



**NATIONAL MEDIATION BOARD**  
WASHINGTON, DC 20572

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In the Matter of the  
Application of the  
  
NORWEGIAN CABIN CREW  
ASSOCIATION  
  
alleging a representation dispute  
pursuant to Section 2, Ninth, of  
the Railway Labor Act, as  
amended  
involving employees of  
  
NORWEGIAN AIR SHUTTLE ASA

43 NMB No. 21

FILE NO. CR-7139

FINDINGS UPON  
INVESTIGATION

April 19, 2016

This determination addresses the application filed by the Norwegian Cabin Crew Association (NCCA) alleging a representation dispute pursuant to the Railway Labor Act<sup>1</sup> (RLA), 45 U.S.C. § 152, Ninth (Section 2, Ninth), among the “Cabin Crew”<sup>2</sup> craft or class at Norwegian Air Shuttle ASA (NAS).

For the reasons set forth below, the Board finds jurisdiction over this representation matter. The Board finds that NAS, its wholly owned subsidiary Norwegian Air Holding Resources Ltd. (NAR)(referred to collectively as “Norwegian”), and OSM Aviation, Inc. (OSM) are subject to RLA jurisdiction and that NAS and OSM are joint employers of the employees in the craft or class at issue.

## **I. PROCEDURAL BACKGROUND**

On May 28, 2015, NCCA filed its application with the National Mediation Board (NMB or Board). The NMB assigned Maria-Kate Dowling to investigate. NAS filed a brief position statement with the Board. NCCA, NAR, and OSM

<sup>1</sup> 45 U.S.C. § 151, *et seq.*

<sup>2</sup> Cabin Crew are more commonly referred to as flight attendants in the United States and the terms will be used interchangeably here.

each filed position statements, responses, and replies with the Board. In response to Board requests, NAR and OSM each filed additional documents.

## **II. CONTENTIONS**

NCCA asserts that the NMB has jurisdiction over NAS' flight attendants working in commercial air passenger service. NCCA states that the employees at issue perform all of their work in the service of NAS and that NAS exerts extensive control through its contract with OSM.

Norwegian contends that OSM is the sole employer of the cabin crew members and that neither NAR nor NAS exercises control over OSM. In addition, Norwegian contends that they lack the "continuing authority to supervise and direct the manner in which the Cabin Crew members render their services." OSM agrees with Norwegian that it is the employer of the Cabin Crew members. OSM further states that it is neither a carrier nor a derivative carrier and that it operates as an independent entity that is not indirectly or directly owned<sup>3</sup> or controlled by an RLA carrier. OSM contends that the RLA "does not define its jurisdiction based on a carrier's control over the employees of a company that services the carrier, but rather upon the service provider itself."

## **III. ISSUES**

Does the NMB have jurisdiction over this representation matter? If so, who is the employer of the employees covered by the application?

## **IV. FINDINGS OF FACT**

The Norwegian Group is a low-cost airline in Scandinavia and Europe. According to its website, [www.norwegian.com](http://www.norwegian.com), the Norwegian group is composed of the "parent company" NAS, and its wholly and partially owned subsidiaries in Norway, Sweden, Denmark, Finland, Ireland, U.K, and

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<sup>3</sup> In its January 19, 2016 submission in response to the Board's request for information, NAR stated that, in December 2015, NAR and OSM Aviation Ltd, the parent corporation of OSM, entered into an agreement under which NAR will acquire fifty percent of OSM, Ltd. This transaction is awaiting approval by the European Commission. NAR also states that if and when this transaction is consummated, the current contract with OSM "will be terminated but the airlines that purchase services from OSM will continue to have a non-delegable regulatory responsibility for ensuring the Cabin Crew's compliance with airline regulations during air flight." Thus, Norwegian as the aircraft operating certificate holder will continue to exercise the same operational control over the Flight Attendants in any prospective contract as it does under the existing contract. While the Board has found RLA jurisdiction based on fifty percent ownership by a carrier, see *Commercial Aviation Services*, 22 NMB 223 (1995), the Board bases its decisions on the present facts and circumstances. *Chicago & Northwestern Railway Company*, 4 NMB 240, 249 (1965). See also *Northwest Airlines, Inc.*, 18 NMB 357, 369 (1991).

