



NATIONAL MEDIATION BOARD
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41 NMB No. 15

April 29, 2014

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

Re: NMB File No. CJ-7105
TriState CareFlight, LLC.

Dear Mr. Cowen:

This responds to your request for the National Mediation Board's (NMB) opinion regarding whether TriState CareFlight, LLC (CareFlight or Employer) is subject to the Railway Labor Act (RLA), 45 U.S.C. § 151, *et seq.* On November 29, 2013, the National Labor Relations Board (NLRB) requested an opinion regarding whether TriState's operations are subject to the RLA.

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

I.

PROCEDURAL BACKGROUND

This case arose out of an October 31, 2013 representation petition filed by the National Emergency Medical Services Association (NEMSA) where it sought to represent a unit of all full-time and part-time nurses and flight paramedics deployed out of or employed at the Employer's Base 5 in Santa Fe, New Mexico. Evidence presented at the underlying NLRB representation hearing in Region 28 (Region) suggested that the Employer may be subject to the jurisdiction of the NMB rather than the NLRB. The Region provided the NMB with copies of all documents from the representation case hearing held in the Region on November 7, 2013. These documents include the representation hearing record, transcripts, exhibits, and the parties' briefs. One of the

exhibits was CareFlight's Part 135 Federal Aviation Authority (FAA) Operating Certificate.

On December 9, 2013, the NMB assigned Susanna F. Parker to investigate. CareFlight submitted a position statement on December 19, 2013, and NEMSA submitted a position statement on December 20, 2013. On February 12, 2014, the NMB reassigned this case to Investigator Cristina Bonaca.

The NMB's opinion in this case is based upon the request and case file provided by the NLRB, as well as NEMSA and CareFlight's submissions to the NMB.

II.

NEMSA'S CONTENTIONS

NEMSA contends that CareFlight is not a common carrier as defined under the RLA as it lacks the public character of a common carrier. NEMSA asserts that the employees at issue provide emergency medical care rather than duties associated with aviation functions. Further, NEMSA states that the Employer's nurses and paramedics are engaged in work normally covered by the National Labor Relations Act, 29 U.S.C. §§ 151-169.

NEMSA argues that CareFlight provides a functional separation between flight operations and the delivery of medical services. CareFlight's Medical Program Director has managerial authority over the employment of all nurses and paramedics, while its Director of Operations has supervisory authority over the operational side of the company, pertaining to helicopter operations regulated by the FAA. Nurses must complete 24 hours of continuing education and training annually, and paramedics must complete 48 hours of continuing education and training annually. Nurses and paramedics must also complete one hour of FAA mandated computer-based training for non-aviators and annual instruction on the use of night vision goggles. In sum, NEMSA argues that these employees' FAA training is substantially less intensive than its continuing education training necessary for state licensing by the New Mexico Nursing Board and the New Mexico Emergency Medical Services Bureau.

NEMSA asserts that while CareFlight holds an FAA operating certificate to operate as an air carrier, it is not a common carrier under the RLA. CareFlight's FAA Part 135 license is restricted to helicopter emergency medical services and air ambulance operations, and it provides a specialized service that individual members of the public cannot utilize. Rather, CareFlight's services are accessed by governmental agencies as part of the 911 system or through a hospital at the direction of a physician.

NEMSA argues that CareFlight is not of “quasi-public character” in that, even though it markets its services to hospitals, it does not advertise or hold itself out to the public for hire. See *Southern Air Transport*, 8 NMB 31 (1980). NEMSA then distinguishes CareFlight’s operations from NMB precedent where operations were found to be under the jurisdiction of the RLA. NEMSA states that CareFlight’s operations are distinguishable from those in *Evergreen Helicopter*, 8 NMB 505, 506 (1981), as it contends that CareFlight’s services are not available to any person who wants to hire them. CareFlight’s operations are also different from those described in *Mountain Air Helicopters*, 39 NMB 512 (2012) and *Offshore Logistics, Inc., Aviation Servs. Division, d/b/a Air Logistics*, 10 NMB 477 (1983) because the services provided by CareFlight are not in the nature of a taxi service and are not available to any company or individual. See *Mountain Air Helicopters*, above. Finally, NEMSA contrasts CareFlight’s operations with those of *Rocky Mountain Holdings, LLC d/b/a Eagle Airmed of Arizona*, 26 NMB 132 (1999), by asserting that in *Eagle Airmed* the aviation and EMS operations were completely integrated where CareFlight’s flight and clinical operations are functionally distinct.

Finally, NEMSA argues that because the NLRB asserted jurisdiction over another CareFlight location in December 2012, and the Employer did not contest jurisdiction then, the Employer has the burden of overcoming the presumption of continued NLRB jurisdiction.

III.

