

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

EMERY WORLDWIDE AIRLINES, INC.¹

Employer

and

Case 4-RC-19619

FOOD DRIVERS, HELPERS AND WAREHOUSEMEN
EMPLOYEES, PHILA. & VICINITY AND CAMDEN AND
VICINITY, NEW JERSEY, LOCAL 500 a/w INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,² the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Petitioner seeks a unit of drivers employed by Emery Air Freight Corporation, a CNF Company, at the Swedesboro, New Jersey Priority Mail Processing Center. The Petitioner contends that the Employer is a freight forwarding company that is subject to the Board's jurisdiction. The Employer contends that the Board lacks jurisdiction over its operations as the employer of the petitioned-for employees is Emery Worldwide Airlines, Inc., an air carrier subject to the Railway Labor Act.

Emery Air Freight Corporation (herein called EAF) and Emery Worldwide Airlines, Inc. (herein called EWA) are separately incorporated subsidiaries of CNF Transportation Inc. (herein called CNF). EAF is a freight forwarding company over which the Board has asserted jurisdiction. *Emery AirFreight*

¹ The name of the Employer is amended consistent with my findings below.

² I have taken administrative notice of the record in Case 12-RC-8242, which presented the same issue presented here. The Petitioner in Case 12-RC-8242 withdrew the petition before a Regional Director's decision issued in that case.

The Employer's unopposed Motion to Correct the Transcript is granted.

Corp., 255 NLRB 1091 (1981). EAF's headquarters is in Redwood City, California and, until recently, David Beatson was the President and CEO of EAF. He also served as Senior Vice President of CNF. Senior Vice President of CNF Roger Piazza, who had also been EAF's Vice President of North American Operations, was promoted to President and CEO of EAF upon Beatson's departure. EAF owns no airplanes and employs no pilots. EAF does, however, have agreements with EWA pursuant to which EWA provides the air transportation portion of EAF's freight-handling business. When EWA provides airlines services for EAF, EAF pays EWA for its services via an inter-company transfer of funds. EWA paints at least some of the airplanes it uses to carry freight with the words, "Emery Worldwide, a CNF Company." "Emery Worldwide" is a trade name that EAF uses. In the Employer's marketing literature, the Employer "focus[es] more on when goods get to their destination — not so much on how they get there." The literature also includes photographs of the Employer's trucks and airplanes, all of which are marked with the "Emery Worldwide" logo without disclosing the existence of EWA. In CNF Transportation's 1997 annual report, under the caption "Emery Worldwide," CNF reports, "The creation of multiple premium services — by air, land or water — bolstered by world-class technology, enables Emery to offer a complete portfolio of transportation solutions anywhere in the world." The annual report also describes the priority mail operation under the phrase, "CNF Puts it All Together." The annual report further says,

EWA provides a dedicated fleet of 18 aircraft that transports Priority Mail within and outside the eastern states. Menlo Postal Logistics operates the sorting centers and a fleet of more than 400 trucks transporting mail between post offices and the Priority Mail Processing Centers. Con-Way Truckload [another CNF company] operates the linehaul system that meets on-time requirements without air delivery. Meanwhile, CNF's Road Systems manufactured newly designed trailers and equipped the trucks with satellite tracking.

...

The Priority Mail contract shows CNF flexibility like no other, and it also serves as a catalyst for pursuing other intra-company synergies. . . .

In listing all of the CNF companies at the end of the annual report, EWA appears as a sub-unit of "Emery Worldwide" and, on page 19, as a subsidiary. In literature aimed at the Employer's employees, the Employer addresses its employees as "Team Emery" without differentiating between employees of EAF and the employees of EWA.