Singapore. NAR is a wholly-owned subsidiary of NAS. OSM is also a Norwegian company that has specialized in supplying crew members to the aviation industry for approximately two years. OSM has offices in over 10 countries and recruits and manages crew for other airlines including Finnair. In a letter to the Board, Geir Steiro, Chief Operating Officer of NAS, stated that it is the Norwegian Group's "longstanding practice to utilize the services of agencies and third party service providers for the recruitment and provision of crews and crew planning services." Accordingly, NAS, through its wholly-owned subsidiary NAR, has a service agreement with OSM to provide cabin crew on its flights to and from the United States. These U.S.-based flight attendants work on board flights that originate from New York, NY (JFK), and Fort Lauderdale, FL (FLL), to destinations in Scandinavia's capital cities and London, as well as return flights from these cities to Orlando, FL (MCO), Oakland, CA (OAK) and Los Angeles, CA (LAX).<sup>4</sup>

*Terms of the Service Agreement between NAR and OSM*

NAR and OSM are parties to an "Agreement for Provision of Services of Aircraft Crew" (Agreement). The Agreement states that OSM, in exchange for compensation, provides employees "to perform work as part of the customer's business under the customer's control and management." The Agreement states that NAR is "responsible for work management for the Crew Members, checks and follow-up of the Crew Members' work including supplying the requisite instructions and information and providing workspace with the equipment needed to perform the Crew Members' tasks." The Agreement also provides that while OSM "shall assume full employer responsibilities for the Cabin Crew, the Crew Members will be assigned to Norwegian and while On Duty shall be under the care, operational control, rostering and supervision of Norwegian."

With regard to the selection of Cabin Crew, the Agreement provides:

[NAR] shall be informed of the current status during the recruitment process of the Crew Members. Within 30 days of a request by [NAR], [OSM] will propose to [NAR] particular Crew Members and give details of name, experience, and furnish [NAR] with documentation supporting that the Crew Member candidate fulfills the Qualifications and in particular the required five (5) year background check and appropriate reference checks. Agency will represent to [NAR] that each prospective Crew Member is competent and fit to perform his other assigned duties and poses

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<sup>4</sup> These flights are operated by NAS under its foreign air carrier permit, Docket DOT-OST-2012-0075. (Sept. 12, 2012).

no danger to other persons or property. [NAR] will then notify [OSM] of any Crew Member Candidate it wishes to accept.

The Agreement states that during an individual's assignment period to NAR, that Crew Member "shall be dedicated to [NAR] and cannot be used for any other customer of [OSM]." During a Crew Member's assignment period, the Agreement provides that NAR shall be responsible "at its own cost" for:

- (i) any and all licenses from and agreements with the relevant airport operator(s);
- (ii) arranging screening, introduction and/or training (including type rating) required by the relevant [Civil Aviation Authority(CAA)] or legislation and/or by [NAR] and for verifying whether or not each Crew Member meets the standard required in relation thereto required for the Crew Member to carry out the Specified Services;
- (iii) provision of Health and Safety training in accordance with legislation applicable to Specified Services; and
- (iv) medical examinations and drug control programmes [sic] required by the relevant CAA or legislation or by [NAR].

A "Supplement Agreement" between NAR and OSM is executed for each Crew Member provided under the Agreement and it lists the name of the crewmember; whether that individual is full- or part-time "as rostered by [NAR] in its sole discretion;" and his or her base, position, aircraft type, and assignment period. In addition, the Crew Member signs an "Employment Agreement" with OSM. The Crew Member agrees to be "subject to the general supervision, advice, and direction" of OSM Aviation and [airline]<sup>5</sup> supervisory personnel."

NAR reserves the right to terminate the Supplement Agreement between the individual Crew Member and OSM at any time if that Crew Member fails or ceases to meet the requirements of (ii) – (iv), above; "materially breaches" a provision of his/her Crew Contract; commits "serious misconduct;" or fails or ceases to meet the following qualifications specified in the Agreement:

Be capable of meeting all current requirements of (I) the relevant [Civil Aviation Authority], (II) legislation and the International Civil Aviation Organization applicable to the relevant position of the

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<sup>5</sup> As previously noted, the Flight Attendants at issue are working on flights between the U.S. and Europe operated by NAS. According to NAS, this operation was to be run by its wholly-owned Irish subsidiary Norwegian Air International (NAI), as part of the Norwegian Group's intercontinental long-haul service. The U.S. Department of Transportation, however, has not yet issued NAI a foreign air carrier permit.