CAREFLIGHT’S CONTENTIONS

CareFlight contends that the evidence demonstrates that it is a common carrier by air as defined by the RLA and that the NMB has repeatedly found carriers similar to CareFlight are subject to the RLA. CareFlight states that it has held a Part 135 certificate from the FAA since December 16, 2003 and that the certification is current and has not been surrendered, suspended, or revoked at any time since 2003. This Part 135 certificate allows the Employer to operate as “an air carrier and conduct common carriage operations in accordance with said Act.”

The Employer states that one hundred percent of its operations are governed by FAA regulations, including its aircraft, its employees, and all operations. FAA regulations require that CareFlight’s nurses and paramedics must annually complete and maintain certification in aircraft training, emergency training, and night vision goggle training – training that is not required for those nurses and paramedics working on the ground. Other training requirements set out in the applicable FAA sections include handling of emergency air-flight-related situations such as rapid decompression, fire in flight, smoke control procedures, ditching, evacuation, hijacking, and other

unusual situations that might occur during a flight. See FAA Federal Aviation Regulations, 14 C.F.R. §§ 135.329, 135.331 (2010). CareFlight tracks all of its flight paramedic and nurses' FAA flight-related training through monthly reports as is required by the FAA regulations. CareFlight additionally requires its flight nurses and paramedics to attend two daily flight briefings, and they are required to remain in constant communication with pilots regarding the aircraft. CareFlight's Base 5 nurses and paramedics are also subject to the regulations and requirements in the State of New Mexico that govern medical professionals.

CareFlight states that it directly employs and supervises its flight nurses and paramedics. The Employer has the sole and continuing authority to supervise and direct the nurses and paramedics, including scheduling, compensation, and benefits.

CareFlight asserts that it clearly falls under the RLA's jurisdiction as it is a common carrier by air as defined by the RLA. CareFlight states that it actively advertises its services and solicits new clients and businesses. Further, CareFlight regularly provides scheduled and unscheduled services to hospitals and other public safety agencies throughout the Southwest, regularly crossing state lines and engaging in interstate commerce. Even individual members of the public have directly hired CareFlight's services.

The Employer cites to a recent NMB decision, *Mountain Air Helicopters*, 39 NMB 512, 514-515 (2012), where the NMB asserted jurisdiction because *Mountain Air Helicopters* was a common carrier by air that held itself out to the public for air transportation of cargo. *Mountain Air Helicopters*, like CareFlight, held a valid FAA operating certificate and provided a variety of helicopter services to individuals, commercial companies, and the government. *Id.* at 514. CareFlight also provided citations to other Board precedent finding similar employers subject to the RLA. See also *Rocky Mountain Holdings, LLC d/b/a Eagle Airmed of Arizona*, 26 NMB 132 (1999); *Offshore Logistics, Inc., Aviation Servs. Division, d/b/a Air Logistics*, 10 NMB 477 (1983); *Evergreen Helicopters, Inc.*, 8 NMB 505 (1981).

Finally, CareFlight states that the fact that the NLRB previously asserted jurisdiction over it is not relevant because the jurisdictional issue was not raised. See *Bombardier Transit Systems Corp.*, 32 NMB 131 (2005).

IV.

FINDINGS OF FACT

The Employer is an Arizona Limited Liability Company headquartered in Bullhead City, Arizona. It is engaged in the business of providing air

ambulance critical care transport services in various states from 24 bases located in Arizona, California, Colorado, Nevada and New Mexico (including Base 5 in Santa Fe), and has served thousands of customers over the past 12 months. The Employer's helicopters routinely cross state lines, although the Base 5 helicopter stays almost entirely in New Mexico.

CareFlight employs approximately four pilots, one mechanic, four to six flight nurses, and four to six flight paramedics at each base. Base 5 has approximately ten employees and one helicopter. The helicopter is the only mode of transportation used in CareFlight's operations.

CareFlight holds a Part 135 certificate from the FAA to conduct air carrier operations. CareFlight's FAA Part 135 certificate allows it to operate as an air carrier and conduct common carriage operations in accordance with the FAA.

CareFlight holds its services out to the public and provides scheduled and unscheduled flights. CareFlight has first-provider contracts with various health care facilities and EMS agencies to rapidly transport critically ill and injured patients to and from hospitals and accident scenes while providing medical care. The Employer also provides "scene flights" which generally involve flying patients to trauma centers at the request of law enforcement and fire agencies. CareFlight additionally receives requests from individuals to provide air transportation related to medical transplants and blood transfusions. On one occasion, a private individual who was injured contacted CareFlight by phone to arrange an air transport.

V.

