



NATIONAL MEDIATION BOARD
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38 NMB No. 18

December 8, 2010

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

Re: NMB Case No. CJ-6992
Boston MedFlight

Dear Ms. Leverone:

This responds to your request for the National Mediation Board's (NMB) opinion regarding whether Boston MedFlight (BMF or Employer) is subject to the Railway Labor Act (RLA), 45 U.S.C. § 151, *et seq.* On August 25, 2010, the National Labor Relations Board (NLRB) requested an opinion regarding whether BMF's operations are subject to the RLA.

For the reasons discussed below, the NMB's opinion is that BMF's operations and its employees are not subject to the RLA.

I. PROCEDURAL BACKGROUND

This case arose out of a representation petition filed by the Massachusetts Nurses Association (MNA) on July 16, 2010 with the NLRB seeking to represent approximately 40 registered nurses and paramedics employed by BMF.

A hearing was held in NLRB Region 1 on July 29, 2010 during which the parties presented testimony and evidence on the jurisdictional issue on July 29, 2010. The MNA filed a post-hearing brief with the NLRB. On August 25, 2010, the NLRB requested an NMB opinion regarding the NMB's jurisdiction over BMF's operations. On August 31, 2010 the NMB assigned Eileen M. Hennessy to investigate. The case was subsequently assigned to Angela I. Heverling. The NMB provided the Employer and the MNA an opportunity to

submit position statements regarding jurisdiction. BMF submitted additional information on September 28, 2010.

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 post-hearing brief submitted by the MNA, and the Employer's September 28, 2010 submission to the NMB.

II. BOSTON MEDFLIGHT'S CONTENTION

The Employer takes no position as to whether the NMB has jurisdiction.

III. IAM'S CONTENTIONS

The MNA argues that the NMB does not have jurisdiction over the Employer. The MNA argues that the Employer is not a carrier under the RLA because it does not hold Federal Aviation Administration (FAA) Part 135 certification; it does not hold itself out to the public as providing transportation services; it employs individuals primarily to provide critical patient care; and it carries no cargo or mail. Further, it argues that the Employer is not owned or controlled by any carrier subject to jurisdiction under the RLA. According to the MNA, although the Employer has contractual relationship with aviation companies, these companies do not exercise direct or indirect ownership or control over the Employer.

IV. FINDINGS OF FACT

BMF is a not-for-profit organization that provides critical care transport services. It operates out of two hangars based at Hanscom Air Force Base in Bedford, Massachusetts and Plymouth Airport in Plymouth, Massachusetts. It is a consortium of the six major teaching hospitals in Boston and describes its mission as "link(ing) those most critically ill and injured patients with the resources they need." BMF provides its transport services through two ambulances, three helicopters, and one fixed wing aircraft. It owns the ambulance and helicopters and leases the aircraft. BMF is the sole air medical provider of critical care transport services in its service area of eastern New England. It transports patients to hospitals and between medical centers. Approximately ninety percent of its patients are transported for care to one of the six member hospitals of the consortium.

During fiscal year 2009, BMF conducted approximately 3000 critical care patient transports. Seventy-five percent of its patients were transported via helicopter or aircraft. Approximately 15 percent of its flights crossed state lines.

BMF does not possess an FAA Part 135 license, which is required to transport patients.¹ It contracts with two companies, Boston Air Charter of Norwood, Massachusetts and EraMED of Lake Charles, Louisiana, which do possess Part 135 licenses. These companies provide pilots and mechanics for BMF's helicopters and aircraft. BMF employees do not maintain or operate the helicopters or aircraft. The pilots provide some training to the nurses and paramedics regarding aviation issues, such as how to use night vision goggles and work around a helicopter. They do not provide training in patient care matters. The pilots wear Boston MedFlight uniforms and may also have a designation of the aviation company on their name tag.

Boston Air Charter and EraMed do not have authority to hire or fire or make recommendations about hiring or firing BMF's employees. The aviation companies have no involvement in the wages, schedules, or staffing levels of BMF's employees. BMF determines how many pilots are needed on any flight. Boston Air Charter and EraMed do not supervise BMF's employees or obtain any services from BMF. Likewise, BMF does not have any involvement in the hiring, firing, wages, or staffing of employees of Boston Air Charter and EraMED.