Kent Scott and Gerald Trimarco are Co-Presidents of EWA, which is a Nevada corporation with its principal place of business located at the Dayton, Ohio International Airport in Vandalia, Ohio. David Beatson, who until recently was EAF's President and CEO and a Senior Vice President of CNF, was also the CNF officer responsible for EWA. Until Beatson recently left the company, Co-Presidents Scott and Trimarco reported to the CNF Board of Directors through Beatson. EWA holds a Federal Aviation Administration Air Carrier Certificate, dated June 19, 1987, which permits the company to carry cargo. The certificate gives, as EWA's address, EAF's Redwood City, California address. EWA provides air carrier service for a number of organizations, including the United States military, the United States Postal Service and, according to Trimarco and Scott, EAF. At least some of EWA's airplanes are painted with EAF's "Emery Worldwide" logo. EWA also reportedly has some aircraft painted with the Postal Service's colors and insignia. None of the Employer's aircraft bear the name, "Emery Worldwide Airlines." EWA has four contracts, or relationships, with the Postal Service. EWA provides express mail services in Indianapolis, carries first-class mail between some locations and also bids for and obtains what it calls a CNET contract with the Postal Service each December to handle overflow Christmas mail.³ EWA's fourth relationship with the Postal Service — a contract to carry priority mail — is at issue here.

³ CNET stands for Christmas network.

In April 1997, Beatson signed an agreement with the Postal Service on behalf of EWA to provide priority mail processing and air carriage from 10 cities across the country. The contract required EWA to build priority mail processing centers (herein called PMPCs) in each of the 10 cities and to deliver priority mail from one location to another within two days. One of the 10 selected cities was Philadelphia, Pennsylvania and EWA built the Philadelphia PMPC in nearby Swedesboro, New Jersey. EWA, which owns the Philadelphia PMPC, employs 80 drivers at that facility who drive 48- and 53-foot tractor-trailers. They are paid with checks signed by CNF Controller Gary Taliaferro, who signs paychecks for other CNF companies as well, including EAF.

When a priority mail package is mailed at a United States Post Office, the Postal Service or another contractor carries it to a Postal plant together with other mail. At the Postal plant, Postal Service employees separate the priority mail and EWA's drivers, using EWA owned or leased trucks, pick up the priority mail from the Postal plant and carry it to a PMPC where EWA employees sort the mail.⁴ Priority mail dropped into a Philadelphia area mailbox and addressed for delivery to a Philadelphia area location will be sorted at the Philadelphia PMPC in Swedesboro and then put back onto an EWA truck and returned to a Philadelphia area Postal plant for delivery. If the piece of priority mail put into the system in the Philadelphia area is addressed for another city in the United States, an EWA truck will pick up that mail at a Postal plant and transport it to the Philadelphia PMPC in Swedesboro. Once it reaches the Philadelphia PMPC, that piece of mail is then sorted and put into containers for air shipment and then transported by drivers to the Philadelphia International airport for transport by air. Seventy percent of the priority mail that EWA handles is transported by air. Once at the airport, the EWA truckdriver opens the doors of the truck and employees of a subcontractor then unload the truck and load the mail onto an EWA airplane. EWA Co-President Gerald Trimarco, the co-president responsible for EWA's Postal Service contracts, testified that EWA subcontracts ground-handling work at all of the airports it uses because ground-handling requires special skills not possessed by EWA. Once loaded onto an EWA owned or leased aircraft, the EWA-employed pilot and crew operates the aircraft to the relevant airport. If EWA has a PMPC in that area, the mail would be removed from the aircraft and loaded by subcontractors onto an EWA truck and the driver would transport the priority mail to the local PMPC where it would then be transported by a driver to the local Postal plant or office for delivery by the Postal Service. If EWA does not have a PMPC in the city, EWA turns the mail over to the Postal Service facility at the airport. At the Dayton International Airport hub, EAF is the subcontractor responsible for transferring mail to and from the Employer's aircraft.

When EWA first entered into its contract with the Postal Service for priority mail, EWA used the name, "Menlo Postal Logistics, a division of Emery Worldwide Airlines" for the priority mail component of its business. However, CNF has a separate company known as "Menlo Logistics" and EWA's use of the Menlo Postal Logistics name to describe its priority mail operation created some confusion. To minimize confusion, EWA changed the name to "CNF Postal Logistics, a division of Emery Worldwide Airlines." Neither the Menlo Postal Logistics nor the CNF Postal Logistics names were registered trade names. Since September 1998, when EWA dropped the fictitious names altogether, it has used only its corporate name to describe the priority mail operation.

