Federal Express Corporation *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Petitioner. Case 4–RC–17698

May 30, 1997

SUPPLEMENTAL DECISION

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Hearing Officer Peter C. Verrochi. Following the hearing, and pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, the case was transferred to the National Labor Relations Board for decision.[1]

The National Labor Relations Board has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. They are affirmed.

On the entire record of the case, the Board finds:

The Employer, a Delaware corporation, is an FAA-certified air carrier which provides express package delivery service worldwide. The Employer maintains its headquarters in Memphis, Tennessee, and hub locations at airports in Memphis, Oakland, Newark, Chicago, Indianapolis, and Anchorage. At present, the Employer operates the sixth largest jet aircraft fleet in the world, with over 250 feeder aircraft.

The personnel division in Memphis establishes and administers the personnel policies for all employees not covered by a collective-bargaining agreement. All employees undergo the same hiring process, some of which is dictated by the FAA, and, with the exception of those employees subject to a collective-bargaining agreement, receive the same benefits. All employees not subject to a collective-bargaining agreement may pursue disciplinary matters through the company's Guaranteed Fair Treatment Procedure. Pay rates are established by the compensation department after a review of similar classifications at other Fortune 500 and express delivery companies.

The Employer uses a highly integrated intermodal, multimodal system to meet its time-sensitive delivery commitments. Its operation involves a system of specific deadlines, pick-up and drop-off stations, and sorting and loading freight onto specially made containers. Packages are picked up by couriers or courier/handlers, trucked to an airport or hub location, sorted and transferred to other aircraft or trucks, and sent to their destination by ground or air. At the destination location, the packages are driven by courier to their ultimate recipients. Often containers are unloaded directly from the trucks and loaded directly onto aircraft, and the process is reversed at the delivery destination. All employees in ground operations are responsible for working with packages that are to be moved by air and by ground, and all packages are commingled. Packages that at some point in the delivery process are transported by air constitute over 85 percent of the Employer's domestic shipments.

The Petitioner seeks to represent certain ground service employees[2] who work out of the Employer's Liberty District, which includes portions of southern New Jersey, southeastern Pennsylvania, and Delaware.[3] At the time of the hearing, there were 18 stations within the Liberty District. At each station, the Employer employs ramp agents, tractor-trailer drivers, dispatchers, couriers, service agents, courier/handlers, operations agents, and cargo handlers.

The Employer contends that it is a common carrier by air engaged in interstate commerce and foreign commerce within the meaning of the Railway Labor Act, that its operations and employees are covered by the provisions of that statute, and that it is, therefore, exempt from the National Labor Relations Act. The Petitioner argues that the ground service employees it seeks to represent perform trucking services that are not integrally related to the Employer's air activities and thus the employees are subject to jurisdiction under the National Labor Relations Act.

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. § 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." The Railway Labor Act, as amended, applies to rail carriers and "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 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 this service." 45 U.S.C. § 151 First and § 181.

On July 17, 1995, the Board requested that the National Mediation Board (NMB) consider the record in this case and determine the applicability of the Railway Labor Act to the Employer and the employees covered by the petition in this case. The NMB subse-

[1] For the related procedural history of this case, see *Federal Express Corp.*, 317 NLRB 1155 (1995).

[2] The unit sought by the Petitioner includes service agents, senior service agents, international document agents, couriers, courier/handlers, tractor-trailer drivers, dispatchers, courier/nondrivers and operations agents.

[3] The Employer's North American operations are divided into five geographic regions: western, eastern, central, southern, and Canadian. The four U.S. regions are subdivided into a total of approximately 35 districts.

quently issued an opinion declaring its view that the Employer is a "common carrier by air" within the meaning of Section 181 of the Railway Labor Act, 45 U.S.C. § 181, and that, by virtue of that coverage, all of the individuals directly employed in its air carrier business, including those in the trucking operation at issue here, are also covered by the RLA. 23 NMB 32, 70–73 (1995). The NMB rejected the contention that the employees could not be deemed covered until a further inquiry was made into whether the trucking operation was "integrally related" to the Employer's air operations, because it regarded the "integrally related" test as applicable only if the trucking services were performed through a separate subsidiary corporation rather than by employees directly employed by the air carrier. Id. The NMB nonetheless went on to hold that, assuming the test applied, the employees were still subject to the RLA because the record showed that their functions were critical to the operations of the Employer's air express delivery service. Id. at 73–74.

