NATIONAL MEDIATION BOARD
WASHINGTON, DC 20572

(202) 692-5000

39 NMB No. 54

June 19, 2012

VIA EMAIL

Anne G. Purcell
Associate General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C., 20570-0001

Re: NMB File No. CJ-7022
Air Serv Corporation

Dear Ms. Purcell:

This responds to your request for the National Mediation Board's (NMB) opinion regarding whether Air Serv Corporation (Air Serv) is subject to the Railway Labor Act (RLA), 45 U.S.C. §151, *et seq.* On August 3, 2011, the National Labor Relations Board (NLRB) requested an opinion regarding whether Air Serv's operations are subject to the RLA.

For the reasons discussed below, the NMB's opinion is that Air Serv's operations and its employees are not subject to the RLA.

I. PROCEDURAL BACKGROUND

This case arose out of an unfair labor practice charge filed by Howard Stevens alleging that Air Serv terminated employees Howard Stevens, Cory Dildy, and Francisco Fernandez for engaging in protected concerted activity, namely objecting to Air Serv's demand that the employees operate vehicles that did not have proper registration, in violation of Section 8(a)(1) of the National Labor Relations Act.

On August 15, 2011, the NMB assigned Maria-Kate Dowling to investigate. Air Serv and Stevens submitted position statements on August 29, 2011.

The NMB's opinion is based on the request and record provided by the NLRB, as well as the position statements filed by Air Serv and Stevens.

II. AIR SERV'S CONTENTIONS

Air Serv contends that it is subject to the RLA. It notes that both the NMB and the NLRB have held that the NMB has jurisdiction over Air Serv. Applying the NMB's two-part function and control test for determining jurisdiction of employers that are not owned by or under common ownership of an RLA carrier, Air Serv contends that it satisfies both parts of the test. Air Serv states that it satisfies the function part of the test because its employees perform work traditionally performed by employees of air carriers, transporting airline employees. It contends that it satisfies the common control part of the test, based on prior NMB decisions and provisions in its contract with the LaGuardia Airport Airline Managers Council (LAAMCO) which, Air Serv argues, demonstrate that the airlines exercise sufficient control over Air Serv.

III. STEVENS' CONTENTIONS

Stevens contends that the NMB does not have jurisdiction over Air Serv because both parts of the two-part test are not satisfied. Stevens argues that Air Serv provides shuttle service to employees of both airline and non-airline employees, which is not work traditionally performed by a carrier.

Stevens also contends that the air carriers do not exercise sufficient control over Air Serv, such that it would meet the second prong of the test. According to Stevens, several factors which support this contention, including the fact that Air Serv exercises control over hiring, firing, compensation, screening of potential employees, training and orientation, uniforms, ownership of the buses, and the building and break room used by Air Serv employees.

IV. FINDINGS OF FACT

Air Serv

Air Serv is an airline service company headquartered in Atlanta, Georgia. It has approximately 8,000 employees who provide services for various carriers at 50 airports across the United States. In 2003, Air Serv executed a Service Agreement with American Airlines for shuttle bus services. Subsequently, in 2008, Air Serv entered into a contract with LAAMCO, a consortium of all the air carriers operating out of LaGuardia Airport (LGA), to provide shuttle bus transportation services between

employee parking areas and terminal buildings at LGA. This contract is an attachment to Air Serv's 2003 agreement with American Airlines.

Air Serv maintains a facility on the premises of LGA for the maintenance and storage of its vehicles. This building is used exclusively by Air Serv employees, who do not share or interact with agents or employees of any airline. Air Serv owns and is responsible for the maintenance and upkeep of its buses. LAAMCO does not share workspace or equipment with Air Serv, instead Air Serv leases (and pays rent to) LAAMCO for its portion of the Marine Terminal. The terminal is divided so that Air Serv only occupies a portion of that terminal and Air Serv employees have a separate and distinct place within the terminal.

