



NATIONAL MEDIATION BOARD
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37 NMB No. 65

September 3, 2010

Richard A. Siegel
Associate General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570-0001

Re: NMB File No. CJ-6980
Automobile Distribution of Buffalo, Inc. and Complete Auto Network

Dear Mr. Siegel:

This responds to your request for the National Mediation Board's (NMB) opinion regarding whether Automobile Distribution of Buffalo, Inc. (ADBI) and Complete Auto Network, Inc. (CAN) (collectively Employers) are subject to the Railway Labor Act (RLA), 45 U.S.C. § 151, *et seq.* For the reasons discussed below, the NMB's opinion is that ADBI and CAN's operations and their employees are subject to the RLA.

I. PROCEDURAL BACKGROUND

This case arose out of an unfair labor practice (ULP) charge filed with the National Labor Relations Board (NLRB) against ADBI on March 10, 2010, by the International Brotherhood of Teamsters, Local 449 (IBT) in NLRB Case No. 3-CA-27568. In the ULP charge, the IBT alleges that ADBI violated Section 8(a)(5) of the National Labor Relations Act (NLRA) by unilaterally repudiating its collective bargaining agreement with the IBT; unilaterally withdrawing recognition from the IBT; refusing to provide information to the IBT; and refusing to process a grievance filed by the IBT. On April 27, 2010, the IBT filed a ULP charge against CAN in NLRB Case No. 3-CA-27634 alleging the same unfair labor practices contained in the charge filed in Case No. 3-CA-27568. The IBT filed the charge against CAN on the basis that it may constitute a single employer and/or alter ego of ADBI. The Employers did not provide any evidence regarding the merits of the charges or the relationship between the charged parties pending a determination of the jurisdictional issue.

On June 2, 2010, the NLRB requested an NMB opinion regarding the NMB's jurisdiction over the Employers. On June 8, 2010, the Board assigned Eileen M. Hennessey as the Investigator in this matter. On August 3, 2010, the case was reassigned to Investigator Susanna F. Parker.

The NMB provided the Employers and the IBT an opportunity to submit position statements regarding jurisdiction under the RLA. On June 22, 2010, the IBT filed a position statement with the NMB. The Employers filed a position statement on June 22, 2010 as well.

The NMB's opinion in this case is based upon the request and record provided by the NLRB, including an affidavit, and the June 22, 2010 position statements submitted by the IBT and the Employers to the NMB.

II. ADBI'S and CAN'S CONTENTIONS

The Employers contend that the nature of the work performed by its employees is work traditionally performed by employees of rail carriers. Additionally, the Employers assert that virtually all aspects of their work are controlled by Norfolk Southern Railway Company (Norfolk Southern), including: the hours of operation; training of managers, supervisors and employees; background investigations; the manner in which work is performed; equipment; access to the facility; staffing during operational hours; insurance coverage; and organizational structure.

III. IBT'S CONTENTIONS

The IBT contends that the NLRB has jurisdiction in this matter. The IBT asserts that employees are directly supervised by the Employers and have little or no contact with any individuals from Norfolk Southern. The IBT states that: employees use an ADBI-owned track mobile; ADBI supervisors and managers make disciplinary determinations; and ADBI managers and supervisors conduct all training at the Norfolk Southern Auto Facility in the Cheektowaga, New York rail yard (Cheektowaga rail facility).

IV. FINDINGS OF FACT

ADBI is a New York corporation owned by Theresa D'Angelo with an office located in Cheektowaga, New York. ADBI had successive contracts from 1994 through 2008 with Norfolk Southern to move rail cars and unload automobiles from rail cars within the Cheektowaga rail facility.¹ In May 2008,

¹ D'Angelo's father owned two companies, Thruway Terminals, Inc. and Rail Services, Inc., that had previously performed these services. D'Angelo incorporated ADBI in 1994, assumed the contract with Norfolk

Norfolk Southern awarded the service contract (Agreement) previously with ADBI to CAN. CAN is co-owned by D'Angelo and her brother, John Harf. CAN then subcontracted a portion of the work at issue to ADBI, which currently employs one individual covered by the collective bargaining agreement between ADBI and the IBT.² In addition to loading and unloading automobiles, this individual also performs rail car switching, which involves the use of a power track mobile to move rail cars within the facility.

CAN's employees load and unload automobiles from rail cars, perform maintenance on Norfolk Southern's buck ramps, bridge plates and parking lot sweeper, and generally maintain the rail yard, which includes sweeping and cleaning. CAN employs a small number of temporary workers from Complete Personnel Solutions³, and two other temporary agencies. The number of workers varies from day to day. Norfolk Southern is CAN's only customer, and ADBI performs work solely for CAN.

