NATIONAL MEDIATION BOARD
WASHINGTON, DC 20572

(202) 692-5000 39 NMB No. 7

November 15, 2011

Anne Purcell
Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570-0001

Re: NMB File No. CJ-7024
Amerijet International, Inc.

Dear Ms. Purcell:

This responds to your request for the National Mediation Board's (NMB) opinion regarding whether Amerijet International, Inc. (Amerijet or Employer) is subject to the Railway Labor Act (RLA), 45 U.S.C. § 151, *et seq*. On September 14, 2011, the National Labor Relations Board (NLRB) requested an opinion regarding whether Amerijet's operations are subject to the RLA.

I. PROCEDURAL BACKGROUND

This case arose out of an unfair labor practice (ULP) charge filed by International Brotherhood of Electrical Workers, Local Union 349 (Local 349) on May 19, 2011. As part of the investigation of the ULP charge, the NLRB's Region 12 (Region) obtained affidavits from several employees who were allegedly discharged. The Region sought information from the Employer regarding the work performed by the employees, its corporate structure, and the management and supervisory structure at the facility at issue. The Region also sought information regarding the merits of the ULP charge and the NLRB's commerce jurisdiction. In response, the Employer provided a copy of its Federal Aviation Administration (FAA) certification as a common carrier by air; two NMB certifications, one for the craft or class of Pilots and one for the craft or class of Flight Engineers; and a position statement in which it asserted that because it was a common carrier by air, the NLRB did not have jurisdiction over it.

The Region issued an investigative subpoena duces tecum on July 13, 2011. On July 21, 2011, the Employer filed a Petition to Revoke the subpoena.

The Region continued to request information and the Employer continued to assert that the NLRB lacked jurisdiction and was exceeding its authority by continuing the investigation.

The NMB's opinion in this case is based upon the request and the case file provided by the NLRB. As stated in the NLRB's referral letter:

> the case file does not contain any substantive information from the Employer relating to the commerce jurisdiction issue or the merits of the case, and only contains a few documents relating to whether either the NLRB or the NMB has jurisdiction over the Employer.

The NMB's opinion is also based on the Employer's September 30, 2011 submission to the NMB.[1]

II. AMERIJET'S CONTENTIONS

Amerijet asserts that it is undisputedly a common carrier by air and thus covered by the RLA and under the exclusive jurisdiction of the NMB with respect to labor matters. In support of its position, Amerijet submitted the following documents: a copy of its FAA operating certificate; copies of several certificates of public convenience and necessity; and copies of the current flight schedule and information on its website holding itself out to the public for the transportation of cargo by air. Amerijet contends that this information established that it meets the RLA's definition of a common carrier by air since it provides transportation by air; its air cargo transportation services are held out to the public; it has a duty to provide services to the public for public convenience and necessity; and it crosses United States' national borders in the course of providing air cargo service. Finally, Amerijet notes that the NMB has previously asserted jurisdiction over it in two representation cases and two mediation cases, and that there have been no changes in corporate structure, FAA certification, or operations of Amerijet since those cases.

III. FINDINGS OF FACT

The Employer operates as a cargo airline and the employees at issue work at its hub at Miami International Airport (MIA). The employees are cargo handlers who use forklifts and other machinery to pick up cargo unloaded from Amerijet aircraft and move the cargo from the tarmac to a warehouse facility at MIA. Inside the warehouse, the cargo handlers break down the air shipment pallets, re-palletize the cargo per customer orders, and store the cargo. They also deal directly with customers who arrive to pick up their products. They

[1] Local 349 did not file a position statement with the NMB. On October 24, 2011, the Employer filed a supplemental position statement with respect to Local 349's amended ULP charges filed with the NLRB on October 5, 2011.

find the items, check and file invoices, and load the items on the customer's trucks. Several times each month, the cargo handlers will load and unload the aircraft.

IV. DISCUSSION

A company and its employees are subject to the RLA in two instances: when that company is a common carrier by air or rail as defined by the RLA or when that company is directly or indirectly owned or controlled by a rail or air carrier engaged in interstate or foreign commerce. When the company is not directly a carrier, the NMB applies a two part jurisdictional test to determine whether the company is subject to the RLA. See, e.g., *Boston MedFlight*, 38 NMB 52 (2010); *Talgo, Inc.*, 37 NMB 253 (2010); *Bradley Pacific Aviation, Inc.*, 34 NMB 119 (2007); *Dobbs Int'l Servs. d/b/a Gate Gourmet*, 34 NMB 97 (2007). First, the Board determines whether the nature of the work performed is that traditionally performed by employees of a rail or air carrier. Second, the Board determines whether a carrier or carriers exerts significant control over the company. Both parts of the test must be satisfied for the NMB to assert jurisdiction over the company as a derivative carrier. As discussed below, Amerijet is a common carrier by air and therefore the two part jurisdictional test is not applicable.

Section 181, which extended the RLA's coverage to air carriers, provides:

> All of the provisions of subchapter I of this chapter except section 153 of this title are extended to and shall cover 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 of rendition of his service. 45 U.S.C. § 181.

