



NATIONAL MEDIATION BOARD
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35 NMB No. 55

July 2, 2008

William B. Cowen
Solicitor
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570-0001

Re: NMB File No. CJ-6935
Swissport USA, Inc.

Dear Mr. Cowen:

This letter responds to your request for the National Mediation Board's (NMB or Board) opinion regarding whether Swissport USA, Inc. (Swissport) is subject to the Railway Labor Act¹ (RLA), 45 U.S.C. § 152, Ninth (Section 2, Ninth). On April 11, 2008, the National Labor Relations Board (NLRB) requested an opinion regarding whether Swissport's operations at Chicago-O'Hare Airport (ORD) in Chicago, Illinois are subject to the RLA.

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

I. PROCEDURAL BACKGROUND

This case arose out of a representation petition filed by Miscellaneous Employees Union, Local 781, International Brotherhood of Teamsters (Local 781) on February 26, 2008, seeking to represent all full-time and regular part-time ramp agents, lead ramp agents, ground service equipment mechanics, lead ground service equipment mechanics, and ground service equipment mechanic helpers employed by Swissport.² Swissport objected to the NLRB's jurisdiction arguing that its employees and operations at ORD are subject to the RLA.

¹ 45 U.S.C. § 151, et seq.

² The petitioned-for unit excluded all other employees, office clerical employees and guards, professional employees and supervisors.

A hearing was held in NLRB Region 13 on March 11, 2008. On April 11, 2008, the NLRB requested an NMB opinion regarding NMB jurisdiction over Swissport's operations at ORD. The NMB assigned Maria-Kate Dowling to investigate. On April 29, 2008, Local 781 filed its position statement. On April 30, 2008, Swissport filed its response. On May 30, 2008, the NMB reassigned the case to Investigator Sarah Halpin.

The NMB's opinion in this case is based upon the request and record provided by the NLRB, including the hearing transcript provided by the NLRB, and the submissions from the participants.

II. SWISSPORT'S CONTENTIONS

Swissport states that its employees are subject to RLA jurisdiction under the NMB's two-part function and control test for determining jurisdiction of employers that are not owned or under common ownership with an RLA carrier. According to Swissport, its employees perform work traditionally performed by employees in the airline industry, and therefore, Swissport asserts that its employees satisfy the function part of the test. Swissport contends that it satisfies the control part of the test since the Carriers it has contracts with (referred to collectively as the Carriers) retain a significant degree of control over Swissport's workforce. Swissport asserts that employees are scheduled based on the Carriers' flight schedule and service levels directed by the Carriers, and that many Carriers require daily briefings and report to Swissport station managers regarding special handling needs on a daily basis. Swissport contends that although Carriers do not have direct control over the hiring process, Swissport staffs the Carriers' accounts according to the Carriers' requests. Additionally, Swissport states that the degree of Carrier control over the employees is considerable. According to Swissport, the Carriers retain the power to request that Swissport discipline employees or remove certain employees from their accounts. Swissport also contends that each Carrier sets forth its own standards regarding training. Finally, Swissport states that it also uses Carrier equipment and office space.

III. LOCAL 781'S CONTENTIONS

Local 781 contends that Swissport and its employees are not subject to the RLA. According to Local 781, the employees of Swissport are private sector employees who are entitled to vote in an NLRB-conducted election. Local 781 asserts that Swissport is subject to NLRB jurisdiction because Swissport has acquiesced to the NLRB's jurisdiction on two previous occasions.³ In the alternative, Local 781 states that Swissport does not satisfy the two-part test

³ The role of the NMB in this case is to issue an advisory opinion at the request of the NLRB. The issue of whether Swissport's jurisdictional claim has been timely raised or is equitable is a decision for the NLRB.

required for jurisdiction under the RLA. First, Local 781 contends that Swissport employees do not perform work traditionally performed by employees of air carriers because Swissport does not operate any aircraft or employ any pilots, flight engineers or airline maintenance personnel. Second, Local 781 claims that the Carriers do not exercise sufficient control over Swissport's operations to support a finding of RLA jurisdiction. Local 781 asserts that Swissport employees are solely employed, paid, and directed by Swissport. Local 781 also asserts that Swissport has its own office, employee handbook, employment application and hiring process. Furthermore, Local 781 states that Swissport has discretion to enforce its own labor relations policies, and does not always terminate an employee at a Carrier's request. Finally, Local 781 contends that Swissport provides its own equipment to perform the ground handling work.