Crew Member and the Aircraft as an International Air Transport Crew Member and (III) of the Airlines operation manual part A and B;

Have the Aircraft type rating and appropriate license, with experience and hours to the satisfaction of Norwegian, applicable to the relevant position of the Crew Member;

Be familiar with and adhere to the rules and regulations that generally apply to the relevant position of the Crew Member in an airport, area and the standards, rules and regulations that generally apply to the Crew Member in relation to the specified Services;

Have and through the Assignment Period maintain the visas, work permits or other entry documentation necessary to perform the Specified Services.

The Agreement requires NAR to state the reason for the termination to OSM. Under the Agreement, NAR is also responsible for the training costs relating to Crew Members attending training during the assignment period as required by the relevant Civil Aviation Authority. NAR also provides and pays for crew uniforms, identification cards and “regalia” required to be worn on duty; provides travel benefits for Crew Members and qualifying family members; and provides ground transportation and accommodations at layover stations during operational duty. The Agreement provides that OSM will pay the Crew members. The Agreement further provides that:

Norwegian is responsible for work management for the Crew Members, checks and follow-up of the Crew Members’ work including supplying the requisite instructions and information and providing a workspace with the equipment needed to perform the Crew Members tasks. Hiring out of a team leader does not imply that Norwegian no longer has work manager responsibility.

Under the Agreement, OSM “manages” labor relations and non-operational performance matters but OSM and NAR will “work together to address any operational or flying performance issues.”

#### Hiring and Training

OSM develops the recruiting advertisement for Crew Members that is posted on its website as well as on other sites on the internet and in aviation industry publications. The advertisement on OSM’s website in March 2016 stated that “OSM is seeking flight attendants to be based in New York (JFK) to work onboard Norwegian’s Dreamliner fleet for its transatlantic routes.” According to Philip Villani, OSM’s Human Resources (HR) Director,



potential employees file an application on OSM's central recruiting website and complete an assessment test. According to Gitte Leonce, OSM's Director of Cabin Crew, applicants for Flight Attendant positions on Norwegian's aircraft must meet specific European Air Safety Agency (EASA) requirements. Based on a review of the application and the result from the assessment test, OSM invites applicants to a two-step interview process. Step one involves a swim test, an OSM orientation, and a short interview. The OSM orientation covers "who we are and what we do so they understand the company." Crew Members who fly for Norwegian are present to answer questions. Applicants who do well in the interview and pass the swim test are invited to step two.

Step two is a group assessment scheduled over three days with each applicant spending one day there. This day includes group exercises and individual interviews. The applicants are divided into groups of eight to ten and are observed in problem-solving exercises. Villani and Leonce each stated that the applicants are rated based on the ability to work well with others and to engage others to participate. According to Villani, the applicants are observed by OSM and Norwegian Managers and recruiters in teams of two; one from OSM and one from Norwegian. Leonce states that Norwegian managers are invited but cannot always attend. Villani stated that within the last six months, Norwegian Managers have included Heidi Bluhme, Chief Cabin Crew Long Haul, and Frank Rygg, Recruitment Lead Operations. The OSM managers include Villani, Leonce, the JFK Base Chief, and HR Managers from OSM's other bases, such as London and Spain. According to Villani, these management teams rate each applicant based on their observations and the results are placed in a database, and the top candidates are selected on a numerical basis from high to low. These top candidates for each day receive a letter from OSM informing them that they have been accepted and will hear about training in the future.

According to Villani, new hires receive four weeks of training. On the first day of training, they receive a welcome letter and the OSM Employee Handbook. The operational training is conducted by Norwegian employees. According to Leonce, Norwegian, as the Aircraft Operating Certificate (AOC) holder, is responsible for operational training. Leonce stated that "OSM cannot do such training. Crew Members cannot fly until they receive their cabin crew attestations and that is from the AOC training department." OSM has recently hired ground instructors to supplement the Norwegian trainers. Norwegian must sign off on the line check or initial operating experience. Upon successful completion of their training, the Flight Attendants receive a certificate signed by Norwegian. OSM conducts training in "soft skills" such as communication, conflict management, and problem-solving on board the aircraft. OSM also conducts training on benefits and harassment in the workplace.

