monitors Air Serv's overall performance.

Q15: Does United monitor the training given by Air Serv to Air Serv employees?

Answer: United periodically audits the training records of Air Serv but does not oversee actual employee training.

Q16: Does United audit the records of Air Serv training files, operational files and/or airport security files? Please describe.

Answer: We periodically audit Air Serv's training records to make sure Air Serv is doing training in compliance with our contractual terms.

Q22: Has United been involved in any personnel decision-making involving the hiring, firing

disciplining, promotion or wages paid to Air Serv employees?

Answer: No.

Q23: Do Air Serv managers/supervisors ever confer with United over decisions in the areas set forth in question 22 above? Please describe.

Answer: No.

Q31: Does United control the scheduling of work and/or number of persons assigned to clean aircraft and lavs on each shift at SFO?

Answer: No. United does have a recommended minimum staffing level and expects Air Serv to meet the terms of its contract which include performance standards.

V. 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. *Aircraft Serv. Int'l Group, Inc.*, 33 NMB 200 (2006). 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. *Aircraft Serv. Int'l Group, Inc.*, *above*. See also *AvEx Flight Support*, 30 NMB 355 (2003).

Air Serv does not fly aircraft and is not directly or indirectly owned by an air carrier. It is undisputed that the Air Serv employees at issue perform work that is traditionally

performed by employees in the airline industry. See, e.g., *John Menzies PLC, d/b/a Ogden Ground Servs., Inc.*, 30 NMB 405 (2003). 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 SFO operations by the Carrier.

Carrier Control of Air Serv's SFO Operations

The standard for satisfying the control prong of the NMB's jurisdiction test is not, as the IAM argues, that a carrier hire, fire, set wages, hours and working conditions of contractor employees. The standard is the degree of influence that a carrier has over discharge, discipline, wages, working conditions and operations. To determine whether there is sufficient carrier control over a company, the NMB looks to several factors, including: the 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. *Aircraft Serv. Int'l Group, Inc.*, above; *John Menzies PLC, d/b/a Ogden Ground Servs., Inc.*, above; *Signature Flight Support of Nevada*, 30 NMB 392 (2003); *Aeroground, Inc.*, 28 NMB 510 (2001); *Miami Aircraft Support*, 21 NMB 78 (1993).

The record in the instant case establishes that United exercises sufficient control over Air Serv's operations to support a finding of RLA jurisdiction. United's flight schedules affect the work schedules of Air Serv employees. United establishes a minimum level of staffing. United provides and repairs the equipment used by Air Serv to service the Carrier's aircraft. United provides many of the supplies Air Serv uses to service the aircraft. United specifies the cleaning supplies which must be used to clean its aircraft. In order to perform periodic security and safety audits, United has access to Air Serv's records regarding personnel, maintenance, and training. United's Series 55 regulations appear, by reference, to be an extensive set of regulations and standards that must be adhered to under the terms of the Services Agreement.

Through the Series 55 regulations United dictates the cleaning guidelines and procedures for servicing the aircraft. Air Serv has very little discretion concerning how or when to provide service.

Although Air Serv supervises its own employees, United exercises a great deal of control over Air Serv employees through its comprehensive monitoring of the contract's performance. This monitoring includes: monetary performance penalties, minimum staffing levels, daily vendor meetings, detailed Series 55 regulations and regular audits.

The facts in this case are similar to many recent jurisdiction cases in which the Board has asserted RLA jurisdiction. For example, in *Signature Flight Support/Aircraft Serv. Int'l, Inc.*, 32 NMB 30 (2004), the carrier required ASII's employees to follow their operating and training procedures, and failure to follow those procedures resulted in discipline. The carrier mandated specific training and did not provide notice for audits. Carrier personnel reported problems with ASII's employees and, at the request of the carrier, ASII disciplined and terminated those employees. The Board concluded that ASII's operations and employees at LaGuardia Airport are subject to the RLA.

Similarly, in *John Menzies, PLC d/b/a Ogden Servs., Inc.*, 31 NMB 490 (2004), carrier personnel directed and supervised Menzies' employees in the day-to-day performance of their duties, reporting problems and effectively recommending discipline. The carrier monitored daily and monthly cleaning, baggage handling, and on-time performance records.

The Board found the exercise of substantial control in *Kannon Serv. Enterprises Corp.*, 31 NMB 409 (2004), where the carrier: requested removal of employees; dictated what constituted adequate supervision; specified personal appearance standards; consulted with the employer on the number of employees hired, the hours worked, overtime, and holiday schedules; provided equipment; required the keeping of certain records; and provided office space.

Finally, in *Signature Flight Support of Nevada*, 30 NMB 392 (2003), the Board asserted jurisdiction. The Board found that carriers exerted substantial control over Signature's McCarran operations by: requiring Signature's employees to follow their operating and training programs; directing and supervising Signature employees; reporting personnel problems and effectively recommending discipline; participating in the investigation of disciplinary incidents by performing audits without notice; and rewarding Signature employees with free passes. The carriers in that case, as in the instant case, also had access to employees' background files as well as training files, and Signature leased space from one of the carriers.

The facts in this case stand in stark contrast to the facts in *Signature Flight Support*, 32 NMB 214 (2005), one of the few recent cases in which the NMB determined that it did not have jurisdiction. Unlike the facts in the instant case, in *Signature Flight Support*, *above*, the carrier did not provide office space or equipment, nor did it directly supervise Signature's employees. The carrier in that case, NetJets, required that Signature employees involved in aircraft handling have appropriate certificates from a NetJets approved training program. However, Signature was permitted to select the training program from a list of approved programs. In this case, United not only trains Air Serv's trainers, it provides the training materials that are used, and United dictates in specific detail, through its Series 55 regulations, the service procedures to be followed. If United's regulations are not followed, it imposes financial penalties on Air Serv.

United routinely audits Air Serv performance and notes staffing levels in the audit. While United states that it only "recommends" minimum staffing levels, the SFO Agreement states that if 14 percent of the audit scores fall below a certain level within a 30-day period, Air Serv faces possible termination of the contract. Although United stated that it was not involved in personnel decisions involving Air Serv employees, United also stated that it has notified Air Serv management of actions by Air Serv employees that may require investigation and

disciplinary action. When notified by United of these actions, Air Serv does investigate and has complied with United's requests regarding discipline and assignments.

The IAM relies heavily upon the letter from United as "clear and concise" evidence that a carrier does not exert substantial control over Air Serv's operations at SFO. The Board finds that United's responses to the NLRB's questions articulate its position regarding its relationship with Air Serv. United does not take a position regarding whether Air Serv is covered by the RLA. Moreover, United's letter is not incompatible with the evidence regarding the substantial level of control the Carrier exercises over Air Serv. The IAM's reliance upon United's letter as evidence of a lack of carrier control is misplaced.

CONCLUSION

Based on the record in this case and for the reasons discussed above, the NMB's opinion is that Air Serv and its employees at SFO are subject to the RLA. This opinion may be cited as *Air Serv Corporation*, 33 NMB 272 (2006).

By direction of the NATIONAL MEDIATION BOARD.



Mary L. Johnson
General Counsel

Copies to:
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