



NATIONAL MEDIATION BOARD
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37 NMB No. 50

July 22, 2010

Susan A. Leverone
Associate Solicitor
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570-0001

Re: NMB File No. CJ-6973
Talgo, Inc.

Dear Ms. Leverone:

This letter responds to your request for the National Mediation Board's (NMB or Board) opinion regarding whether Talgo, Inc. (Talgo or Employer) is subject to the Railway Labor Act (RLA), 45 U.S.C. § 151, *et seq.* On January 11, 2010, the National Labor Relations Board (NLRB) requested an opinion regarding whether Talgo's operations at its Seattle, Washington facility and its employees working on trainsets¹ operated by Amtrak² in the geographic corridor between Eugene, Oregon, and Vancouver, British Columbia are subject to the RLA.³

For the reasons discussed below, it is the NMB's opinion that Talgo's Seattle operations and its employees working on trainsets operated by Amtrak are not subject to the RLA.

¹ A trainset is described in the agreement between Talgo and Amtrak as "at least twelve cars, including one baggage car, one power car, one bistro car, one dinner car, five coaches, one accessible coach, one custom class coach and one custom class accessible coach; provided that during any scheduled major maintenance period occurring during a non-peak period, a Trainset may consist of eleven cars." (Emphasis in original.)

² The National Railroad Passenger Corporation is more commonly known as "Amtrak."

³ NLRB Chairman Liebman concurred in the decision to refer the case to the NMB notwithstanding her view that *Peatross, Serv. Co.*, 21 NMB 139 (1994) is dispositive of the jurisdictional issue presented.

I. PROCEDURAL BACKGROUND

This case arose out of a representation petition filed by the International Brotherhood of Electrical Workers, Local 46 (Local 46) on September 25, 2009, with the NLRB seeking to represent all full-time and regular part-time On-Board Technicians, On-Board Technician Lead, and Electromechanics employed by the Employer out of its Seattle facility.

A hearing was held in NLRB Region 19 (Region 19) in Seattle, Washington on October 13, 2009, during which the parties presented testimony and evidence regarding jurisdiction. Both Talgo and Local 46 stipulated that the National Labor Relations Act (NLRA) should apply. On January 11, 2010, the NLRB requested an NMB opinion regarding the NMB's jurisdiction over Talgo's Seattle operations. On January 14, 2010, the NMB assigned Maria-Kate Dowling to investigate. The NMB invited Talgo and Local 46 to submit position statements regarding jurisdiction under the RLA. Talgo filed a position statement.

The NMB's opinion in this case is based upon the request and record provided by the NLRB, including the hearing transcript and record provided by the NLRB, and the position statement submitted by Talgo.

II. TALGO'S CONTENTIONS

Talgo states that it is not a provider of transportation services by rail, but is instead a passenger trainset manufacturer and maintenance service provider to the Washington State Department of Transportation (WSDOT) and WSDOT's operator, Amtrak. As such, Talgo performs preventive maintenance, general maintenance, repairs, cleaning services and occasional overhaul work for Amtrak and WSDOT for trainsets running in the geographic corridor from Eugene, Oregon to Vancouver, British Columbia.

Applying the NMB's two-part function and control test for determining jurisdiction of employers that are not owned by or under common ownership with an RLA carrier, Talgo contends that it is not subject to the RLA. Talgo asserts that it fails to satisfy the first or function part of the test because "the concept of using an onboard technician (OBT) is unique to Talgo." Talgo states that other train manufacturers and service providers do not provide OBTs as part of their maintenance service. Thus, Talgo states that its OBT services regarding Talgo-manufactured trainsets are performed only by Talgo and not by Amtrak across Amtrak's entire network of trains. Accordingly, Talgo contends that these services are not "traditionally performed" by Amtrak but "are traditionally and always performed by Talgo."

Talgo also asserts that it does not satisfy the second or ownership/control part of the NMB's jurisdictional test since it is neither

directly nor indirectly owned by a carrier and there is no evidence of carrier control over its daily operations. Talgo identified and drafted the scope of work clause in its contract with Amtrak. Talgo also provides the training, supervision, scheduling and day-to-day management of its OBT employees. Talgo also supplies the tools and supplies used by the OBTs. Talgo maintains its own policies, procedures and employee handbook. According to Talgo, they also hire, fire, and discipline the OBTs, and Amtrak reviews Talgo's records only to the extent necessary to establish a record of the safety of Talgo's trainsets.