### Crew Planning and Crew Scheduling

According to the declaration of Valentin Lorien, President of NCCA and a Norwegian Crew Member, Flight Attendant schedules are dictated by NAS not by OSM. Flight Attendants do not submit bids on monthly schedules or rosters. According to a document entitled "Crew Planning Roster information Cabin crew 787," the roster period is a calendar month and the roster is released "normally 14 days before actual roster month." According to statements from Villani and Leonce, the practice is that on the 15<sup>th</sup> of each month, Crew Members receive the schedule for the next month. For example, on March 15<sup>th</sup>, Crew Members receive the April schedule. Leonce stated that the schedules are the responsibility of Norwegian as the AOC holder under EASA regulations. OSM's role is in "re-planning" or handling changes to the schedule because Crew Members are sick or unable to fly for other reasons.

With regard to the issues of schedule changes, personal or sick days, vacation requests, "private roster swaps," and special scheduling, the Crew Planning document instructs Flight Attendants "to notify all contacts about unplanned sick leave." These contacts include NAS OCC crew office (using a phone number with a Norwegian country code); OSM by emailing Ft. Lauderdale Crew Manager, Lise Lunding or the New York Crew Manager, Gitte Leonce; and advising Norwegian and OSM by email about the length of sick leave. With regard to private roster swaps, the guide states that they are "normally not allowed," but only certain requests are to be approved after "evolution [sic] by OSM Aviation and finally Re-planning." According to this document, "Re-planning" has an email address at Norwegian. Documentation from OSM includes requests from Flight Attendants regarding personal days and vacation days to Lise Lunding or Gitte Leonce. According to Leonce, OSM evaluates each change request under its policies and applicable law such as the Family and Medical Leave Act. She then notifies Norwegian whether the requested change should be granted or denied.

### Discipline

Villani and Leonce state that OSM is responsible for all discipline. Generally, incidents are reported to Villani by a Base Chief or by Crew Members. According to Villani, once he receives a report, he conducts an investigation and determines the severity of the discipline under OSM's progressive discipline policy. He states that he usually makes this decision but he will also discuss the matter with the base chief or "run the decision by Gitte."

Miscellaneous

OSM maintains and distributes its own Employee Handbook that outlines policies and procedures regarding, *inter alia*, Flight Attendants' compensation, performance reviews, job descriptions, holidays, vacation, and health and medical benefits. OSM has conducted investigations and made determinations regarding allegations of sexual harassment by flight attendants. OSM also conducts its own training of the Flight Attendants with regard to applicable Transportation Security Administration and Port Authority of New York and New Jersey regulations. OSM negotiates, obtains, and maintains the Flight Attendants' health and medical benefits and requisite insurance.

It is undisputed that the Crew Members wear Norwegian uniforms, insignia, and IDs.

## V. DISCUSSION

### A. RLA Jurisdiction

The RLA was enacted to limit interruptions to interstate commerce by “promoting labor-management relations by providing a comprehensive framework for resolving labor disputes” in the airline and railroad industry. *Hawaiian Airlines v. Norris*, 512 U.S. 246, 252 (1994). The jurisdiction of the RLA extends to

every common carrier by air engaged in interstate or foreign commerce, 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, First.

This jurisdiction also extends to entities that are not themselves air or rail carriers but are “derivative carriers.” The Board considers an entity to be a derivative carrier and covered by the RLA if the employees at issue render a service traditionally performed by carrier employees and if the entity is indirectly or directly owned or controlled by or under common control with a carrier. *See, e.g., Airway Cleaners*, 41 NMB 262 (2014); *Aero Port Services, Inc.*, 40 NMB 139 (2013); *Talgo, Inc.*, 37 NMB 253 (2010). This latter requirement is met if a carrier owns the entity in question, whether or not the carrier controls it, or if a carrier controls the entity in question, whether or not the carrier owns



it. *Delpro Co. v. Brotherhood RY Carmen*, 676 F.2d 960, 964 (3d Cir. 1982) (Rejecting argument that the Act should be read to require a company to be both owned and controlled by a carrier in order for it to be under NMB jurisdiction.) *See also Global Aviation Services*, 35 NMB 2 (2008); *LSG Sky Chefs*, 27 NMB 55 (1999).

