

Phoenix Systems and Technologies, Inc., and Rome Research Corporation and Laborers Local 35, Laborers International Union of North America, AFL-CIO, Petitioner. Case 3-RC-10402

August 27, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

On April 9, 1996, the Union filed a petition seeking to represent certain employees employed at Griffiss Airfield in Rome, New York. A hearing was thereafter conducted, at which the Employers asserted that their operations at Griffiss Airfield were covered by the Railway Labor Act (RLA) and that, therefore, the Board lacked jurisdiction under Section 2(2) of National Labor Relations Act. The Acting Regional Director transferred the proceeding to the Board for resolution of this issue. Thereafter, the Employers filed a brief and the Union filed a memorandum with the Board.

The Board, by a three-member panel, has reviewed the hearing officer's rulings and finds that they are free from prejudicial error. They are affirmed.

On the entire record in this proceeding the Board finds:

1. Phoenix Systems and Technologies, Inc. (Phoenix), is a California corporation with offices and principal place of business in New Hartford, New York, and with facilities at Griffiss Airfield in Rome, New York, where it is engaged in the operation and maintenance of Griffiss Airfield. During calendar year 1995, a representative period, Phoenix purchased and received goods and services valued in excess of \$50,000 directly from points located outside the State of New York.

Rome Research Corporation (RRC) is a New York corporation with offices and principal place of business in Rome, New York, where it is engaged in the operation and maintenance of Griffiss Airfield. During calendar year 1995, a representative period, RRC purchased and received goods and services valued in excess of \$50,000 directly from points located outside the State of New York.

The Employers jointly operate and maintain Griffiss Airfield under a contract with the New York Air National Guard, which owns and controls the airfield. The Employers' functions include air traffic control, base operations, fuels dispensing, de-icing of aircraft, airfield security, and maintenance of the facilities, vehicles, aerospace ground equipment, electronic equipment, and navigational aids. The Employers contend that the Board may not exercise jurisdiction over them because they meet the National Mediation Board's (NMB) two-part test for determining whether an em-

ployer is subject to the RLA. Under that test, which applies to employers that do not fly aircraft held out to the public for transportation of freight or passengers, the NMB first determines whether the nature of the work performed 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 a common carrier or carriers. See *United Parcel Service*, 318 NLRB 778, 794-795 (1995); *Ogden Aviation Services*, 23 NMB 98, 104 (1996). The Employers at least arguably meet the first part of the test. In contending that they also meet the second part of the test, the Employers assert that the New York Air National Guard is a common carrier and that the Employers' operations are controlled by the New York Air National Guard.

The Board follows a general practice of referring cases to the NMB when a party raises a claim of arguable RLA jurisdiction. See *United Parcel Service*, 318 NLRB at 780. There are, however, several exceptions to this policy, including cases that present jurisdictional claims in factual situations similar to those where the NMB has previously declined jurisdiction. *Ibid.* We find that the present case comes within this exception and that, therefore, referral of this case to the NMB is unwarranted. The Employers do not contend that they themselves are common carriers under the RLA.¹ Rather, they contend that the New York Air National Guard is a common carrier under the RLA because it owns and operates an airfield. Under NMB decisions, however, it is clear that the New York Air National Guard is not a common carrier.

In *Southern Air Transport*, 8 NMB 31 (1980), the NMB stated:

The essential characteristic of a common carrier is its quasi-public character. If a carrier is under an affirmative duty to serve the public, or if the public has the right to demand service of the carrier, the carrier is a "common carrier." Regardless of whether a carrier has a duty to serve the public, a carrier which in fact "holds itself out" as available to serve the public is a common carrier. [*Id.* at 34 (citations omitted).]

The New York Air National Guard directs and controls the operation of Griffiss Airfield *exclusively* to support the training and mission requirements of the U.S. Army 10th Mountain Division, located at Fort Drum, New York. Griffiss Airfield is used to deploy troops. Training exercises in troop deployment are conducted there.² Thus, as Griffiss Airfield has exclu-

¹ Nor is there any contention or any indication in the record that either the Employers or the New York Air National Guard transport U.S. mail, which would serve as a separate basis for RLA coverage. See, e.g., *Pan Am World Services*, 18 NMB 5, 6-7 (1990).

² Approximately 80 percent of the aircraft used in such training is military aircraft and approximately 20 percent is commercial aircraft

sively a military purpose, the New York Air National Guard in directing the operation of the airfield does not have a duty to serve the public and does not hold itself out as available to serve the public, nor does the public have the right to demand service from it. Consequently, the New York Air National Guard clearly is not a common carrier.

