



**NATIONAL MEDIATION BOARD**  
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39 NMB No. 59

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**VIA EMAIL**

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Re: NMB File No. CJ-7022  
Air Serv Corporation

Participants:

This letter responds to the Motion for Reconsideration filed by Air Serv Corporation (Air Serv or Employer) on June 27, 2012 regarding the National Mediation Board's (NMB) opinion regarding whether it is subject to the Railway Labor Act (RLA), 45 U.S.C. §151, *et seq.* Howard Stevens<sup>1</sup> filed a response opposing Air Serv's Motion on July 9, 2012.

Air Serv seeks reconsideration of the NMB's opinion in *Air Serv Corp.*, 39 NMB 450 (2012), that Air Serv and its shuttle service employees at LaGuardia Airport (LGA) are not subject to the RLA. The Board based its opinion on the request and record provided by the National Labor Relations Board (NLRB), as well as the position statements filed by Air Serv and Stevens. For the reasons

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<sup>1</sup> This case arose out of an unfair labor practice charged filed with the NLRB by Howard Stevens.

set forth below, it continues to be the NMB's opinion that Air Serv's shuttle service operations and employees are not subject to the RLA.

### I.

Air Serv does not dispute the NMB's conclusion that the shuttle service employees at issue perform work traditionally performed by airline employees and therefore the first prong of the NMB's jurisdictional test is satisfied. Air Serv argues that the NMB should reconsider its opinion regarding the second part of its jurisdictional test, namely whether the employer is directly or indirectly owned or controlled or under common control with a carrier in light of additional information and specific instances of carrier control that have occurred since August 2011.

Stevens opposes Air Serv's request for reconsideration and states that Air Serv has failed to set forth any point of law or fact that the NMB either overlooked or misapplied. Stevens argues that the evidence submitted by Air Serv only confirms that it is not under the control of any RLA carrier.

### II.

Section 11.0 of the NMB's Representation Manual (Manual) provides that

The motion must state the points of law or fact which the participant believes the NMB has overlooked or misapplied and the grounds for the relief sought. Absent a demonstration of material error of law or fact or circumstances in which the NMB's exercise of discretion to modify the decision is important to the public interest, the NMB will not grant the relief sought. The mere reassertion of factual and legal arguments previously presented to the NMB is insufficient to obtain relief.

When presented with requests for reconsideration, the NMB has stated its policy as "absent new substantive evidence presented in support of such requests, the Board generally does not reverse its decisions upon requests for reconsideration." *America West Airlines*, 17 NMB 226 (1990). See also *Northwest Airlines*, 19 NMB 334 (1991); *Metro Flight*, 19 NMB 8 (1991). The NMB has carefully reviewed and considered Air Serv's Motion for Reconsideration and, as discussed below, finds no basis to reverse or alter its decision in 39 NMB 450.

## III.

In applying the second part of its jurisdictional test, the Board looks for evidence of whether a material degree of control exists between the carrier and the employer in question for the latter to be deemed a carrier. *Georgia Ports Authority*, 31 NMB 303, 319 (2004); *C.W.S., Inc.*, 17 NMB 371 (1991). Significant factors in the NMB's analysis include: (1) whether the entity's employees are supervised by the carrier; (2) whether the employees of the entity in question act as the carriers' agents; (3) whether carrier officials have the ability to make effective recommendations regarding the hiring and firing of the entity's employees; (4) whether the entity in question uses equipment owned by the carrier to perform its duties; (5) whether the carrier has a significant degree of control over the training of the entity's employees, and; (6) whether the entity performs work for more than one company and retains control over its operations. *Georgia Ports Authority*, 31 NMB at 319.