### 1. NAS and NAR

It is undisputed that NAS is a common carrier as defined by the Act. As discussed above, NAS has been issued a foreign air carrier permit by the United States Department of Transportation. NAR is a wholly owned subsidiary of NAS. For many years, NAS has utilized NAR to contract with staffing agencies such as OSM to provide crew members on its flights. These crew members, such as the Flight Attendants at issue in this case, perform essential air transportation services integrally related to NAS' business. Thus, NAR is an integral part of its parent air carrier's travel operations and therefore subject to the Act's jurisdiction.

### 2. OSM

OSM is not a rail or air carrier engaged in the transportation of freight or passengers. OSM provides crew management services for NAS through its contract with NAR. The duties of flight attendants are essential to air transportation services and have been long held to be services traditionally performed by carrier employees. *Northwest Airlines*, 2 NMB 16 (1948); *American Airlines*, 1 NMB 394, 402 (1945). Therefore, the Board's jurisdiction over OSM depends on the control exercised by NAS and NAR through their contractual relationship.

#### Carrier Control over OSM

To determine whether there is carrier control over a company, the NMB examines the carrier's role in the entity's daily operations and its effect on the manner in which employees perform their jobs. The Board examines 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 decision; including hiring, firing, and discipline; degree of supervision of the employees at issue; and control over employee training. *See, e.g., Airway Cleaners*, 41 NMB 262 (2014); *Bags Inc.*, 40 NMB 165 (2013); *Air Serv Corp.*, 39 NMB 450 (2012).

OSM, along with both NAR and NAS, contend that OSM is the employer of the Flight Attendants and that it is not subject to RLA jurisdiction. NAR and NAS argue that they do not exercise the requisite authority to direct OSM's employees to render OSM a derivative carrier. OSM argues that it is an independent entity not owned or controlled by an RLA carrier. In addition,

OSM argues that RLA jurisdiction is not based on “a carrier’s control over the employees of a company that services the carrier, but rather upon the service provider itself.” For the reasons described below, neither of these arguments is persuasive.

Contrary to OSM’s assertion, when the Board determines whether a company is under the control of an air carrier, it looks almost exclusively to whether the carrier has meaningful control over the company’s employees. Although the Board has considered factors such as a carrier’s control over how a company runs its business or its access to company records, recent cases have focused significant attention on the carrier’s “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.” *Airway Cleaners*, 41 NMB 262, 267-68 (2014). *See also*, *Air Serv Corp.*, 39 NMB 450 (2012); *Signature Flight Support/Aircraft Serv. Int’l, Inc.*, 32 NMB 30 (2004); *John Menzies PLC, d/b/a Ogden Ground Servs., Inc.*, 30 NMB 405 (2003). In *Airway Cleaners*, the Board majority focused on whether there was “meaningful control over personnel decisions” and “jurisdictionally significant control over (the company’s) labor relations.” 41 NMB at 268. The Board has required evidence that a carrier exercises greater control over the employees at issue than that found in the typical contract between a service provider and a customer. *Id.*

The evidence in this case demonstrates that NAS and NAR exercise sufficient control over OSM and the Flight Attendants to establish RLA jurisdiction. The Agreement between NAR and OSM allows for greater carrier control over the manner of rendition of the employees’ services than typically seen in such contracts. The Agreement specifically states that the employees “will be assigned to Norwegian and while on duty shall be under the care, operational control, rostering and supervision of Norwegian” and NAS retains complete control over their training and scheduling, and actively participates in the hiring process.

The Flight Attendants are held out to the public as Norwegian flight attendants. They wear Norwegian uniforms, insignia, and IDs. Norwegian’s Service Manual for long haul flights gives detailed instructions to the Flight Attendants regarding the “travel and service experience” to be delivered to its customers. The Service Manual states:

[t]he role of a cabin crew member is to provide excellent customer service to the passengers, while ensuring their comfort and safety throughout the flight. Excellent customer service creates loyal customers for life, who are willing to refer Norwegian to friends, family, and colleagues.

NAS and NAR concede “the reality that Norwegian’s passengers perceive the Cabin Crew members as ‘representatives’ of Norwegian;” and that “Norwegian is involved in customer service, safety, security, and operational matters related to its flights” to comply with the requirements of the EASA and the FAA.