III. FINDINGS OF FACT

TALGO

Talgo is a wholly owned subsidiary of Patentes Talgo, S.L. a train manufacturer and service provider located in Madrid, Spain. Talgo provides maintenance for trainsets manufactured by its parent corporation. According to its Chief Financial Officer (CFO), George Hlebechuk, Talgo has two customers: Amtrak and the State of Washington. Amtrak has no direct or indirect ownership interest in Talgo or its parent company. At the hearing, Talgo and Local 46 stipulated that Talgo is not directly or indirectly owned by a carrier.⁴

In 1999, Amtrak and the WSDOT purchased five Talgo trainsets for operation in the geographic corridor between Eugene, Oregon and Vancouver, British Columbia. Two of the five trainsets are owned by Amtrak and three of the five are owned by WSDOT. All five of the trainsets are operated by Amtrak. Through a contract with Amtrak, Talgo provides maintenance, repair, cleaning and overhaul services of these trainsets. According to Talgo, the trainsets manufactured and serviced by Talgo are unique in Amtrak's nationwide system and are not operated anywhere else within that system.⁵

According to its CFO, Talgo does not hold its services out to the public, engage in advertising, provide transportation for hire, or provide transportation services. Talgo conducts its operations from an administrative office and a maintenance facility located in Seattle, Washington. The maintenance facility is not owned by Talgo, but Talgo owns the equipment and tools used by its employees.

⁴ Talgo and Local 46 also stipulated that the testimony regarding control applied not only to Amtrak but also to Washington State and WSDOT.

⁵ At the hearing, Talgo stated that it is in negotiations to sell similar trainsets to Wisconsin, Michigan, Illinois, and Minnesota. Amtrak would operate the trainsets and Talgo would also provide identical or substantially similar maintenance services.

Nature of Work for Talgo Employees

The Talgo employees at issue in this case include 1 OBT Lead, 13 OBTs, and 2 Electromechanics. CFO Hlebechuk characterized OBTs as “basically troubleshooters,” since Talgo’s role is to provide preventive and corrective maintenance. OBTs perform most of their duties onboard the trainsets while in operations. The Electromechanics perform their duties at the maintenance facility. According to Hlebechuk, Talgo’s “philosophy is to take one person away from maintenance and put them on the train. The cost of the maintenance is no different but our position is have [sic] someone onboard the train so that they can identify the problem or issues ahead of time.” Thus, the Talgo employees perform certain repairs or light maintenance while the train is en route and other heavy maintenance at the maintenance facility.

OBTs

The job description provided for the OBTs list their duties as inspecting, monitoring, and repairing mechanical and electrical systems and acting as Talgo’s representative with Amtrak’s onboard employees. The OBTs are also responsible for responding to customer comments or complaints, monitoring parts and tool use and notifying the supervisor when replacement tools and parts are needed.⁶ With respect to customer contact, the OBT Supervisor stated that a small portion of the OBT’s shift, approximately 15-20 minutes, involves selling headsets to customers who want to watch movies.

OBTs perform maintenance checks on the trainsets before and after operations. They use laptops to conduct inspections and monitor various systems such as refrigeration temperatures and water temperatures. OBTs perform any required maintenance using tools and equipment owned and supplied by Talgo. After the train arrives at its destination, the OBTs turn the seats around in preparation for the return trip.

According to CFO Hlebechuk, the agreement with Amtrak requires that an OBT be onboard the train while it is in operation. If the scheduled OBT is unable to work, Talgo finds a replacement. There is no instance of a trainset operating without an OBT.

Electromechanics

The two Electromechanics work at the maintenance facility. Amtrak employees also perform maintenance tasks at the facility under the supervision of Talgo. The Electromechanics are not permitted, however, to perform

⁶ OBTs are also encouraged to pick up trash as necessary to maintain equipment and provide assistance with baggage on an as-needed basis.

maintenance work which could be performed by an Amtrak maintenance employee.