IV. FINDINGS OF FACT

Swissport is a Delaware corporation engaged in the business of providing ground support services to international and domestic airline carriers. At ORD, Swissport provides ramp services to between twelve to sixteen Carriers.

Swissport stipulated to NLRB jurisdiction in two previous NLRB cases. On October 1, 2004, Swissport stipulated to NLRB jurisdiction when the NLRB decertified the Transportation Workers Union of America, ALF-CIO, Air Transport Local 504 as the collective bargaining representative of Swissport's ramp agents and ground service mechanics at ORD. On January 26, 2006, Swissport stipulated to NLRB jurisdiction when the NLRB certified Local 705, International Brotherhood of Teamsters as the exclusive collective bargaining representative of Swissport's ramp agents and ground service mechanics at ORD.

Nature of the Work Performed

Swissport employees load and unload cargo and passenger baggage from aircraft at the airport, weigh and balance the cargo and baggage for outgoing flights, process passenger baggage, clean aircraft cabins, and de-ice aircraft in preparation for flight departures.

Carrier Control over Swissport's ORD Operations and Employees

Training

The record in this case includes Swissport's Standard Ground Handling Agreements and Service Level Agreements with eight different Carriers. These agreements vary, but all include training provisions in which a Carrier dictates the type of training Swissport employees must receive. For example, Swissport's agreement with Virgin Atlantic states that Swissport employees

must “undergo such training as the Carrier reasonably requires from time to time. ...” Virgin Atlantic provides initial training on Carrier-specific requirements, and Swissport provides training on aspects of the work where Swissport has expertise, such as on driving ramp vehicle equipment. Similarly, Swissport’s agreement with Asiana Airlines, Inc. provides that the Carrier conducts training at the beginning of the contract and requires Swissport to conduct necessary training thereafter. Austrian Airlines sets forth various types of training that Swissport employees must undergo. Swiss Air requires significant training in the handling of dangerous goods.

Hiring, Scheduling, Staffing, and Supervision

Swissport hires its own employees and sets their wages and benefits. Swissport employees do not have to be approved by Carriers before hiring. Once hired, Swissport employees are assigned to Carriers based on the Carriers’ flight schedule and service levels. Under Swissport’s separate contracts, the Carriers have varying degrees of control over Swissport’s scheduling and staffing. Some agreements, such as Swissport’s agreement with Asiana Airlines, contain specific staffing levels. Also, Noreen Jedlicka, Swissport’s Chicago Station Manager, testified that Carriers have input as to which Swissport employees service their accounts. For example, Air Jamaica sent an e-mail to Swissport requesting an individual Swissport employee by name to service its account. Asiana Airlines sent an e-mail with a list of Swissport employees it wanted to work in its bag room operation. Jedlicka testified that Swissport attempted to accommodate these requests. In addition, Carriers have requested employees with specific language skills.

Swissport provides its employees with an employee handbook, authored by the company. Additional performance requirements are provided in the contracts with individual Carriers. All Carrier contracts contain specific provisions that Swissport employees must perform their duties in accordance with Carrier policies and governmental regulations. All Carriers, in addition to Swissport itself, do quality and performance audits of Swissport employees. Additionally, all Carriers require Swissport to provide reports and statistics regarding baggage delivery time, cabin cleaning, and safety audits. Swissport’s contract with Air-India Ltd. and Swiss International Airlines, Ltd. specify that the Carrier controls when and how Swissport employees may take overtime. According to its agreement with Swissport, Air-India inspects its aircraft after Swissport’s de-icing operations to determine whether the de-icing was done in accordance with Carrier procedures and safety standards. Swissport’s agreements with Air-India, Asiana Airlines, Inc., and Virgin Atlantic set a maximum time to unload the first bag of an arriving airplane and the maximum time until the last bag is removed.

Dennis Bertelli, Swissport’s Regional Vice President, testified regarding the Carriers’ day-to-day interaction with Swissport. Specifically, Bertelli

testified that many Carriers require daily briefings and report to Swissport station managers regarding special handling needs each day. Also, many Carriers require debriefings to discuss Swissport's day-to-day performance. Jedlicka testified that Carriers have day-to-day input regarding manpower issues. She referenced an e-mail from an Asiana Airlines station manager requesting a separate crew for each flight, which Swissport then provided.