By its terms, the Agreement prevents OSM from utilizing these employees for any other customer with whom it contracts. OSM advertises for applicants who “want to join the world’s fastest-growing global airline.” The position is described as flight attendants “who work onboard Norwegian’s Dreamliner fleet for its transatlantic routes.” Norwegian managers are invited to and participate in the hiring process including assessing and rating applicants. Those ratings form the basis for accepting applicants for training. The training they receive is prescribed, provided, and certified by Norwegian. The Flight Attendant training forms certifying the completion of safety training is signed by Norwegian employees Stig Larsen, Manager Training and Berit Andreassen, Cabin Crew Manager Training. NAR states that this detailed Flight Attendant training on various safety, technical, and operational issues is established by NAS to comply with EASA regulations. NAR further states that the “Norwegian Air Cabin Crew Certificates” certify completion of various training courses and were issued to comply with EASA regulations.

All discipline is issued by OSM through the Directors of Cabin Crew at OSM’s JFK and FLL bases. Although OSM provides a salary and general benefits to the employees at issue, NAR provides a number of benefits to the employees traditionally provided by an air carrier to its employees. These include crew uniforms, travel benefits, and ground transportation and accommodations at layover stations. The Flight Attendants wear Norwegian uniforms and Norwegian ID badges, each issued by Norwegian. They do not have OSM badges.

In addition, the Employment Agreement received by OSM Flight Attendants states that they are “subject to the general supervision, advice, and direction of supervisory personnel of OSM Aviation and Norwegian Air International’s supervisory personnel.” However, both the Agreement between NAR and OSM and the Employment Agreement between the individual Flight Attendant and OSM clearly state that Norwegian retains operational control over the Flight Attendants.

The evidence here indicates that NAS supervises and directs the day to day work activity of the Flight Attendants. NAS concedes it in fact operationally supervises the Flight Attendants while they are engaged in revenue flying. NAS provides the equipment with and within which the Flight Attendants work. NAS controls the manner by which Flight Attendants carry out the service

and operational and safety procedures on Norwegian flights. NAS management communicates directly with the Flight Attendants referring to them as "NAS Cabin Crew" in such communications. In these communications, NAS management notifies Flight Attendants about issues related to training and scheduling.

The crew planning or rostering is the sole responsibility of Norwegian and Norwegian transmits rosters directly to each Flight Attendant. OSM does not dispute that NAS is solely responsible for crew planning or rostering, but states that it has sole authority to approve Flight Attendants requests to use personal days, request vacations, make schedule changes, make private roster swaps, and request special scheduling. Flight Attendants make these requests to OSM and OSM advises Norwegian whether to grant or deny these requests according to OSM policies or applicable US law.

The evidence clearly demonstrates that NAS, through NAR, asserts sufficient significant control over OSM and its Flight Attendants to establish RLA jurisdiction.

### **B. Employer of the Cabin Crew**

NAS has structured its airline so that it cannot function independently from NAR and OSM. NAS's airline operation depends on the interrelationship between these separate corporations. The Board has rarely found joint employer status but has done so when necessary to effectuate the purposes of the Act. *See Ground Services Inc.*, 8 NMB 112 (1980). In the circumstances of this case, the joint employer concept may properly be invoked to ensure the uninterrupted flow of commerce.

In its earliest decisions involving air carriers, the Board recognized that employees fall into two main divisions: employees who man the airplanes in flight, "or what might be called the 'operating' group" and all other ground employees, "the 'nonoperating' group." *See American Airlines, Inc.* 1 NMB 394, 401 (1945). Further, the operating employees, flight attendants and pilots, are the employees that Congress had in mind when it amended the RLA to cover airline employees. During the Senate Hearings on the 1935 amendment to extend the RLA's coverage to every common carrier by air engaged in interstate or foreign commerce, O. S. Beyer, Federal Coordinator of Transportation, testified that:

The general concern of the Federal Government for safety in the conduct of air transportation has, just as in the case of railroad transportation, led to the employment of highly competent

personnel. The simple fact, for example, that it has been deemed necessary to license many employees performing key duties in air transportation verifies this point. In short, all that can be said for the need of able, alert, well-trained, and responsible employees to man the railroads of the country applies with at least equal force and effect to *the employees required to man the air lines [sic] of this country*; and by the same token, anything which makes for stability in the labor relations and good morale of the railroad industry applies also to the flying industry.