LAAMCO

LAAMCO is a consortium of all carriers (both major carriers and smaller carriers) which operate out of LGA Airport. LAAMCO includes not only the larger, more well-known carriers (such as Delta or American Airlines), but also various smaller carriers. The group is made up of every General Manager for each airline that operates out of LGA. No non-airline managers sit on the council. LAAMCO's main purpose is to act and communicate as an intermediary between the constituent airlines and various LGA venders, which includes Air Serv. LAAMCO was founded because various carriers concluded it would be simpler to negotiate on behalf of all carriers for services and "split the bill" between the carriers for any shared services. General Managers of the LGA airlines not only sit on the council but also serve as the President of LAAMCO on a rotational, yearly basis. Because LAAMCO is a consortium, and not an actual carrier, it has no office space, telephones, email, or employees. All members of LAAMCO serve only in their capacity as a representative from their respective airlines and attend various monthly meetings with venders.

Nature of Work for Air Serv Employees

At LGA, Air Serv provides shuttle bus services to all employees of the airport, both air carrier employees and other airport employees. The agreement between Air Serv and LAAMCO provides that Air Serv shall "furnish licensed and qualified operators and vehicles to provide LAAMCO with ground transportation services" at LGA. This agreement does not specify whether Air Serv is to provide transport to all LGA employees (both carrier and non-carrier). The agreement specifies a number of things which Air Serv provides in executing its agreement with LAAMCO, including but not limited to vehicles and operators, storage, maintenance, labor and related expenses, fuel (to be repaid monthly), supervisors, training and orientation, and two way radios in each bus.

Air Serv follows routes through each parking lot, which are established by LAAMCO. LAAMCO establishes pick up and arrival sites for loading and unloading passengers.

While LAAMCO designates specific stopping points and times for Air Serv buses, this schedule is not based on any of the flights of any carrier which are part of LAAMCO. The contract between Air Serv and LAAMCO states that LAAMCO has the ability to set and alter bus routes, has the ability to set pick up and arrival sites, and has the ability to fine Air Serv in the event that a driver misses a stop or is caught sleeping on the job. LAAMCO, however, has no authority to determine which buses make which routes, nor which drivers are assigned to which routes. When it comes to actual personnel decisions, LAAMCO instead defers to Air Serv to meet its staffing needs.

All Air Serv employees report to work for eight-hour shifts. These shifts run around the clock at LGA. These employees report at the Marine Terminal Building on LGA's property, where Air Serv's office is located. This terminal building also serves as a storage and maintenance garage for Air Serv's vehicles.

The terminal building also houses the Delta shuttle; however, Air Serv employees enter on the other side of the building and go directly into their office. The office consists of a supervisor's area and a break room for drivers. All drivers report to this building to clock in and get their rotation assignments. The employees then drive to the parking lot, where they inspect the buses. Assuming nothing is wrong with a bus, employees start their rotations through the employee parking lot, picking up carrier and non-carrier employees and dropping them off at the terminal entrance. The buses do not go directly to airplanes or on the tarmac. Air Serv owns all of its buses and transports them between various airports depending on size of the airport and demand for service. Air Serv is responsible for upkeep and maintenance of the buses at its sole expense.

All Air Serv employees wear a uniform consisting of a blue shirt, navy blue trousers, and a vest. The shirts and vest are all adorned with Air Serv logos. These uniforms are worn at all times while the drivers are making their rounds in the buses. These uniforms are standardized uniforms mandated by the corporate headquarters in Atlanta. Any time an employee is performing a job function, they are required to be in their Air Serv uniform, which also includes the applicable grooming standards.

Air Serv has its own employee handbook, setting out all terms and conditions of employment. Each employee is issued a handbook upon employment. The handbook makes no reference to any airline having a

controlling relationship with the employee. Air Serv also requires all employees to attend orientation and training programs, which are "designed to provide an overview of Air Serv's history, philosophy, mission, structure, policies, and procedures." Although LAAMCO does reserve the right in the contract to approve or disapprove any training requirements, there is no evidence in the record that LAAMCO has ever done so.

According to the Air Serv employee handbook, all employees work on an at-will basis. Either the employee or Air Serv may choose to initiate or terminate employment with the company. Air Serv managers, not LAAMCO officials, interview for and offer open job positions to all potential applicants. Air Serv has submitted one instance in which they did not hire a senior official until that senior official had been approved by the LGA carriers. This official was hired as an Air Serv Account Manager and would have been directly involved with working with LAAMCO. The contract specifies that "[s]ervices shall be furnished by Supplier as an independent supplier. All personnel utilized by Supplier . . . shall be employees or independent contractors of Supplier and under no circumstances shall be deemed employees of LAAMCO."