In this case, Air Serv has a contractual relationship with LaGuardia Airline Managers Council (LAAMCO), a consortium of all the air carriers operating out of LGA, to provide shuttle bus transportation services between the employee parking areas and the terminal buildings at LGA. As part of its shuttle bus operations, Air Serv transports airline and non-airline employees, including airport cleaning staff, newsstand workers, security personnel, and restaurant employees, to and from their work stations. In support of its motion for reconsideration, Air Serv submitted an affidavit from Tom MacVicar, Senior Vice President for the Northeast Region of Air Serv. In his affidavit, MacVicar reiterates the detailed contractual requirements regarding the shuttle bus services provided by Air Serv at LGA. Pursuant to the contract, LAAMCO establishes the bus routes through each parking lot that Air Serv must follow as well as designates the pickup and arrival sites for loading and unloading passengers. Under the contract, LAAMCO also reserves the right to alter pick-up and arrival sites at its discretion. The bus schedule is not based on the flight schedule of any specific air carrier. Instead, Air Serv shifts operate around the clock at LGA, twenty-four hours a day and seven days a week. Although Air Serv owns and is responsible for the upkeep of the buses, the contract provides detailed specifications on bus service, including fines for missed routes, requiring certain mechanical inspections, maintaining insurance, licenses and operating permits, maintaining and allowing audits of accounting records and invoices, and requiring communications between LAAMCO and Air Serv regarding any contingencies which would affect shuttle

service. The contract also requires that the buses be equipped with heat and air conditioning. The contract also requires employees to be “well groomed” and to speak English.

These contractual terms were previously submitted to and considered by the NMB. There can be no dispute that the contract between LAAMCO and Air Serv is evidence of some degree of control because Air Serv is engaged in a business which requires it to provide specific services to a customer that requires the timely and efficient transportation of airline and non-airline employees to and from work at a busy airport. Air Serv sells its shuttle services to LAAMCO and tailors its business to meet LAAMCO’s needs, but this is not the material degree of control required to be deemed a carrier. Especially where, as here, Air Serv owns its own equipment, leases its premises, pays its employees, provides day to day supervision of its employees and provides uniforms that hold the employees out to the public as Air Serv employees.

In his affidavit, MacVicar also states that LAAMCO exerts significant influence over Air Serv’s discipline and firing of employees. An example in his affidavit is the termination of an Air Serv LGA Account Manager. MacVicar states that in July 2011, LAAMCO President Robert Rogriquez reported the “substandard performance” of the Account Manager. According to MacVicar, Rodriguez explained that the Account Manager failed to respond to calls and emails and had missed a monthly meeting. MacVicar states that he “ultimately made the decision” because LAAMCO was unhappy with the Account Manager’s performance. He also states Rodriguez’s complaints and feedback from other LAAMCO managers were “very strong influences on my decision to discharge.” MacVicar adds that he made the decision to terminate the manager “based, in part, on LAAMCO’s President’s request that I do so.” The affidavit does not clearly state that LAAMCO’s President demanded that the Account Manager be terminated. It appears that after MacVicar heard from Rodriguez, he sought additional information from other LAAMCO managers and that this information together with other unspecified factors led to his decision to discharge an Account Manager. This evidence establishes that poor performance of an Air Serv employee was reported by LAAMCO but the decision to terminate the employee was ultimately MacVicar’s.

The affidavit of Richard Haverstick, Air Serv General Manager, submitted in support of Air Serv’s Motion demonstrates again that Air Serv receives complaints about its employees but Air Serv investigates these incidents and disciplines employees according to their own personnel procedures. In his

affidavit, Haverstick states that "I investigated this complaint" that shuttle buses were running late. Based on his investigation, he identified employees and directed a response pursuant to the disciplinary procedure in Air Serv's handbook. This new evidence together with the evidence previously considered by the NMB establishes that LAAMCO reports incidents, but Air Serv investigates and determines what, if any, discipline will occur based on its own policies. Accordingly, this new evidence does not establish a material error of law or fact in the NMB's conclusion that air carriers do not exert significant control over hiring or firing of Air Serv employees.

The remaining new evidence submitted by Air Serv is communications between Air Serv and LAAMCO regarding air carrier employee safety during inclement weather; revised or altered bus routes; requests for increased bus size and passenger capacity; and cleanliness of the buses. As previously stated, these communications evidence the type of control that exists between a service provider and a customer and not the material degree of control necessary to confer RLA jurisdiction.

#### IV.

The Board has considered Air Serv's Motion for Reconsideration and finds that the Employer has presented an insufficient basis, either in the form of new evidence or arguments, for granting its request. Accordingly, Air Serv's Motion is denied.

By direction of the NATIONAL MEDIATION BOARD



Mary L. Johnson  
General Counsel