



NATIONAL MEDIATION BOARD
WASHINGTON, DC 20572

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In the Matter of the
Application of the

GATEWAY EMPLOYEE ALLIANCE

alleging representation disputes
pursuant to Section 2, Ninth, of
the Railway Labor Act, as
amended
involving employees of

GATEWAY FRONTLINE SERVICES

42 NMB No. 23

CASE NO. R-7434
(File No. CR-7087)

FINDINGS UPON
INVESTIGATION-
DISMISSAL

June 4, 2015

This determination addresses the application filed by the Gateway Employee Alliance (Alliance) alleging a representation dispute pursuant to the Railway Labor Act¹ (RLA), 45 U.S.C. § 152, Ninth (Section 2, Ninth), among “Passenger Assistant and Dispatcher” employees of Gateway Frontline Services (Gateway) at McCarran International Airport (McCarran) in Las Vegas.

For the reasons set forth below, the Board finds that Gateway is subject to RLA jurisdiction.² The Alliance does not meet the showing of interest requirement for the system-wide craft or class of Passenger Services Employees and, therefore, the application is dismissed.

¹ 45 U.S.C. § 151, *et seq.*

² Chairman Hoglander has previously expressed the view that the two-part test applied in this case should be replaced with a traditional agency test to determine whether there is RLA jurisdiction. *Airway Cleaners*, 41 NMB 262, 270-73 (2014). In the absence of a Board majority to overrule the traditional two-part test, Chairman Hoglander agrees that it is correctly applied here and that there is RLA jurisdiction.

I. PROCEDURAL BACKGROUND

On December 27, 2012, the Alliance filed its application with the National Mediation Board (NMB or Board). The NMB assigned Maria-Kate Dowling to investigate. Gateway filed a position statement on February 11, 2013, requesting that the NMB dismiss the case because the Alliance did not seek to represent the employees on a system-wide basis as required under the RLA. In addition, Gateway informed the Board that it had voluntarily recognized Local 74 of the United Service Workers Union (Local 74) as the representative of its Passenger Service Escorts and Dispatcher Employees at McCarran and that there was a collective bargaining agreement (CBA) covering these employees. Gateway provided a List of Potential Eligible Voters that included Passenger Service Employees at all of its locations. Local 74 also filed a position statement requesting that the Board dismiss the application.

On January 9, 2015, the NMB assigned Angela I. Heverling to investigate. The Board requested that participants provide position statements on whether Gateway is subject to the RLA. These were received on March 6, 2015.

II. GATEWAY'S CONTENTIONS

Gateway contends that it is subject to the RLA and the application should be dismissed because the Alliance did not file an application to represent the employees on a system-wide basis. It notes that its employees perform work traditionally performed by air carriers and argues that air carriers at McCarran exercise substantial control over its operations.

Gateway also argues that "Passenger Assistant and Dispatcher" is not an appropriate craft or class under the RLA.

III. LOCAL 74'S CONTENTIONS

Local 74 also contends that Gateway is subject to the RLA based on air carriers' substantial control over Gateway's personnel decisions at McCarran and that the application should be dismissed.

IV. THE ALLIANCE'S CONTENTIONS

The Alliance argues that the circumstances at McCarran warrant deviating from the usual system-wide requirement. These circumstances include the current voluntary recognition of Local 74 as the representative of

the employees at issue and lack of community of interest among employees at McCarran and Gateway's employees at other airports.

The Alliance did not file a position statement on the jurisdiction issue.

V. FINDINGS OF FACT

Gateway provides security and frontline services to airlines at 11 US airports, including flight dispatching, baggage handling, wheelchair services, and skycap services. Gateways' passenger service operations are centralized in its corporate headquarters based in Newark, New Jersey and Los Angeles, California. Gateway's labor and employment functions, including collective bargaining, are controlled in its corporate office in Los Angeles, California under the supervision of its Vice President and Chief Executive Officer. Gateway uses two employee handbooks; one covering employees in California and one for all other employees. Both handbooks contain identical policies regarding sexual harassment, discipline, and work rules. All Gateway passenger service employees are under the same drug and alcohol policy. Gateway's administrative functions, including payroll, accounting, and marketing, are based in the New Jersey location. The Human Resources department in New Jersey issues standards for nationwide hiring and approves all hiring and discharge decisions.