Indeed, the NMB has declined jurisdiction in cases factually similar to the present one. In *Dynamic Science, Inc.*, 14 NMB 206 (1987), the employer, pursuant to a government contract, provided such services as air traffic control, flight information and dispatch, and cleaning, maintenance, and refueling of aircraft at Phipps Army Airfield. Finding no evidence of any degree of control, either direct or indirect, exercised over the employer by any common carrier by air, the NMB concluded that the employer was not subject to the RLA.

In *EG & G Special Projects, Inc.*, 17 NMB 457 (1990), the employer, a Defense Department contractor, employed pilots to fly six Boeing 737's on scheduled flights carrying the employer's employees, Defense Department contractors, and others to various locations within the United States. The employer also employed aircraft mechanics. The NMB found that the employer

does not function as a common carrier by air and is not directly or indirectly owned by a carrier. EG & G is a defense contractor which owns and pilots several corporate planes solely for the use of its employees and clients. It does not advertise its services to the public and does not permit public access to its airfield. Though EG&G's air service is regularly scheduled, there is no evidence that it is available for hire. [Id. at 458-459.]

Accordingly, the NMB found that "[s]ince EG & G is not a common carrier or directly or indirectly owned or controlled by a carrier or carriers, it does not fall under the [NMB]'s jurisdiction." Id. at 459.

In *Aircraft Engineering and Maintenance Co.*, 3 NMB 45 (1958), the employer was primarily engaged in military contract overhaul of aircraft owned by the U.S. Air Force and performed less than 5 percent of its work for common carriers. The NMB declined jurisdiction, because, as the result of a corporate reorganization, the employer was no longer a subsidiary of an airline.³

Longshoremen ILA v. North Carolina Ports Authority, 463 F.2d 1 (4th Cir. 1972), on which the Employ-

under contract with the Army. At hearing, the Employers disclaimed any contention that such commercial carriers had control over the Employers or the Employers' employees.

³See also *Pan Am World Services*, supra (military contractor that provided, inter alia, loading and unloading of aircraft, found to be not a common carrier nor owned or controlled by a common carrier following its sale by airline company).

ers rely, is not on point. In that case, a state port authority was found to be a common carrier, and thus subject to the RLA, because it operated seaport terminals that transferred freight between ships and trucks or trains, using the port authority's own terminal railroads. The court found that the port authority was "[p]lainly . . . a link in the interstate and foreign carriage of shipments controlled by ship and railway companies." Id. at 3. Unlike the port authority, the New York Air National Guard is not engaged in the commercial transportation of freight.

Three Board cases cited by the Employers, *Eagle Aviation*, 290 NLRB 1149 (1988); *Friendship of BWI*, 266 NLRB 207 (1983); and *Mercury Service, Inc.*, 253 NLRB 466 (1980), also are inapposite. In each of those cases, the employers were found to be covered by the RLA because they were controlled by commercial airlines.

In sum, we find that it is clear under NMB precedent that the New York Air National Guard is not a common carrier. Accordingly, we find that Phoenix and RRC are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the NLRA and that they are within the Board's statutory jurisdiction.

2. We shall remand the case to the Regional Director for resolution of unresolved issues⁴ and to take further appropriate action.

ORDER

IT IS ORDERED that this proceeding is remanded to the Regional Director for Region 3 for further appropriate action consistent with this decision.

CHAIRMAN GOULD, concurring.

For the reasons set forth in my dissenting opinion in *Federal Express Corp.*, 317 NLRB 1155 (1995), I would eliminate the Board's general practice of referring cases involving RLA jurisdictional claims to the NMB for an initial ruling. On the facts of this case, I find there is ample basis for the Board's assertion of jurisdiction. Accordingly, I concur in my colleagues' decision to assert jurisdiction over the Employers and to remand the case to the Regional Director for resolution of any unresolved issues and to take further appropriate action.

⁴At the hearing, the Employers disputed the scope of the requested unit and also argued that the Board should decline jurisdiction based on the control exercised by an exempt governmental body, the New York Air National Guard, over the terms and conditions of employment of the Employers' employees. In light of the Acting Regional Director's memorandum transferring this proceeding to the Board, which indicated that, in the event the Board found that the Employers were not covered by the RLA, the case should be remanded for resolution of the foregoing issues, we are leaving these issues for resolution by the Regional Director on remand.