Supervision and Scheduling

CAN and ADBI employees are supervised by John Harf, CAN's co-owner, and Jeffrey Andrejewski, an ADBI manager. The yardmaster, an employee of Norfolk Southern, directs CAN and ADBI employees as to when to move railcars in or out of the rail facility. Employees must get permission to move railcars in or out of the rail facility. The work standards for the Employers' employees are set forth in the Association of American Railroads' Multi-Level Manual (AAR Manual). Andrejewski verifies which rail cars on the track are for ADBI, and relays this information to ADBI's sole employee, who then moves the rail car, breaks the seals, opens the rail car doors, sets the bridge plates and buck ramps, removes the securement devices holding the automobiles in place, and drives the automobiles into parking places. Harf ensures that CAN employees perform their work in accordance with the standards in the AAR Manual.

Work hours are from 6:30 a.m. until approximately 3:00 p.m. and are set by Norfolk Southern. Norfolk Southern has the sole discretion to change the hours of operation and to require CAN to perform services on any day at any time of day, including weekends and holidays. Norfolk Southern pays CAN a flat rate for the services it performs (based on type of service and volume), and CAN is solely responsible for any overtime or other additional charges it accrues in connection with rendering the services set forth in the contract when services are rendered outside of normal operating hours. Once a train arrives, it must be offloaded regardless of how long it takes. If a train is held

Southern at the Cheektowaga facility, and inherited the collective-bargaining relationship between her father's companies and the IBT.

² ADBI's defense to the ULP allegations was that it did not have a duty to bargain with the IBT because the unit was diminished to one employee.

³ Complete Personnel Services is owned in part by D'Angelo.

up for some reason, the Employers cannot send employees home without approval from Norfolk Southern.

CAN determines staffing based on the number of cars that will be delivered on a given day. D'Angelo testified that one employee can unload approximately 40 to 50 vehicles during an eight hour shift and she determines the number of staff needed based on the number of cars that will be delivered.

Hiring, Evaluation, Discipline and Discharge

Under the terms of the CAN Agreement, CAN is an independent contractor responsible for hiring and supervising all employees. CAN is responsible for complying with applicable state and federal labor and employment laws at its own expense, and must provide documentation to Norfolk Southern, upon request, that it has done so. D'Angelo sets the wages and benefits for CAN's and ADBI's employees. All employees working under the terms of the Agreement are governed by the AAR Manual and are required to comply with all rules and regulations contained in the AAR Manual, as well as any other rules and regulations provided by Norfolk Southern. For example, CAN and ADBI employees are also governed by Norfolk Southern's "Operating Guidelines for Contractors" (OGC). The OGC sets forth additional standards for job performance at the rail yard.

In an affidavit taken by the NLRB, D'Angelo testified that ADBI has not hired any employees since entering into its contract with Norfolk Southern in 1994. CAN employs temporary workers to meet its obligations under the Agreement. As set forth in the Agreement, D'Angelo selects the applicants she wishes to employ, and then submits the applicants for a background investigation through Norfolk Southern's E-Verifile service. CAN is responsible for costs associated with the background investigations through E-Verifile at a rate negotiated by Norfolk Southern on CAN's behalf. All applicants must pass a drug screen and the E-Verifile background investigation to secure employment with CAN or ADBI.

According to the Agreement, Norfolk Southern retains the right to ban any of CAN's employees from the facility, with no requirement to notify CAN or give reasons for the action. D'Angelo testified that Norfolk Southern has banned employees on a couple of occasions and, when this has occurred, she has received a call from a Norfolk Southern manager advising her that the individual is banned. D'Angelo testified that on other occasions, Norfolk Southern may appear at the Cheektowaga rail yard and escort an individual off the property. On March 31, 2010, Norfolk Southern police banned two CAN employees from the Cheektowaga rail yard for fighting. After conducting its own investigation, Norfolk Southern permitted one employee back onto the premises. Several years ago, Norfolk Southern banned an employee from the rail yard at D'Angelo's request, but the employee was later reinstated pursuant

to a grievance filed by the IBT. According to D'Angelo, because Norfolk Southern is CAN's only client, CAN terminates any employee who is banned from the premises.

CAN is required, pursuant to its contract with Norfolk Southern, to have at least two supervisory employees on staff at all times – one to supervise vehicle-handling and one to handle administrative duties. CAN must also consult with Norfolk Southern prior to making any supervisory personnel changes, including eliminating or reorganizing positions.