*Hearing Before the Subcomm. Of the Senate Comm. On Interstate Commerce, 74th Cong. 24 (1935) (emphasis added).*

The Board has also recognized that where there is a “high degree of interface” between the employees of the contracting company and the materials and equipment of its air carrier customers, it must determine whether the carrier does in fact have the authority to “supervise and direct” the manner of rendition of the contracted employees’ services. *Pinkerton, Inc.*, 5 NMB 255, 257 (1975). In *Pinkerton*, the Board investigated a representation dispute among personnel performing security screening of passengers for five carriers in Milwaukee. The applicant organization contended not only that Pinkerton was a carrier within the meaning of the Act, but that it was also a joint employer with the carriers of the screening personnel. The Board disagreed, concluding that there was no RLA jurisdiction because Pinkerton’s security work was a de minimis part of Pinkerton’s overall business and that the “continuing authority of the air carriers to supervise and direct the manner of rendition of the service performed” by the Pinkerton employees was absent. *Id.* In contrast, there can be no higher degree of interface than that presented here, namely between an airline and its flight attendants and pilots, those employees whose services are essential to the air carrier’s transportation of persons, property, and mail and who are the face of an airline to the flying public.

In *Ground Services, supra*, the Board recognized, in the context of increased subcontracting of airline work, a joint employer finding was “sound public policy” and would ensure that airlines be held accountable under the Act in personnel and industrial relations matters. 8 NMB at 117. The Board noted that the “contractor employees are no less important to the uninterrupted flow of commerce than the employees of the airline itself.” *Id.* Although the Board subsequently relied on derivative carrier findings to sweep contractors under the jurisdiction of the Act, the instant case is distinguishable from prior cases involving the contracting out of work traditionally performed by airline employees. Here, for the first time, the Board is faced with a contract for services of operational employees of an air carrier. The

nature of the control exercised by the carrier over these operational employees is different. While on duty, the Flight Attendants assigned to Norwegian are under the operational control and supervision of Norwegian. They are held out so to the public.

The Crew Members' duties extend beyond the safety duties prescribed by regulation to the customer service functions that are at the core of Norwegian's business plan. Norwegian's Service Manual states that "[t]he business idea of Norwegian Air Shuttle ASA is to give everybody the opportunity to travel by air, attracting customers by offering competitive low fares and high quality travel experience based on operational excellence and helpful, friendly service." Thus, Norwegian controls the manner by which these Flight Attendants wearing Norwegian uniforms carry out service to passengers and perform operational and safety procedures on Norwegian's aircraft. If the statutory language, "subject to its continuing authority to supervise and direct the manner of rendition of his service" covers anything, it covers these Flight Attendants' activities. 45 U.S.C. §181. Like all statutes, the RLA should be construed to give effect to all its provisions, so that no part will be inoperative or superfluous. *Corley v. United States*, 556 U.S. 303, 314 (2009).

The joint employer concept recognizes that two or more business entities are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of an employment. *See, e.g., Boire v. Greyhound Corp.*, 376 U.S. 473 (1964). The record in this case establishes that both Norwegian and OSM meaningfully affect matters relating to the employment relationship. Norwegian managers are often present for and participate in the hiring process. Norwegian controls the detailed and thorough training employees receive in safety and service procedures. Training is prescribed, provided, and certified by Norwegian who maintains control through on-going recurrent training during their employment as Flight Attendants on Norwegian's aircraft. OSM has recently hired ground instructors to supplement the Norwegian trainers. The Flight Attendants perform their duties on Norwegian's aircraft wearing Norwegian uniforms. OSM provides training related to communication and problem-solving on the aircraft, when it is necessary to write reports, and the required code of conduct. OSM also provides training on benefits, health insurance, and workplace harassment. OSM administers those benefits and pays the Flight Attendants. Norwegian is solely responsible for crew planning while OSM is responsible for crew scheduling or re-planning. While on duty, the Flight Attendants assigned to Norwegian are under the operational control and supervision of Norwegian. OSM is responsible for discipline and termination. Together these entities co-determine the essential terms and conditions of the employment for the Flight Attendants.