According to the job description, Electromechnics' duties include journeymen-level mechanical and electrical systems maintenance as well as repair and overhaul work. Electromechnics perform similar duties to those of the OBTs, but at the maintenance facility rather than onboard the trains. An Electromechnic might also take care of problems that an OBT discovered late in a shift but did not have time to correct. Electromechnics also perform work on unique or special projects such as improvements or modifications during the life of the equipment. According to Hlebechuk, the Electromechnics are supervised by Talgo supervisors.

Scope of Work Agreement

Under the scope of work agreement between Talgo and Amtrak, Talgo must provide Amtrak with maintenance and repair of the trainsets, but this agreement does not provide specific details about how those tasks are to be performed. The agreement states that Talgo "shall perform and be responsible for all maintenance and repair services related to trainsets [and] shall meet the performance standards specified herein and ensure that the trainsets are safe, clean, reliable and efficient." The agreement does not, however, specify details about how Talgo shall perform its tasks to meet the performance standards. Instead, the performance goals are linked to factors like availability, i.e., trainsets are available for service in well-maintained condition and can make a scheduled trip. The agreement also provides that Talgo is responsible for developing and implementing the maintenance plan to keep the trainsets safe, efficient, reliable and clean. The only requirement is that the trainsets be maintained in accordance with Federal Railroad Administration (FRA) requirements, including determining the frequency of various maintenance requirements.

Training

The contract between Amtrak and Talgo requires that Talgo's employees be sufficiently trained but Talgo is tasked with providing training. Talgo conducts and trains Talgo employees. This training includes a 90-day orientation and training program conducted by Talgo. Approximately 20 percent of OBT training is related to Amtrak's safety procedures for working in and around train yards. According to CFO Hlebechuk, Amtrak's training did not address how an OBT would perform his or her job functions.

Terms and Conditions of Employment

CFO Hlebechuk stated that Talgo has the sole responsibility for establishing the wages and benefits of its employees. Talgo employees do not receive the benefits available to Amtrak employees such as rail passes or discounted travel. Talgo maintains its own Employee Handbook which was drafted by Talgo management and outlines its policies applicable to employees including compensation, holidays, code of conduct, and work schedules. Every Talgo employee receives a copy of the Employee Handbook. Amtrak had no role in the drafting of Talgo's Employee Handbook.

Hiring, Evaluation, Discipline, and Discharge

According to CFO Hlebechuk, Amtrak plays no role in the hiring, discipline or discharge of Talgo employees. Amtrak places no hiring restrictions or requirements on Talgo. The decision of when and who to hire is made by the OBT Supervisor with approval from the CFO. Amtrak does not participate in Talgo's evaluation process. In the last ten years, Amtrak notified Talgo of only one incident involving a Talgo employee. The communication from the Amtrak Assistant Superintendent indicated that Amtrak would investigate and discipline any Amtrak employees involved and Talgo should investigate and discipline the Talgo employee involved. Talgo did not follow up with or report to Amtrak regarding the actions it took with regard to that Talgo employee. Amtrak did not pursue the matter further.

Supervision and Scheduling

CFO Hlebechuk stated that Amtrak does not directly supervise Talgo employees or assign or transfer them. Talgo assigns duties, schedules, transfers, evaluates, approves vacation, and supervises Talgo employees. With regard to staffing levels, Talgo's agreement with Amtrak allows it to establish specific arrangements regarding the details of service and number of technical personnel or OBTs present on the trainsets. According to Hlebechuk, typically there is one OBT assigned per trainset.

Pursuant to a separate subcontract between Talgo and Amtrak, Talgo supervises Amtrak employees at the maintenance facility. In the course of this supervision, Talgo must comply with all applicable labor agreements between Amtrak and its employees.

Uniforms

OBTs wear a Talgo uniform and are not held out to the public as Amtrak employees. Talgo's "OBT clothing policy" states that "[d]uring business hours or when representing Talgo, you are expected to present a clean, neat, and tasteful appearance." Talgo provides OBTs with uniform clothing items

including long and short sleeve blue shirts, navy pants, jackets and coveralls as well as an annual clothing allowance of \$75.00. The “OBT uniform specifications” require display of the Talgo photo ID at all times and that the Talgo uniform must be worn in its entirety.

Access to Records

According to Hlebechuk, Amtrak can request access to Talgo’s records. For example, Amtrak has requested to look at maintenance records and to audit financial records. Hlebechuk stated that such requests happened “about every four years.”