Training

Norfolk Southern sets the training requirements for employees, but the Employers conduct the training. Employees must pass certain written tests, including the Norfolk Southern Quality Vehicle Loading Assessment and a Norfolk Southern Vehicle Unloader/Loader Certification Test. These tests are created by Norfolk Southern but may be administered by either Norfolk Southern or D'Angelo. Norfolk Southern sets the standard for passing, and issues an Auto Handlers Certificate to employees who pass the tests. ADBI's sole employee has track mobile certification, which was issued by ADBI.

The Employers' managers and supervisors are required to attend monthly safety meetings conducted by Norfolk Southern. Pursuant to the Agreement, CAN is required to conduct daily safety and quality meetings for all employees, an employee accountability process with incentives, a formal training process for all corrective action, and active participation in the ramp quality process. CAN must also comply with all manuals and instructions, and must provide sufficient communication equipment and transportation to move its personnel throughout the facility.

Terms and Conditions of Employment

D'Angelo sets the wages and benefits for all CAN and ADBI regular employees. The various temporary agencies set the wages and benefits for the temporary employees. All CAN and ADBI employees receive identical health benefits through Independent Health. There is no retirement plan for CAN or ADBI employees.

Under the Agreement, CAN is required to maintain certain levels of workers' compensation insurance; employer's liability insurance; commercial general liability insurance; and automobile liability insurance. CAN is required to furnish Norfolk Southern documentation demonstrating compliance with the insurance requirements set forth in the Agreement.

Equipment and Premises

ADBI has a lease agreement with Norfolk Southern, wherein Norfolk Southern leases to ADBI a portion of its track in Buffalo, Erie County, New York for \$1.00 for the sole purpose of placing and removing rail cars (switching). CAN and ADBI share office space, provided by Norfolk Southern at no cost, at the Cheektowaga rail facility.

CAN uses Norfolk Southern's proprietary software to track work performance and to submit reports. Norfolk Southern provides training on the software, issues the IDs and passwords needed to access the Norfolk Southern computer system, and issues an operational manual for the software. CAN employees who operate bar code scanners and the computer systems have Norfolk Southern email addresses. D'Angelo and Harf have CAN email addresses.

Norfolk Southern owns the buck ramps and bridge plates used by CAN employees to load and unload automobiles and other large equipment located in the Cheektowaga rail yard. The Employers are responsible for maintenance of this equipment and CAN owns small equipment, such as tools. Either CAN or ADBI owns the track mobile, which is used to move rail cars within the rail yard and is required to provide this equipment pursuant to the Agreement.

Access to Records

Norfolk Southern has full and complete access to CAN's and ADBI's books and records as required to perform an audit. Norfolk Southern also conducts audits of the Cheektowaga rail yard to monitor the Employers' compliance with Norfolk Southern's maintenance and operational requirements. CAN is responsible for remediating any deficiencies identified by Norfolk Southern, and must report to Norfolk Southern on the progress of remediation.

Employee Identification Badges and Uniforms

Norfolk Southern issues employee identification badges to all of the Employers' employees. The badges bear the Norfolk Southern symbol and identify the individuals as "contractor." The primary employer listed is ADBI.⁴

Both CAN and ADBI employees wear uniforms. The only difference is that the ADBI uniform has the employee's name on it, while the CAN uniforms do not. CAN does not supply the uniform, but dictates clothing requirements that meet Norfolk Southern's approval, as set forth in the Agreement, which

⁴ According to D'Angelo, the primary employer should list CAN, but lists ADBI because E-Verifile has failed to update their system with the correct name of the employer despite several requests to do so.

states that all employees must wear approved clothing while performing duties covered by the Agreement. For example, the AAR Manual states: “Personnel are to wear clean clothing, free of objects that could cause damage to the exterior or the interior of the vehicle. Tools or other objects which could cause damage are not to be carried in pockets when handling vehicles. If gloves are worn they must be clean.”

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. See e.g., *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).

CAN and ADBI are not rail carriers and are not directly or indirectly owned by a rail carrier. The loading and unloading of automobiles on and off rail cars is a service in connection with the transportation of freight by railroads. *Foreign and Domestic Car Serv., Inc.*, 28 NMB 82 (2000); *Union Pacific Motor Freight*, 27 NMB 441 (2000); *Glenway, Inc.*, 17 NMB 257 (1990); *Inter Mobile Co.*, 17 NMB 223 (1990). Therefore, the Employers’ employees at issue perform work that is traditionally performed by employees in the railroad industry. See also *Delpro, Inc.*, 8 NMB 6 (1980). Accordingly, to determine whether CAN and ADBI are subject to the RLA, the NMB must consider the degree of direct or indirect control exercised over the Employers’ operations by Norfolk Southern.