Gateway provides services to several carriers at McCarran, with approximately 70% performed for Southwest Airlines (Southwest) and 20% performed for Delta Air Lines (Delta). Gateway provides frontline services to Southwest through a Core Airport Support Services Agreement (Southwest Agreement) and to Delta pursuant to Airport Annex Agreement (Delta Agreement). The Southwest Agreement also covers Gateway employees in Los Angeles, Oakland, Panama City, Kansas City, and Houston. In addition to the contracts, Gateway provided a declaration from Xavier Merizalde, Regional Manager, Zone B for Gateway, who oversees all of Gateway's operations at McCarran.

In August 2012, Gateway recognized Local 74 as the representative of Passenger Services Escorts and Dispatcher employees at McCarran. On September 1, 2012, Gateway and Local 74 concluded an agreement that covers the terms and conditions of employment for wheelchair escorts, wheelchair dispatchers, skycaps, and wheelchair coordinators.

According to the Southwest Agreement, Gateway is an independent contractor. Southwest has the authority to approve or disapprove any of Gateway's staffing recommendations and Gateway must acquire prior written

approval from Southwest to grant overtime to any of its employees. Southwest also maintains the right to change, for any reason, the hours during which Gateway's employees provide services. According to the Southwest Agreement, Gateway "agrees that upon request by Southwest, [it] will remove from service any Contractor Personnel who, in the opinion of Southwest, displays improper conduct or is deemed not qualified or necessary to perform the work assigned."

Gateway management meets with Southwest on a monthly basis to discuss staffing requirements. During these meetings, Gateway submits staffing recommendations subject to Southwest's approval. Southwest has the discretion to increase or decrease hours as necessary, and Gateway does not have the right to appeal. According to Merizalde, Southwest management makes daily decisions about when to close Gateway's curbside operations.

The Delta Agreement similarly describes Gateway as an independent contractor. It also requires preapproval before Delta will pay for overtime hours. Delta can change the number of hours that Gateway employees work by notifying Gateway of the change.

Both contracts set minimum hiring requirements for Gateway employees and specify training requirements. Both carriers provide annual training in several areas and the training provided by Gateway must be pre-approved by the carriers. Southwest has conducted audits of Gateway's training records.

The carriers have different uniform requirements for Gateway employees who work on their respective contracts. Both carriers provide computers, baggage carts, and base radio units for Gateway employees. Gateway leases office space from Southwest at McCarran and Gateway employees use the same break rooms and restrooms as carrier employees.

Both carriers have conducted audits of Gateway's records, and the contracts provide access to business records upon request. For example, Southwest has requested passenger records regarding pick-ups and drop-offs. In April 2014, Southwest conducted an audit of Gateway's compliance with certain Department of Transportation regulations. Southwest has also conducted unannounced customer service audits of Gateway. Gateway must correct any deficiencies discovered in Southwest's audits within ten days of the receipt of the results. In August 2014, Delta conducted an audit of Gateway's transportation of passengers via wheelchairs, resulting in Delta requiring additional training for Gateway employees.

Gateway must comply with Key Performance Indicators (Southwest) and Performance Metrics (Delta) in areas such as wheelchair customers' wait times,

flight delays, and Department of Transportation complaints. Failure to meet these standards at Southwest results in a corrective course of action or liquidated damages.

According to Merizalde, both carriers have influenced Gateway's personnel decisions. Gateway followed Southwest's recommendation to hire a former Southwest employee as a skycap and has followed recommendations regarding promotions. Likewise, Gateway followed the recommendation of Delta with regards to which coordinator to promote to a Duty Manager position. Both carriers have successfully requested specific individuals be hired as dispatchers.