DISCUSSION

The NMB has asserted RLA jurisdiction over a company and its employees in two instances: when that company is a common carrier by air or rail as defined by the RLA or when that company is directly or indirectly owned or controlled by a rail or air carrier engaged in interstate or foreign commerce. When the company is not directly a carrier, the NMB applies a two part jurisdictional test to determine whether the company is subject to the RLA. *See, e.g., Boston MedFlight*, 38 NMB 52 (2010); *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 Board determines whether the nature of the work performed is that traditionally performed by employees of a rail or air carrier. Second, the Board determines whether a carrier or carriers exerts significant control over the company. Both parts of the test must be satisfied for the NMB to assert jurisdiction over the company as a derivative carrier. As discussed below, CareFlight is a common carrier by air and therefore the two part jurisdictional test is not applicable.

Section 181, which extended the RLA's coverage to air carriers, provides:

All of the provisions of subchapter I of this chapter except section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service. 45 U.S.C. § 181.

CareFlight holds a valid Part 135 FAA operating certificate authorizing it to operate as an air carrier in accordance with the requirements of the Federal Aviation Act of 1958. CareFlight holds itself out to the public as it actively advertises its services, regularly provides services to hospitals and other public safety agencies, and also has been hired by individual members of the public. *See Southern Air Transport*, 8 NMB 31, 35 (1980) (“A given carrier’s services need not be available to the entire public. One may be a common carrier though the nature of the service is sufficiently specialized as to be of possible use to only a fraction of the total population.”); *Amerijet Int’l, Inc.*, 39 NMB 48, 50 (2011).

In *Rocky Mountain Holdings, LLC d/b/a Eagle Airmed of Arizona (Eagle Airmed)*, 26 NMB 132, 134-135 (1999), the employer provided air transport emergency services and operated under a Part 135 license issued by the FAA. Eagle Airmed did not solicit or act on calls directly from a patient. *Id.* at 133. Rather, it provided its services in response to calls from authorized agencies which requested ambulance services. *Id.* Like at CareFlight, Eagle Airmed employed pilots and mechanics to operate and maintain the aircraft and medical personnel (nurses and paramedics) to administer the emergency medical treatment. *Id.* Also, similarly to CareFlight, Eagle Airmed marketed directly to hospitals and public safety agencies. *Id.* The Board found Eagle Airmed to be subject to the RLA, as it was a helicopter taxi service, which engaged in common carriage by air, held itself out to the public for hire, and actively solicited customers. *Id.* at 135. Citing to *Evergreen Helicopters, Inc.*, 8 NMB 505, 506 (1981), the Board found that “[a]lthough this air transportation may be geared to specialized types of service, it is available to any person who desires to employ [it].” *Id.* The facts of *Eagle Airmed* are virtually identical to those present in the instant case.

NEMSA argues that the *Eagle Airmed* decision can be distinguished as CareFirst’s medical and flight operations are functionally distinct. The NMB stated, in *Federal Express Corp.*, 23 NMB 32, 71 (1995), that “the Railway

Labor Act does not limit its coverage to air carrier employees who fly and maintain aircraft” but “extends to virtually all employees engaged in performing a service for the carrier so that the carrier may transport passengers or freight.” The limit on Section 181’s coverage recognized by the Board in *Federal Express* is that “the carrier must have ‘continuing authority to supervise and direct the manner of rendition of . . . [an employee’s] services.’” *Id.* at 72. Here, CareFlight clearly controls the employment relationship with all of its employees, including pilots, mechanics, flight paramedics and flight nurses. The fact that the flight nurses and flight paramedics are supervised by the Medical Program Director rather than the Director of Operations is not determinative since all employees are directly controlled by CareFlight.

Accordingly, because CareFlight is a common carrier by air offering ambulance critical care helicopter service, which holds itself out to the public for hire, and has the sole authority to supervise and direct its employees, the NMB finds that CareFlight and its employees are subject to the RLA.¹ *See also Mountain Air Helicopters*, 39 NMB 512 (2012) (company that provided helicopter utility flight services under a valid FAA operating certificate and held itself out to the public for hire was a carrier under the RLA); *Offshore Logistics, Inc., Aviation Servs. Division, d/b/a Air Logistics*, 10 NMB 477 (1983) (entity which transported oil company personnel and equipment was found to be a common carrier under the RLA as it held an FAA operating certificate to conduct air taxi operations, and provided specialized services that were available to any company or individual).

CONCLUSION

Based on the record in this case and for the reasons discussed above, the NMB’s opinion is that CareFlight and its employees are subject to the RLA. This decision may be cited as *TriState CareFlight, LLC*, 41 NMB 55 (2014).

By direction of the NATIONAL MEDIATION BOARD.



Mary L. Johnson
General Counsel

¹ The fact that the NLRB has previously asserted jurisdiction over CareFlight is not relevant, because there is no evidence that the jurisdictional issue was raised by any party in proceedings before the NLRB. *See Bombardier Transit Systems Corp.*, 32 NMB 131, 141 (2005); *Inter-Rail Transport of Jacksonville, LLC*, 31 NMB 478, 483 (2004).

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