In a world where airlines subcontract out many functions, the Board does not suggest that the parties to every contract for services are joint employers or even subject to RLA jurisdiction.<sup>6</sup> The airline industry's need to take advantage of ever greater outsourcing opportunities, however, cannot trump the purposes of the Act. An air carrier cannot subcontract out every essential function, including as here, those performed by employees manning the aircraft, and attempt to avoid its legal obligations by stating that none of the companies providing what collectively amounts to the totality of the air operations are air carriers.

Congress enacted the RLA to provide a comprehensive framework for the prompt resolution of labor disputes between air and rail carriers and their employees and for the prevention of interruptions to interstate commerce. We find that Congress intended all entities that provide these essential transportation services to be subject to the NMB's jurisdiction to level the playing field and achieve these statutory purposes. All carriers must abide by the same rules. In the absence of today's decision, an admitted air carrier could adopt a corporate form or business model that allows it to hold itself out to the public as an airline without being governed by the RLA as Congress intended and to evade the procedures of the RLA that protect the public interest by minimizing interruptions to the free flow of interstate commerce.

## VI. CONCLUSION

Based on the record in this case and for the reasons discussed above, the NMB's opinion is that Norwegian and OSM jointly employ the Flight Attendants based at Fort Lauderdale and New York and that they are subject to the RLA.

Having found that Norwegian, OSM, and their U.S.-based Flight Attendants are subject to the RLA's jurisdiction, the Board must address the representation issues raised by NCCA's application under Section 2, Ninth of the RLA. Under Section 2, Ninth, the Board's authority includes the ability to designate who is eligible to vote, to establish the rules to govern the election, and to have access to and make copies of all records of the carriers to obtain and utilize the information necessary to carry out its statutory mandate. 45 U.S.C. §2, Ninth. Norwegian and OSM must comply with the requirements

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<sup>6</sup> See *e.g. Menzies Aviation, Inc.*, 42 NMB 1 (2014); *Airway Cleaners, LLC*, 41 NMB 262 (2014) (majority holding that company contracting with airlines was not subject to RLA jurisdiction). As indicated in those cases, the Board Members have differing views on the general application of a carrier control requirement for jurisdiction over a contractor. In this case, however, both Chairman Geale and Member Hoglander join Member Puchala in applying the current standard for the reasons outlined above.

outlined in the Board's May 28, 2015 docket letter including the notice posting provisions. A copy of that letter is attached to this decision. Further, as previously requested by the Board in its May 28, 2015 docket letter, the following information should be provided by **10 a.m., ET, May 3, 2016**, or as provided below:

1. Norwegian and OSM must deliver to the Board's Office of Legal Affairs **an alphabetized list of potential eligible voters** as a **Microsoft-Excel file**. The format of the list of potential eligible voters must be prepared in five columns or fields **exactly** as the enclosed sample format displays. There must not be any other information or data in the file except as displayed in the five columns or fields on the sample format. The column or field headers must be contained on one row only. The Carrier must not include any **hidden** columns or fields in the **Excel file**. Note that employee middle initials appear with the first name. Do not make a separate column or field for the middle initial. **If you have any questions about the correct format for this list of potential eligible voters, contact the NMB Election Administrator at 202-692-5040.**
2. Norwegian and OSM **must inform the Investigator of the date of the last day of its last payroll period prior to May 28, 2015** and the number of employees covered by this application. The list of potential eligible voters must contain **all individuals with an employee-employer relationship as of the last day of the last payroll period prior to May 28, 2015.**<sup>7</sup> The list must be **alphabetized** on a system-wide basis. The Carrier must provide a copy of the list to the Organization.
3. **Norwegian and OSM** must provide **one set of signature samples for the eligible voters solely to the Investigator**. The alphabetized signature samples must be in the same order as the names on the list of eligible voters. Until an applicable list and the signature samples are received by the Investigator,

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<sup>7</sup> Section 9.2 of the NMB's Representation Manual defines the categories of individuals with an employee-employer relationship under the Railway Labor Act. That section of the Manual is available at <http://www.nmb.gov/representation/representation-manual.pdf>.

the Investigator will **continue to accept additional authorization cards.**

By direction of the NATIONAL MEDIATION BOARD



Mary L. Johnson  
National Mediation Board

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