VI. 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).

Talgo is not a rail carrier and is not directly or indirectly owned by a rail carrier. Although Talgo contends that the concept of using an onboard technician is unique to Talgo, it is undisputed that the work performed by the employees at issue, namely the maintenance and repair of rail cars, is work traditionally performed by employees in the railroad industry. See *Peatross Servs., Co.*, 21 NMB 139 (1994) (first part of jurisdictional test satisfied where employees perform mechanical and electrical maintenance of locomotives and passenger cars and cleaning of rail cars); *Delpro, Inc.*, 8 NMB 6 (1980). Therefore, to determine whether Talgo is subject to the RLA, the NMB must consider the degree of direct or indirect control exercised over Talgo’s operations by Amtrak.

Carrier Control Over Talgo and Its Employees

To determine whether there is 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. *Signature Flight Support/Aircraft Serv. Int'l, Inc.*, 32 NMB 30 (2004); *John Menzies PLC, d/b/a Ogden Ground Servs., Inc.*, 30 NMB 463 (2003); *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 Amtrak does not exercise a significant degree of control over Talgo's operations. Talgo hires, sets pay and benefits, evaluates, and disciplines its workforce without involvement from Amtrak. While Amtrak requires safety training, this accounts for only 20 percent of the training received by Talgo employees. The remaining training is designed and administered solely by Talgo. Talgo assigns duties, schedules and supervises their employees. Talgo employees wear Talgo uniforms with clearly displayed Talgo identification tags while performing their duties and are not held out to the public as Amtrak employees. Talgo employees do not receive benefits such as rail passes or travel discounts that are available to Amtrak employees. Amtrak had no role in the drafting of Talgo's Employee Handbook. By contract, Amtrak retains the right to audit Talgo's records in order to assure compliance with legislative, legal, and contractual requirements, but in practice such record requests are limited, occurring only once every four years. Under the scope of work agreement with Amtrak, Talgo must meet certain performance goals but neither Amtrak nor the agreement specifies details about how Talgo shall perform its tasks to meet the performance standards.

In *Peatross Servs. Co.*, 21 NMB 139 (1994), the employer provided mechanical and electrical maintenance of locomotives and passenger cars and cleaning of railcars for commuter rail service between Manassas and Fredericksburg, VA and Union Station, Washington, DC, under a contract with Amtrak. While Amtrak's contract with Peatross called for certain staffing levels and Amtrak set minimum hiring requirements, Peatross determined the work schedules for individual employees and was solely responsible for hiring, supervising, evaluating, disciplining and terminating its employees. Accordingly, the Board concluded that the employer was not controlled by a carrier and not subject to RLA jurisdiction, finding that Amtrak exercised "virtually no control on a day-to-day basis over the manner in which Peatross does business." 21 NMB 139, 146. The same is true in the instant case.

The factual difference between the instant case and *Peatross* is that the OBTs perform their duties onboard the trainsets while they are in operation. The Board, however, finds this jurisdictionally inconsequential in the absence of any evidence that the carrier exercises any significant control over Talgo's daily operations and/or the manner in which Talgo's employees perform their

jobs. In cases involving entities that may be deemed derivative carriers solely because of their operational relationship with an air or rail carrier, employees necessarily perform their duties in close proximity to airports, rail yards, trains and planes. This fact alone, even when carried to its logical extreme as in this case, cannot confer RLA jurisdiction in the absence of significant indicia of control. *See also D & T Limousine Co., Inc.*, 207 NLRB 121 (1973) (NLRB noted that NMB found that employer whose sole customer was Penn Central Railroad and whose employees spend all working time within the railroad's rail yard was not subject to RLA jurisdiction because there was insufficient evidence of direct or indirect ownership or control by a rail carrier).

Accordingly, the NMB finds that there is insufficient evidence of control by a carrier over Talgo's day-to-day operations to satisfy the second part of the Board's jurisdictional test.

CONCLUSION

Based on the record in this case and for the reasons discussed above, the NMB's opinion is that Talgo, its employees at its Seattle facility and its employees working on trainsets operated by Amtrak in the geographic corridor between Eugene, Oregon, and Vancouver, British Columbia are not subject to the RLA. This opinion may be cited as *Talgo, Inc.*, 37 NMB 50 (2010).

By direction of the NATIONAL MEDIATION BOARD.



Mary L. Johnson
General Counsel