Authority to Remove and Discipline Swissport Employees

Jedlicka and Bertelli testified that Carriers have the right to request that Swissport remove a Swissport employee from their account or discipline an employee, but Swissport makes the ultimate decision as to whether the employee is removed or disciplined. Jedlicka testified that, based on the Carriers request, Swissport may terminate the offending employee, transfer him or her to a different account, or reduce his shifts on the Carriers account. Jedlicka offered no examples of times when Swissport had terminated or transferred an employee as the result of a Carrier's request. She did testify, however, that when Air-India requested that a specific bag room employee be removed from the Carrier's account due to poor performance that the employee "was put less frequently on the flight but he was not moved a hundred percent from the operation."

Equipment and Facility

Bertelli testified that Swissport uses the main deck loaders, tugs, containers, and pallets owned by its contract Carriers. According to Swissport's agreements with the Carriers, Swissport maintains the vehicles it uses to perform work.

Uniforms

Although not specified in most of the agreements, Swissport's agreement with Asiana Airlines provides that Swissport employees must wear uniforms provided by Asiana and that Swissport employees should appear to be employees of Asiana.

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. *Bradley Pacific Aviation, Inc.*, 34 NMB 119 (2007); *Dobbs Int'l Servs. d/b/a Gate Gourmet*, 34 NMB 97 (2007). 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. *Bradley Pacific Aviation, above; Dobbs Int'l Servs. above. See also Aircraft Servs. Int'l Group, Inc.*, 33 NMB 200 (2006).

Swissport does not fly aircraft and is not directly or indirectly owned by an air carrier. The Swissport 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); *Sky Chefs, Inc.*, 15 NMB 397 (1988). Therefore, to determine whether Swissport is subject to the RLA, the NMB must consider the degree of direct or indirect control exercised over Swissport's operations by carriers.

Carrier Control over Swissport and Its Employees

The standard for satisfying the control prong of the NMB's jurisdiction test is the degree of influence that a carrier or carriers has over discharge, discipline, wages, and working conditions. To determine whether there is sufficient carrier control over a company, the NMB looks to several factors, including: 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. *Bradley Pacific Aviation, above; Dobbs Int'l Servs., above; Aircraft Servs., above; Signature Flight Support/Aircraft Serv. Int'l, Inc.*, 32 NMB 30 (2004).

In *Air Serv Corp.*, 33 NMB 272 (2006), the NMB found that Air Serv, a non-carrier owned business, fell within its jurisdiction. The NMB cited the following facts as determinative of carrier control over Air Serv's operations: the Carrier's flight schedules affected the work schedules of Air Serv employees; the Carrier provided and repaired the equipment used by Air Serv to service the Carrier's aircraft; the Carrier provided many of the supplies Air Serv used to service the aircraft; the Carrier specified the cleaning supplies to be used to clean its aircraft; the Carrier had access to Air Serv's records regarding personnel, maintenance, and training in order to perform periodic security and safety audits; and the Carrier had an extensive set of regulations and standards which governed training and servicing and other aspects of performance under the Agreement.

The instant case is similar to *Air Serv, above*. The service agreements between Swissport and the Carriers dictate nearly all aspects of Swissport's operations. The Carriers specify the services provided, the penalties for improper service, staffing and supervisory levels required to provide the

specified services, timelines for providing the specific services, manuals and standards that Swissport's employees must meet, and required training for Swissport's employees. Most of the agreements provide that the Carrier provides initial training to Swissport employees. Under its contract with one of the Carriers, Asiana Airlines, Swissport employees wear Asiana uniforms and hold themselves out to the public as Asiana employees. The Carriers have the right to audit, inspect, or observe Swissport's operations in carrying out the services specified in the agreements. Each Carrier requires a daily briefing from Swissport on the day's activities.

This case is also similar to *International Total Servs.*, 26 NMB 72 (1998). In that case, as here, the carriers did not control hiring or firing employees. Nevertheless, the Board found the company subject to RLA jurisdiction based, in part, on the fact that carriers could request employee re-assignment and played a significant role in staffing and other working conditions. *See also Quality Aircraft Servs.*, 24 NMB 286 (1997).

The NMB finds, therefore, that the level of control exercised by the Carriers over Swissport's ORD operations and employees is extensive and satisfies the control prong of the jurisdiction test.

CONCLUSION

Based on the record in this case and for the reasons discussed above, the NMB's opinion is that Swissport's operations and its employees at ORD are subject to the RLA. This opinion may be cited as *Swissport USA, Inc.*, 35 NMB No. 190 (2008).

By direction of the NATIONAL MEDIATION BOARD.



Mary L. Johnson
General Counsel

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