Both carriers have requested that employees be removed from their contracts. In early 2013, there were two incidents in which Gateway complied with the carriers' request to terminate employees who solicited tips from customers. Gateway generally follows the carriers' recommendation to suspend an employee. In some instances, Gateway has requested the option to impose less severe discipline on employees. If the carrier does not approve of the lesser discipline, Gateway imposes the discipline recommended by the carrier.

Southwest and Delta directly supervise Gateway's employees at McCarran. Carrier supervisors are staged in areas where Gateway employees perform services, such as ticket counters and gates. Gateway employees are trained to seek out carrier supervisors for work-related issues, such as addressing passenger complaints and dealing with large passengers or intoxicated passengers. Gateway's dispatchers are directly monitored by Southwest's supervisors in the Southwest Operations Command Center. Carrier managers occasionally send individual emails to Gateway employees in recognition for doing a good job. Gateway is required to forward complaints from passengers to the carriers, who then forward them to their own complaint resolution departments. Gateway supervisors attend daily briefings with the carrier supervisors where they routinely receive new instructions from the carriers.

VI. DISCUSSION

Jurisdiction Issue

Gateway does not fly aircraft and is not directly or indirectly owned by an air carrier. 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 company and its employees are subject to the RLA. *See, e.g., Menzies Aviation*, 42 NMB 1 (2014); *Airway Cleaners*, 41 NMB 262 (2014). 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.

The security and frontline work performed by Gateway under its contracts with Southwest and Delta at McCarran is work traditionally performed by employees of air carriers. Therefore, the Board must determine whether Gateway is directly or indirectly owned or controlled by carriers to determine whether its McCarran employees are subject to RLA jurisdiction.

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, including hiring, firing, and discipline; degree of supervision of the company's employees; and control over employee training. *See, e.g., Menzies Aviation*, 42 NMB 1 (2014); *Airway Cleaners*, 41 NMB 262 (2014); *Bags Inc.*, 40 NMB 165 (2013); *Air Serv Corp.*, 39 NMB 450 (2012).

The evidence indicates that Southwest and Delta exercise a sufficient amount of control over the manner in which Gateway conducts its business at McCarran to establish RLA jurisdiction. Although many of the contract provisions described above are typical of those found in any contract for service, the carriers have a level of control over Gateway's personnel decisions greater than that seen in recent cases where the Board has not exercised jurisdiction.

The Board has found jurisdiction where a company terminated an employee upon a carrier's request that he be removed from the contract. *See Aircraft Services Int'l*, 32 NMB 30, 33-34 (2004). Gateway has terminated employees upon request of the carriers and provided the names of these

individuals. This can be distinguished from the facts in *Menzies*, a recent determination where the Board majority did not find RLA jurisdiction. Unlike in *Menzies*, where the company utilized employees on another contract or elsewhere in the airport, Gateway terminated the employees at issue. Gateway has also hired and promoted specific individuals, including frontline staff, such as skycaps, upon request of the carriers.

Gateway does not independently determine the appropriate discipline for its employees; rather, it acquiesces to the carriers' discipline requests, even when Gateway managers request less severe discipline for their employees. This distinguishes Gateway from *Menzies*, where the carrier merely reported performance or behavior problems, leaving *Menzies* to determine the appropriate discipline or work together "to resolve such issues to mutual satisfaction." *Menzies*, 42 NMB at 6. This greater control over discipline at Gateway is related to a greater level of direct carrier supervision over Gateway employees than seen in cases where the Board has not found jurisdiction. Gateway employees are trained to approach Southwest and Delta supervisors when addressing passenger complaints and Gateway is required to forward all complaints for the carriers to handle through their own complaint resolution departments.

Delta and Southwest have sufficient control over the hiring, firing, and disciplining of Gateway employees to establish RLA jurisdiction over its employees at McCarran. While much of the evidence describes the type of control "found in almost any contract between a service provider and a customer" as discussed in *Airway Cleaners*, 41 NMB 262, 269 (2014), Gateway does not independently determine how to discipline its employees and the carriers have greatly influenced its hiring and firing decisions.