As the Board noted in its decision referring this case to the NMB, while we do not consider ourselves necessarily obligated to seek the opinion of that agency as to cases filed with us in which questions of RLA jurisdiction are raised, we consider it prudent to seek the views of the NMB whenever the issue is not entirely clear. 317 NLRB at 1155 fn. 5. It was certainly not clear in this case that the Employer should be deemed subject to our jurisdiction. Thus, the case was properly submitted to NMB. Similarly, where, as here, the jurisdictional issue has been referred to NMB, we consider it prudent to, at the very least, consider seriously the NMB's view.[4]

The NMB's determination that it has jurisdiction is correct. The Employer is indisputably a "common carrier by air" within the meaning of Section 181 of the RLA, 45 U.S.C. § 181; its trucking services that come within the representation petition have been operated from their inception under the RLA; and the appropriateness of such coverage has been consistently reaffirmed in numerous decisions of the NMB, this agency, and the courts.

Without passing on whether we agree with the NMB that the inquiry is at an end once it is determined that the Employer is a "carrier by air" under 45 U.S.C. § 181, we agree that under the "integrally related" test, the employees at issue here are subject to the RLA. As noted above, more than 85 percent of the Employer's domestic shipments are transported by the Employer's aircraft at some point or other, and because shipments are commingled, every trucking employee essentially either funnels packages into or out of that air operation. Where air and trucking operations are thus linked in such a substantial proportion of an employer's business, it is reasonable to find that the trucking operations come within the RLA. Compare *United Parcel Service, Inc.*, 318 NLRB 778, 781–782 (1995), enfd. 92 F.3d 1221, 1227–1228 (D.C. Cir. 1996) (finding NLRA coverage for trucking operations of which less than 10 percent service the employer's air business and distinguishing that from cases in which more than 80 percent of trucking operations serve an employer's rail or air business).

Because we agree with the NMB that the operations in which the employees sought by the petition in this case were employed are covered by the RLA, we find that they are not subject to the Act. Accordingly, we shall dismiss the petition.

ORDER

It is ordered that the petition in Case 4–RC–17698 is dismissed.

CHAIRMAN GOULD, concurring.

For institutional reasons, I join in the decision of my colleagues to dismiss the instant petition. In my view, Congress has specifically confirmed, with regard to the circumstances of this case, that Federal Express is an express company within the meaning of the Railway Labor Act. A rider to the Federal Aviation Authorization Act of 1996 contained a clarifying amendment restoring the term "express company" to the definition of a "carrier" under the Railway Labor Act. Pub. L. No. 104-264, § 1223, 110 Stat. 3213, 3287 (1996). The congressional debate over that amendment centered on the issue of the Board's jurisdiction over Federal Express Corporation and its employees, and Senator Hollings, one of the sponsors of the legislation, repeatedly expressed criticism concerning my decision to dissent from referral of this matter to the National Mediation Board.[1] Accordingly, despite the lack of precision in the language of the amendment, I view Senator Hollings' comments and the debate as a whole as an expression of congressional intent that, with regard to the instant petition, Federal Express Corporation remains under the jurisdiction of the National Mediation Board.[2] Accordingly, I join in dismissing the petition.

[4] In the prior *Federal Express* opinion, we did not pass on whether we are mandated to refer these jurisdictional issues to NMB. Similarly, in the instant case, we do not pass on whether we are required to accept the NMB's resolution of the jurisdictional issue. Rather, as discussed below, we conclude that the NMB decision is correct. We therefore do not reach the issue of our authority to act if we disagree with the NMB decision.

[1] See my dissenting opinion in *Federal Express Corp.*, 317 NLRB 1155 (1995); 142 Cong. Rec. S11854-01 (Sept. 30, 1996); and 142 Cong. Rec. S12102-03 (Oct. 1, 1996) (statement of Sen. Hollings).

[2] I express no view as to the appropriate scope of the "trucking services" exception to the Railway Labor Act. 45 U.S.C. § 151 First.