The Petitioner has a contract with EWA at the Philadelphia International Airport covering terminal handlers. From the early 1970s through December 1998, the Petitioner's contract was with EAF. In February 1999, the Petitioner entered into another three-year contract. In this instance, the Employer "changed its name" to EWA. Prior to EWA's priority mail contract with the Postal Service, EAF's employees handled mail at the Philadelphia International Airport, moving it from Postal Service aircraft to the Postal Service's mail facility located at the airport. According to EAF terminal handler John Schmitt, who is also a shop steward for the Petitioner, EAF was losing market share in the 1980s because it lacked "lift" or aircraft. To resolve that problem, EAF leased 20 aircraft and created the name "Emery Worldwide," which it painted on the aircraft. The company continually added aircraft thereafter and continued to use the name "Emery Worldwide." The Employer's witnesses did not dispute Schmitt's account except with respect to the ownership of the aircraft, which the Employer's witnesses claim are, at least currently, owned or leased to EWA.

⁴ The classifications of the employees at an EWA PMPC include mail handler, cart or equipment operator, tug operator, forklift operator, voice encoders and key voice inductors.

As indicated above, the Board has asserted jurisdiction over EAF pursuant to its “longstanding policy to assert jurisdiction over freight forwarders and trucking companies.” *Emery AirFreight*, supra, 255 NLRB at 1092. See also *Emery Worldwide*, 289 NLRB 1395 (1988); and 313 NLRB No. 85 (Feb. 9, 1994).⁵ The NMB has asserted jurisdiction over EWA in *Emery Worldwide Airlines*, 23 NMB No. 39, 1996 WL 179920 (Apr. 6, 1996); and 24 NMB No. 78, 1997 WL 402809 (July 8, 1997). In both of these NMB cases, the unit at issue was a unit of pilots and flight crew. The NMB has never asserted jurisdiction over any freight forwarding activities by EWA.

The evidence establishes that the EWA and EAF are highly integrated companies that hold themselves out to the public as a single integrated entity known as Emery Worldwide. However, EWA and not EAF employs the drivers at issue here.⁶ Having found that the Employer of the employees at issue is an air carrier does not end the inquiry. The decision whether the Board or the NMB has jurisdiction turns “on the relationship between the work performed by the employees and the transportation activities covered by the RLA” rather than the identity of the employer. *ServiceMaster Aviation Services*, 325 NLRB No. 151, slip op. at 2 (May 15, 1998); *Trans World Airlines*, 211 NLRB 733 (1974). “There must be a more direct connection between the employees and the transportation function so as to warrant the special considerations for which Congress enacted the Railway Labor Act.” *TWA*, supra, 211 NLRB at 733, citing *Pan American World Airways v. Carpenters*, 324 F.2d 217, 54 LRRM 2487 (9th Cir. 1963), cert. denied 376 U.S. 964 (1964); *United Parcel Service*, 318 NLRB 778 (1995), affd. 92 F.3d 1221, 153 LRRM 2001 (D.C. Cir. 1996). In the instant case, the Employer’s primary business interest is transporting freight and U.S. mail, not the operation of an airline. Though substantial, the Employer’s aircraft operations are incidental to its freight forwarding operations as evidenced not only by the facts, but also by the Employer’s marketing strategy, which is to “focus more on when goods get to their destination — not so much on how they get there.”

