**NATIONAL MEDIATION BOARD**
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November 3, 2022
50 NMB No. 5

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**RE: NMB Case No. R-7606**
**NMHC Air Care and OPEIU**

Participants:

This determination addresses the Motion for Reconsideration (Motion) filed by North Memorial Health Care d/b/a Air Care (NMHC) on October 20, 2022. NMHC seeks reconsideration of the National Mediation Board's (NMB or Board) October 18, 2022 determination authorizing an election in *North Memorial Health Care d/b/a Air Care,* 50 NMB 5 (2022). The Office and Professional Employees International Union (OPEIU) filed a response in opposition to the NMHC's Motion on October 21, 2022.

For the reasons set forth below, NMHC's Motion is denied.

## PROCEDURAL HISTORY

On April 25, 2022, OPEIU filed an application alleging a representation dispute involving the Pilots at NMHC. The application was given NMB File No. CR-7232 and Josie G. M. Bautista was assigned as the Investigator. On May 24, 2022, NMHC filed its initial position statement asserting that the NMB lacks jurisdiction over this dispute and moved to dismiss OPEIU's application. On the same date, OPEIU also filed its initial position statement and asserted that NMHC is a common carrier by air. OPEIU filed its response to NMHC's position statement on June 7,

2022. NMHC filed a reply on June 17, 2022. On June 27, 2022, the Investigator requested additional information from NMHC and requested that OPEIU file a rebuttal to NMHC's reply. NMHC filed its response to the request for additional information on July 7, 2022 and OPEIU filed its rebuttal the same day.

On October 18, 2022, the Board issued its determination asserting jurisdiction over NMHC's Air Care operation that is regulated by the Federal Aviation Administration (FAA), denying NMHC's request to dismiss OPEIU's application, and authorizing an election for the Pilots craft or class at NMHC. NMB File No. CR-7232 was converted to NMB Case No. R-7606. On October 20, 2022, NMHC filed its Motion asking the Board to reconsider its decision and dismiss OPEIU's application. In its Motion, NMHC contends that the Board's decision misapplied prior NMB cases relating to the *de minimis* air operations and misunderstood the facts in this case. In its response in opposition to the Motion, OPEIU contends the NMHC failed to meet the Board's demanding standard for granting a motion for reconsideration, and asserts the Motion is nothing more than a "mere reassertion of factual and legal arguments previously presented to the NMB" and is insufficient to obtain the requested relief. OPEIU contends that the Board's decision is thorough, well-reasoned, and addresses each of the primary arguments made by NMHC.

**DISCUSSION**

The Board's Representation Manual at Section 11.0 states:

> Reconsideration may not be sought from the NMB's certification or dismissal. Any motions for reconsideration of Board determinations must be received bythe General Counsel within two (2) business days of the decision's date of issuance.…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.

The Board recognizes the vital importance of the consistency and stability of the law and grants relief on Motions for Reconsideration in limited circumstances where, in its view, the prior decision is fundamentally inconsistent with the proper execution of the NMB's responsibilities under the Railway Labor Act (RLA or Act). *Norwegian Air Shuttle,* 42 NMB 152 (2016); *Port Auth. Trans-Hudson Corp.,* 34 NMB 114 (2007); *Virgin Atl. Airways,* 21 NMB 183, 186 (1994).

NMHC contends that the Board's determination that NMHC is a "carrier" under the RLA is "erroneous firstly because the Employer's Air Care Operation is *de minimis* such that it does not justify NMB jurisdiction under the Act." It questioned the Board's intent in mentioning Air Care's fleet size, the speed of its helicopters, its average of 6,000 service flights per year, and the millions of dollars in revenue generated by Air Care. Further, NMHC asserts that the Board's determination misunderstood and misapplied "prior case law regarding other air care operations" because it is clear from prior cases that the Board looks to the "*percentage* of revenue generated by the air care operation as it relates to the total revenue generated by the employer as a whole."

A review of the record demonstrates that NMHC's arguments were previously presented, considered, and rejected by the Board. In its Motion, NMHC relies on the same cases that the NMB previously found unpersuasive. NMHC again cites *C & E Aero Servs., Inc. d/b/a Tumbleson & Payne Aero Service,* 10 NMB 62 (1982), a case in which the NMB declined jurisdiction where the common carrier activities – air taxi services - were "sporadic and negligible" when viewed against its primary business of aircraft sales and service. The NMB found that case distinguishable since NMHC's Air Care operation is neither sporadic nor negligible since it conducts more than 6, 000 flights per year, generating more than $55 million per year, and is integrally related to and held out to the public as part of its health care operation. NMHC's Air Care operation is not a separate business of "air transport" as asserted by NMHC but an essential aspect of NMHC's primary business of healthcare.

The NMB made it clear in its determination that NMHC is a healthcare provider and also a licensed Part 135 air taxi operator, authorized to operate as an air carrier and conduct common carriage operations. The NMB, in its discretion, only asserted jurisdiction over "Air Care's flight operation and those employees that perform the flight transportation functions regulated by the FAA." The NMB's determination excludes from RLA coverage NMHC's operations pertaining to the medical services of its hospitals, clinics, urgent centers, urgency centers and those employees who work in those facilities. The fact that medical personnel covered by the National Labor Relations Act (NLRA) attend to patients transported on helicopters flown by pilots covered by the Act is not statutorily impossible.[1] As the Board stated in its determination, Congress enacted two federal labor statutes and the NMB was exercising its jurisdiction over the employees with a direct connection to the air transportation function for which Congress enacted the RLA.

Finally, in its Motion, NMHC elaborates on its previously raised argument that being subject to two statutory schemes would be problematic by asserting that "potential labor unrest on the part of the pilots will lead to patient care issues" because, unlike the NLRA, the RLA does not require a union to give ten days' notice

[1] The Board notes that this statutory impossibility did not concern NMHC when it denied Pilots overtime pay under the Fair Labor Standards Act (FLSA), as exempt employees covered by the RLA.

of its intent to strike. The NMB notes however that the RLA's statutory purpose is the prevention of disruption of essential transportation functions through collective bargaining and its mediation process. The RLA sets forth rules and procedures that affect the timing of self-help and completion of those processes can take months or years. *Detroit & T. Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149, 72 LRRM 2838 (1969) (a "crucial" aspect of the RLA's collective bargaining machinery is "to make the exhaustion of the Act's remedies an almost interminable process").

While it is clear that NMHC disagrees with the NMB's jurisdictional determination, its reassertions of its previous arguments are insufficient to obtain the relief requested.

**CONCLUSION**

NMHC has failed to demonstrate a material error of law or fact or circumstances on which the Board's exercise of its discretion to modify the decision is important to the public interest. Furthermore, the Board finds that NMHC has failed to show the prior decision is fundamentally inconsistent with the proper execution of the Board's responsibilities under the Railway Labor Act, 45 U.S.C. §151, et seq. Accordingly, any relief upon reconsideration is denied.

By direction of the NATIONAL MEDIATION BOARD.

Maria-Kate Dowling
General Counsel