Each air transport conducted by BMF includes a crew consisting of a pilot, flight nurse, and flight paramedic. BMF receives requests for services from first responders and hospitals. Requests are taken by Communications Technicians. When the request is for an air transport, the Communications Technician alerts a pilot, who determines whether the transport can be safely performed according to FAA regulations. If the pilot determines that the transport cannot be safely conducted, BMF will not conduct the flight.

During the transport, the nurse and paramedic provide critical care to the patient. Patient care is governed by state law and regulations and by the Commission on Accreditation of Medical Transport Services. The medical crew also prepares a detailed patient care record that is transmitted to the receiving institution.

BMF has about 75 employees. Nurses and paramedics make up about 44 of these employees. In addition to providing care to patients during transports, the nurses and paramedics teach courses and participate in community education activities. BMF also employs Communications Technicians, Emergency Medical Technicians, and administrative staff.

BMF does not advertise its services but does send out some materials regarding its fundraising efforts. First responders and hospitals contact a hotline when BMF's services are needed. The hotline number is on the

¹ The Employer reports that its Board of Trustees has authorized it to explore the possibility of obtaining the FAA license.

company's website and stationery and in materials that BMF presents to towns when educating them about responding to emergency situations.

V. DISCUSSION

Applicable Legal Standard

BMF is not a common carrier by air under the RLA. It can be distinguished from air taxi and charter operations that the Board has determined were common carriers by air pursuant to Section 181 of the RLA, 45 U.S.C. § 181. *United Jet Center*, 18 NMB 354 (1991); *Evergreen Helicopters, Inc.*, 8 NMB 505 (1981). For example, in *Rocky Mountain Holdings d/b/a Eagle Airmed of Arizona*, 26 NMB 132 (1999), the Board asserted jurisdiction over a company that provided air transport emergency medical services. That company supplied aircraft and FAA-certified pilots and mechanics and held itself out to the public as available for hire. Neither BMF nor its employees hold FAA certification. It also does not advertise or hold itself out to the public as available to anyone who wants to utilize its services.

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., Talgo, Inc.*, 37 NMB 253 (2010); *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. *Talgo, above*; *Bradley Pacific Aviation, above*; *Dobbs Int'l Servs., above*. *See also Aircraft Servs. Int'l Group, Inc.*, 33 NMB 200 (2006).

With regard to the nature of the work performed, the NMB has recognized the craft or class of "Flight Nurses and Flight Medics" or "Nurses." *See, e.g. Mercy Air Services, Inc.*, 36 NMB 20 (2008); *Critical Air Medicine Nurses*, 20 NMB 484 (1993). The fact that the employees at issue perform health care functions does not exclude them from RLA jurisdiction. Therefore, to determine whether BMF is subject to the RLA, the NMB must consider the degree of direct or indirect control exercised over BMF's operation by a common carrier.

Carrier Control Over BMF and its Employees

Although it owns its helicopters and leases its aircraft, BMF does not employ pilots or mechanics to operate or maintain them. It contracts with FAA-certified aviation companies Boston Air Charter and EraMed to provide

these services. It is not necessary to determine whether these companies are carriers under Section 181 of the RLA. The evidence demonstrates that these companies do not exercise control over BMF's operations.

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. *Talgo, above; Signature Flight Support/Aircraft Serv. Int'l, 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).*

Boston Air Charter and EraMed have no control over BMF's hiring, firing, or scheduling of employees. The companies do not supervise BMF's employees. They contract with BMF to provide FAA-certified pilots and mechanics. Beyond determining whether a transport can be made safely according to FAA regulations, Boston Air Charter and EraMed's pilots have no control over BMF's flying or operations. They do not provide training to BMF employees beyond minor aviation-related issues, such as how to use night goggles.

There is no evidence that BMF employees are held out to the public as employees of Boston Air Charter and EraMed. In fact, employees of these companies wear BMF uniforms while flying on BMF's helicopters and aircraft. There is no evidence that BMF or its employees identify Boston Air Charter and EraMed in any way, such as by identifying them on their uniform or in their materials.

Accordingly, the NMB finds that there is insufficient evidence of control by a carrier over BMF'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 Boston MedFlight and its employees are not subject to the RLA. This opinion may be cited as *Boston MedFlight, 38 NMB 52 (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:

Howard M. Bloom
Brian E. Lewis
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