The Employer’s employees at the Philadelphia PMPC are not involved in the operation of an airline. Like the rest of the Employer’s business operations, the primary focus of the Philadelphia PMPC is to transport U.S. priority mail. The Employer’s drivers transport priority mail to the Philadelphia PMPC by truck where other employees involved in the Employer’s priority mail operations sort the mail. That mail is then loaded onto the Employer’s trucks where it is either returned to the local Postal plant or transported to the Philadelphia International Airport. PMPC drivers cease handling the mail once a truck arrives at the airport and the driver opens the doors to the truck. There, employees employed by subcontractors — including EAF, over which the Board has asserted jurisdiction — unload the Employer’s trucks and then reload the mail onto airplanes for transport to another city. The petitioned-for employees do not even come into contact with the Employer’s pilots or other aircraft crew. Even when the mail arrives at another city, PMPC employees do not again come into contact with the mail until another subcontractor unloads the airplanes and loads the mail onto the Employer’s trucks. This work is functionally identical to work that the Employer’s sister company, EAF, has performed at the Philadelphia International Airport, and it is also work that, if performed by EAF rather than EWA, would be subject to the Board’s jurisdiction. *Emery AirFreight*, supra, 255 NLRB at 1092. Since the Board has asserted jurisdiction over the work when

⁵ The 1994 case is a summary judgment case and is not published in bound Board volumes. It is, however, available at 1994 WL 275362. The Board also asserted jurisdiction over EAF based on a charge that EAF filed alleging that Teamsters Local 295 violated Section 8(b)(3) of the Act. The Board found that the union in that case violated Section 8(b)(3) by insisting that EAF sign a contract that contained terms different than those the parties agreed to. *Teamsters Local 295 (Emery AirFreight)*, 197 NLRB 26 (1972).

⁶ I have not found that the EWA and EAF are a single employer. Contrast *Masland Industries*, 311 NLRB 184, 186–187 (1993). Rather, I find that I must examine the overall operation of the two corporations in order to determine the Board’s jurisdiction. To examine only EWA in isolation would be misleading and inconsistent with the Employer’s overall business purpose.

performed by the Employer's sister company, there is no need to transfer this case to the NMB for an advisory opinion as to whether the NMB would assert jurisdiction. *United Parcel Service*, supra, 318 NLRB 778. Accordingly, I find that the EWA is subject to the Board's jurisdiction.⁷

Because EWA also meets the Board's jurisdictional standards, I find that EWA is an Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Employer took no position on the composition of the unit. A unit of truckdrivers is one that the Board frequently finds appropriate, *Rinker Materials*, 294 NLRB 738, 739 (1989); *Laidlaw Waste Systems v. NLRB*, 934 F.2d 898, 137 LRRM 2631 (7th Cir. 1991), enf. 299 NLRB No. 124 (1990); *Gogin Trucking*, 229 NLRB 529, 538 (1977); *Giordano Lumber*, 133 NLRB 205, 206-207 (1961), and there is no factual basis for expanding the unit here. Accordingly, I find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time truckdrivers employed by Emery World Airlines, Inc. at its Philadelphia Priority Mail Processing Center in Swedesboro, New Jersey, excluding mail handlers, cart or equipment operators, tug operators, forklift operators, voice encoders, key voice inductors, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently,⁸ subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the

⁷ Seventy percent of the priority mail the Employer handles is eventually transported by air and only 30 percent is transported solely by truck. There is, however, no evidence in the record of how much of the Employer's revenue is derived from its air operations. See *Wiggins Airways*, 210 NLRB 996 (1974); *Safair Flying Service*, 207 NLRB 119 (1973); *Tri-State Aero*, 180 NLRB 60 (1969). Moreover, because of the nature of the Employer's business, it is not clear why such statistics would be relevant here. Freight forwarding, which the Board contends is a business operation that is subject to the Board's jurisdiction, frequently results in some or all of the freight eventually being transported by air.

⁸ Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

**FOOD DRIVERS, HELPERS AND WAREHOUSEMEN
EMPLOYEES, PHILA. & VICINITY AND CAMDEN AND
VICINITY, NEW JERSEY, LOCAL 500 a/w INTERNATIONAL
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LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within **7** days of the date of this Decision **3** copies of an election eligibility list, containing the **full** names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be clearly legible, and computer-generated lists should be printed in at least 12-point type. In order to be timely filed, such list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **July 9, 1999**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, NW, Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **July 16, 1999**.

Dated July 2, 1999

at Philadelphia, PA

/s/ Dorothy L. Moore-Duncan
DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four

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