Carrier Control Over CAN and ADBI and Their Employees

The NMB looks to several factors to determine whether there is carrier control over a company, 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 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 Norfolk Southern exercises a significant degree of control over CAN's and ADBI's operations. Norfolk Southern is ADBI's and CAN's sole client. ADBI's and CAN's employee applicants must submit to a background investigation through Norfolk Southern's E-Verifile service to secure employment.

The yardmaster, an employee of Norfolk Southern, directs CAN and ADBI employees as to when to move rail cars in or out of the rail facility. Although Andrejewski and Harf supervise ADBI and CAN employees, all loading and unloading of vehicles is done pursuant to the AAR Manual. This Manual describes every step in the loading and unloading of vehicles on and off Norfolk Southern rail cars. ADBI and CAN employees are also governed by Norfolk Southern's OGC, which sets forth additional standards for job performance.

Norfolk Southern has sole discretion to change the hours of operation. Additionally, the Employers cannot send employees home without approval from Norfolk Southern. Norfolk Southern retains the right to ban any of the Employers' employees from the facility with no obligation to notify the Employer or offer reasons for the action. CAN terminates any employee who is banned from the premises.

Norfolk Southern sets all training requirements and the Employers' managers and supervisors must attend monthly safety meetings conducted by Norfolk Southern. CAN uses Norfolk Southern's proprietary software to track work performance and to submit reports. Norfolk Southern provides training on the software, and issues the IDs and passwords needed to access the Norfolk Southern computer system. CAN employees who operate bar code scanners and the computer systems have Norfolk Southern email addresses. ADBI leases a portion of Norfolk Southern's track in Buffalo, Erie County, New York for \$1.00 for the sole purpose of switching rail cars. Norfolk Southern owns the buck ramps and bridge plates used by CAN employees to load and unload automobiles, and other large equipment located in the Cheektowaga rail yard. Additionally, CAN and ADBI share office space, provided by Norfolk Southern at no cost, at the Cheektowaga rail facility.

CAN and ADBI employees wear uniforms. CAN does not supply the uniform, but dictates clothing requirements that meet Norfolk Southern's approval, as set forth in the Agreement. By contract, Norfolk Southern requires that Employers' employees clothing be clean and free from exposed objects. The sole ADBI employee wears a uniform provided by ADBI. Norfolk Southern issues employee identification badges bearing the Norfolk Southern symbol and the badges identify the individual as "contractor."

Finally, by contract, Norfolk Southern requires full access to all books and records as required for an audit.

In *Foreign and Domestic Car Serv., Inc.*, 28 NMB 82 (2000), the Board found that Norfolk Southern exercised substantial control over Foreign and Domestic Car Service (FDCS). In that case, the Board stated:

FDCS's sole client is the NSC. The equipment, scanners, computers, and software used by FDCS employees are owned by NSC. FDCS pays no fees to NSC for this equipment.

FDCS employee applicants must sign an affidavit permitting a background check done by NSC employees. NSC has disqualified FDCS applicants following background checks. The record also establishes that if NSC determines that an applicant or employee is unsatisfactory or objectionable, NSC notifies FDCS that the individual is barred from Norfolk Southern property. This NSC bar terminates the individual's employment with FDCS.

NSC requires FDCS employees to wear industry standard uniforms for new vehicle loading that are free from any attachments that might scratch new vehicles. FDCS determines the uniform color and insignia. If an FDCS employee damages a vehicle, NSC determines the degree of punishment based on the severity of the damage. NSC advises FDCS of the punishment and FDCS disciplines the employee.

FDCS employees are trained by NSC employees on scanners, computer systems, and administrative systems used at the Venice facility. All loading and unloading of vehicles is done pursuant to the NSC *Manual for Loading & Unloading Autos on Railcars*. This manual describes every step in the loading and unloading of new vehicles on and off NSC rail cars. This manual constitutes the only work rules for FDCS employees, with the exception of an FDCS policy against sexual harassment.

The facts in the instant case are virtually identical. Therefore, the NMB finds that this record establishes that Norfolk Southern exercises substantial control over ADBI, CAN, and its employees.

CONCLUSION

Based on the record in this case, and for the reasons discussed above, the NMB's opinion is that ADBI and CAN and their employees are subject to the RLA. This opinion may be cited as *Automobile Distribution of Buffalo, Inc. and Complete Auto Network*, 37 NMB 372 (2010).

By direction of the NATIONAL MEDIATION BOARD.

A handwritten signature in cursive script that reads "Mary L. Johnson".

Mary L. Johnson
General Counsel

Copies to:
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