

**Evergreen Aviation Ground Logistics Enterprises, Inc. and Transportation Workers Union of America, Local 500, AFL-CIO, Petitioner.** Case 12-RC-8202

March 15, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On March 2, 1998, the Petitioner filed a petition seeking to represent all full-time and regular part-time maintenance employees, including service mechanics, fuelers, painters, mechanic helpers, ramp service agents, and aircraft cleaners, employed at Miami International Airport (MIA), Miami, Florida. The Employer asserts that it is subject to the Railway Labor Act (RLA) and therefore the jurisdiction of the National Mediation Board (NMB) because: (1) its employees perform traditional airline work and (2) their work is controlled by carriers and/or the Employer is owned by or in common with a carrier recognized by the NMB. Therefore, the Employer argues that the National Labor Relations Board (the Board) lacks jurisdiction under Section 2(2) of the National Labor Relations Act. After a hearing, the Regional Director transferred the proceeding to the Board.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in this case, the Board finds:

The Employer is a wholly owned subsidiary of Evergreen International Aviation, the parent corporation, which also owns various other subsidiaries including two air carriers, Evergreen International Airlines and Evergreen Helicopters International.

The record establishes that the Employer provides ground services at 20 domestic airports, including MIA. The Employer's employees perform aircraft loading and unloading, aircraft cleaning, passenger service, and aircraft/airport ground equipment maintenance for airlines. The Employer also employs licensed dispatchers who prepare flight information for aircraft crews.

The evidence reflects that common carriers exercise varying degrees of control over the Employer's employees. The Employer's ramp employees working with Evergreen International Airlines are subject to Evergreen's standards and to the direct control of an Evergreen loadmaster. Certain carriers monitor the Employer's employees' performance for timeliness. Carrier employees oversee the Employer's employees' performance of cabin cleaning duties and sometimes direct that work be redone. Certain carriers employing the Employer's ramp employees train them. The Employer's passenger service employees work directly with MartinAir managers at the carrier's Miami ticket counters and gates, use MartinAir equipment, and wear uniforms required by MartinAir.

While the Employer has the authority to assign, transfer, promote, discipline, and fire its own employees, carriers' recommendations of discharge and discipline have

resulted in reassignment, further training, and discharge. At the hearing, the Employer's vice president testified that there are no instances of Eagle not discharging an employee when directed to do so by a carrier. Eagle does its own hiring, but some carriers interview and approve passenger service agents before the Employer hires them. The Employer generally trains its own employees, but it does so in accordance with the procedures set by the carriers. Occasionally, the carriers will train Eagle employees. Eagle considers carrier input when evaluating its employees' job performance. Carriers also are consulted and approve of promotions of certain Eagle employees to supervisory positions.

Section 2(2) of the National Labor Relations Act provides that the term "employer" shall not include "any person subject to the Railway Labor Act." 29 U.S.C. Section 152(2). Similarly, Section 2(3) of the Act provides that the term "employee" does not include "any individual employed by an employer subject to the Railway Labor Act." 29 U.S.C. 153(3). The RLA, as amended, applies to rail carriers and to

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 or rendition of his service. [45 U.S.C. Sec. 151 First and 181.]

The RLA was extended to carriers by air by amendments enacted in 1936.

On April 27, 1998, the Board requested that the NMB study the record in this case and determine the applicability of the RLA to the Employer. The NMB subsequently issued an opinion indicating that, in its view, the Employer and its employees are subject to the RLA. *Evergreen Aviation Ground Logistics Enterprises*, 25 NMB No. 121 (1998).<sup>1</sup>

<sup>1</sup> The NMB uses a two-pronged jurisdictional analysis where the company is a separate corporate entity and does not fly aircraft for the public transportation of freight or passengers. Under the first prong of the test, known as the "ownership or control" prong and derived from the language of the Railway Labor Act, the NMB determines whether a common carrier exercises direct or indirect ownership or control of the entity. Thus, 45 U.S.C. § 151 First and 181 states that "the term 'carrier' includes . . . any company which is directly or indirectly owned or controlled by or under common control with any carrier." *Delpro Co. v. Railway Carmen*, 519 F.Supp. 842, 848 and fn. 14 (D.C.Del.1981), affd. 676 F.2d 960 (3d Cir. 1982), cert. denied 459 U.S. 989 (1982). See also *Ground Services, Inc.*, 7 NMB 509, 509-510 (1980). The second prong of the test, known as the "function" prong, is also derived from 45 U.S.C. § 151 First. For the NMB's jurisdiction to attach to the noncarrier under the carrier's control, the RLA states that the entity must be one "which operates any equipment or facilities or performs any service . . . in connection with the transportation, receipt, delivery . . . transfer in transit . . . and handling of property transported." *Delpro*

Having considered the facts set forth in light of the opinion issued by the NMB, we find that the Employer is engaged in interstate common carriage so as to bring it within the jurisdiction of the NMB pursuant to Section 201 of Title II of the RLA. Accordingly, we shall dismiss the petition.

ORDER

It is ordered that the petition in Case 12–RC–8202 be dismissed.

MEMBER LIEBMAN, concurring.

I agree with my colleagues in deferring to the opinion of the National Mediation Board (NMB) that the Employer and its employees are subject to the Railway Labor Act (RLA) on the grounds, as discussed by my colleagues and the NMB in its opinion,<sup>1</sup> that (1) the work

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*Co.*, supra, 676 F.2d at 964. In this part of the test, the NMB determines whether the work is traditionally performed by employees of air or rail carriers. The NMB requires that both prongs of the test be met in order for it to assert jurisdiction under the RLA. *United Parcel Service*, 318 NLRB 778, 779–780 fn.7 (1995), enf. 92 F.3d 122 (D.C. Cir. 1996). In its opinion, the NMB concluded that both prongs of the test had been met.

<sup>1</sup> 25 NMB (No. 121) (1998).

functions performed by the Employer’s employees are functions that are traditionally performed by employees in the airline industry and (2) the Employer’s operations and employees are controlled by a carrier or carriers subject to the RLA. I would also find that the Employer is subject to the RLA on the grounds that it is “under common control with” carriers subject to the RLA.<sup>2</sup> Specifically, the record establishes that the Employer is a wholly owned subsidiary of Evergreen International Aviation, Inc. (Aviation), a parent company which is not an air carrier, but which also wholly owns Evergreen International Airlines (Airlines) and Evergreen Helicopters International (Helicopters), both of which are air carriers subject to the RLA. Therefore, since the Employer is controlled by the same corporate parent as Helicopters and Airlines, the Employer is “under common control with” carriers subject to the RLA. I would find that the Employer is subject to the RLA on this basis as well.

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<sup>2</sup> Sec. 1, First of the RLA provides, inter alia, that “[t]he term ‘carrier’ includes . . . any company which is . . . under common control with any carrier.”