Amerijet holds a valid FAA operating certificate authorizing it to operate as an air carrier in accordance with the requirements of the Federal Aviation Act of 1958. Amerijet also possesses Department of Transportation Certificates of Public Convenience and Necessity for Foreign Air Transportation. Amerijet holds itself out to the public for the air transportation of cargo in foreign commerce. *See Southern Air Transport*, 8 NMB 31(1980). Further, the NMB has previously found it to be a carrier within the meaning of the RLA and subject to the Board's jurisdiction in representation disputes involving employees in the Pilot and Flight Engineer crafts or classes. *Amerijet Int'l, Inc.*, 31 NMB 382 (2004); *Amerijet Int'l, Inc.*, 31 NMB 384 (2004).

The NMB stated, in *Federal Express Corp.*, 23 NMB 32, 71 (1995), that "the Railway Labor Act does not limit its coverage to air carrier employees who fly and maintain aircraft" but "extends to virtually all employees engaged in performing a service for the carrier so that the carrier may transport passengers or freight." The limit on Section 181's coverage recognized by the Board in *Federal Express* is that "the carrier must have 'continuing authority to supervise and direct the manner of rendition of . . . [an employee's] services.'" 23 NMB at 72. In this case there is no contention that Amerijet did not employ, compensate, supervise, direct or set the terms and conditions of the cargo handlers.

In its referral, the NLRB notes that in *Emery Worldwide Airlines*, 28 NMB 216 (2001); *motion for reconsideration denied*, 28 NMB 355 (2001), the NMB declined jurisdiction over certain employers of a common carrier. In that case, the NMB applied the limitation provided in Section 181 and found that the carrier did not have the authority to supervise and direct the employees at issue. The NMB found that those employees worked at a separate location from the carrier's employees, had separate management and did not interact with other carrier employees. 28 NMB at 240. In contrast, Amerijet's cargo handlers work at Amerijet's MIA facility, directly with other Amerijet employees and under the supervision of Amerijet managers. See *ABX Air, Inc., d/b/a Airborne Express*, 25 NMB 274 (1998) (asserting RLA jurisdiction over sorters at New England Hub of cargo airline where carrier employs, schedules and supervises the sorters).

In *Federal Express*, *above*, the NMB also noted that two courts have held that carrier employees who perform work functions unrelated to the airline industry are not covered by the RLA: *Pan American World Airways v. Carpenters*, 324 F.2d 2487 (9th Cir. 1963) *cert. denied*, 376 U.S. 964 (1964) and *Jackson v. Northwest Airlines, Inc.*, 185 F.2d 74 (8th Cir. 1950). The court in *Pan American World Airways* found the RLA not applicable to Pan Am's "housekeeping services" at the Atomic Energy Commission's Nuclear Research Development Station. In *Jackson*, the court concluded that the RLA did not apply to employees at Northwest Airlines' "modification center" where U.S. Army aircraft were reconfigured for military purposes. In its referral, the NLRB also cited two NLRB cases in which the NLRB determined, without referral to the NMB, that carrier employees were not covered by the RLA relying on the *Pan American World Airways* court's reasoning: *Golden Nugget Motel*, 235 NLRB 1348 (1978) and *Trans World Airlines*, 211 NLRB 733 (1974). In *Golden Nugget Motel,* the NLRB rejected the assertion of RLA jurisdiction where union sought unit of bartenders, cooks, desk clerks, waitresses, maids, and janitors at a motel that was a wholly owned subsidiary of Alaska Airlines. Similarly, in *Trans World Airlines*, the NLRB rejected TWA's claim of RLA jurisdiction where union sought unit of employees who provide support services for tours of Cape Canaveral Space Center at TWA's Visitor Information Center. In both *Golden*

Nugget and *Trans World Airlines*, the NLRB relied on *Pan American World Airways* for the proposition that

> [w]here a group of employees are involved in work which would normally be covered by the National Labor Relations Act, the mere fact that the employer is one within the definitional sweep of the Railway Labor Act will not serve to bar this Board's jurisdiction. 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. 211 NLRB at 733.

The NMB has not had the occasion to make a final determination regarding the appropriate application of the court cases and finds it unnecessary to do so here since the employees' work function is directly related to Amerijet's transportation of freight by air. In *Airline Industry Hearings*, 5 NMB 1, 4 (1972), the Board stated that employees who preponderantly perform duties, inter alia, of loading and unloading aircraft baggage or freight, deliver and pickup baggage and freight to and from baggage and freight areas; sort baggage and freight; and complete the required paperwork directly associated with the movement of baggage are part of the craft or class of Fleet Service Employees.

Accordingly, in view of the Employer's status as a common carrier by air and its continuing authority to supervise and direct the employees' work, the NMB finds that Amerijet and its employees are subject to the RLA.

CONCLUSION

Based on the record in this case and for the reasons discussed above, the NMB's opinion is that Amerijet and its employees are subject to the RLA. This decision may be cited as *Amerijet Int'l Inc.*, 39 NMB 7 (2011).

By direction of the NATIONAL MEDIATION BOARD.

Mary L. Johnson
General Counsel

Copy to:
Joan Canny
Chris Simpson
Abby Simms, NLRB