Scope of the System

The RLA requires system-wide representation and it is the Board's longstanding policy that system-wide representation is only achieved when a craft or class includes all eligible employees, regardless of their work locations. *R.R. Passenger Serv. Corp.*, 31 NMB 178, 189 (2004); *LSG Lufthansa Servs., Inc.*, 25 NMB 96 (1997). Therefore, it is the Board's practice to conduct elections across a carrier's entire system. Early in its history, the Board stated the following with regard to this practice:

The Railway Labor Act does not authorize the National Mediation Board to certify representatives of small groups of employees arbitrarily selected. Representatives may be designated and authorized

only for the whole of a craft or class employed by a carrier.

Pennsylvania R.R. Co., 1 NMB 23, 24 (1937). This practice has been extended to the airline industry. *See Ross Aviation, Inc.*, 5 NMB 145, 148 n.5 (1972).

When determining the scope of a carrier's system, the Board examines the extent of the consolidation of operations, labor relations, and payroll functions. *Aircraft Serv. Int'l Group*, 31 NMB 508, 515 (2004). The Board also examines how the carrier is held out to the public. *Id.*

Gateway's McCarran operations do not constitute a separate system for purposes of representation under the RLA. Gateway's passenger services operations are centralized in two corporate headquarters. Its employment and collective bargaining functions are located in California while its administrative functions are centralized in New Jersey. Gateway utilizes one employee handbook for all employees outside of California and it has uniform standards for hiring and recruiting nationwide.

Despite the Alliance's contention to the contrary, the Board is not bound by Gateway's voluntary recognition of Local 74 as the representative of certain employees at McCarran. The RLA does not preclude a carrier from voluntarily recognizing a craft or class that does not conform to the requirements of the RLA. *Galveston Wharves*, 4 NMB 200, 203 (1962) ("private representation agreements which do not conform to the recognized craft or class lines cannot be relied upon to modify the requirements of the statute").

Proper Craft or Class

The Alliance's application seeks to represent "Passenger Assistant and Dispatcher" employees. Gateway contends that the appropriate craft or class for these employees is Passenger Services Employees and is made up of Gateway employees with the following job titles: Customer Service Representative, Wheelchair Escort, Wheelchair Dispatcher, Wheelchair Coordinator, Baggage Handler, Skycap, Document Checker, MARS (Mobility Assistance Resource System), MARS Escort, Check & Go, Wheelchair Shared Services, Electric Cart Escort, and Business Select. The collective bargaining agreement between Gateway and Local 74 includes employees in several of these job titles at McCarran, although not all of these job titles are represented at the airport. Gateway provided a List of Passenger Service Employees at all of its locations.

As with the appropriate scope of the system, the Board is not bound by any of the provisions of the voluntary recognition of Local 74 in determining the appropriate craft or class for these employees. The Board makes craft or class determinations on a case-by-case basis, relying on its own precedent and policy. See, e.g., *US Airways*, 28 NMB 104 (2000). The Passenger Service Employees craft or class is the appropriate craft or class for employees, such as these, whose primary functions involve servicing the customers' "immediate requirements for flight arrangements." *United Airlines*, 6 NMB 180, 186 (1977).

CONCLUSION

Based on the record in this case and for the reasons discussed above, the NMB's opinion is that Gateway and its employees at McCarran are subject to the RLA. In addition, Gateway's McCarran facility does not constitute a proper system. The Board further finds that the proper craft or class for the "Passenger Assistant and Dispatcher" employees is Passenger Service Employees.

The Alliance has failed to meet the requisite 50% showing of interest requirement as set forth in Board Rule 1206.2 and, therefore, the Alliance's application is dismissed subject to Board Rule 1206.4. Case No. CR-7087 is converted to R-7434 and closed.

By direction of the NATIONAL MEDIATION BOARD.



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