LAAMCO does not hire, train, promote, or discipline Air Serv employees. Air Serv is directly responsible for training all new employees. All opportunities for advancement in Air Serv are solely under Air Serv's discretion. LAAMCO has no involvement in the promotion or transfer of any of Air Serv's employees. There is no indication in the record that LAAMCO has any role, direct or indirect, of supervising or disciplining Air Serv's employees.

Air Serv's handbook also sets out standards of conduct and disciplinary actions. All violations of the standards of conduct are subject to disciplinary actions to be taken at Air Serv's discretion. Open positions are posted in "employee break rooms, job listings kept by the Human Resources representative..., or Air Serv's website."

V. DISCUSSION

Applicable Legal Standard

When an employer is not a rail or air carrier engaged in the transportation of freight or passengers, the NMB applies a two-part test in determining whether the employer and its employees are subject to the RLA. *See e.g., 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 NMB determines whether the nature of the work 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, or under common control with, a carrier or carriers. Both parts of the test must be satisfied for the NMB to assert jurisdiction. *Talgo, above*; *Bradley Pacific Aviation, above; Dobbs Int'l Servs., above. See also Aircraft Servs. Int'l Group, Inc.*, 33 NMB 200 (2006).

Air Serv does not fly aircraft and is not directly or indirectly owned by an air carrier. At LGA, Air Serv does not exclusively transport airline employees and does not transport them to and from their work stations. Air Serv also transports non-airline employees to and from the employee parking lots. These employees include airport cleaning staff, newsstand workers, security personnel, and restaurant employees. Air Serv transports all employees from the employee parking area to the publicly accessible terminal, not to the tarmac or to the aircraft themselves. Although the shuttle service is provided to both airline and non-airline employees, the nature of the work is shuttle transportation and the NMB has previously found that providing shuttle transportation is work traditionally performed by employees in the airline industry. *Air Serv Corp.*, 35 NMB 201 (2008); *Milepost Industries*, 27 NMB 362 (2000) (finding that transportation of flight crews was an integral part of a carrier's business and therefore a function traditionally performed by airline employees); *Crew Transit, Inc.*, 10 NMB 64, 69 (1982); *Security '76, Inc.*, 5 NMB 234 (1976) (finding that security and shuttle bus service was work traditionally performed by carrier employees). Since Air Serv's LGA shuttle service employees perform duties that have been traditionally been performed by carrier employees, the first part of the NMB's jurisdictional test has been satisfied.

The Board has previously determined that Air Serv was subject to RLA jurisdiction. In 2006, the NMB determined that Air Serv's cabin cleaning and lavatory servicing operations at San Francisco International Airport were subject to the RLA based on the substantial level of carrier control exercised by United Air Lines under its service agreement with Air Serv. *Air Serv Corp.*, 33 NMB 272 (2006). In 2008, the NMB determined that Air Serv's shuttle transportation operations in Memphis were subject to the RLA because of the degree of control exercised by FedEx, an air carrier. *See Air Serv Corp.*, 35 NMB 201 (2008). In 2011, the NMB found that Air Serv's security services operations were subject to RLA jurisdiction because of the significant degree of control exercised by various airlines with which Air Serv contracts. *Air Serv Corp.*, 38 NMB 113 (2011). These decisions, however, do not control the jurisdictional issue in the instant case. Because contracts and local practices might vary in a determinative manner for different employee groups, different operations, and in different locations, the NMB's opinion is based on the

record before it in each case. Therefore, to determine whether Air Serv is subject to the RLA in the instant case the NMB must consider the degree of direct or indirect control exercised by RLA carriers over Air Serv's LGA operations.

Carrier Control over Air Serv and its Employees

To determine whether there is jurisdictionally significant carrier control over a company, the NMB looks to several factors, including the extent of the carrier's control over the manner in which the company conducts its business, access to the company's operations and records, role in personnel decision, degree of supervision of the company's employees, whether employees are held out to the public as carrier employees, and control over employee training. *Signature Flight Support/Aircraft Serv. Int'l, Inc.*, 32 NMB 30 (2004); *John Menzies PLC, d/b/a Ogden Ground Servs., Inc.*, 30 NMB 405 (2003); *Signature Flight Support of Nevada*, 30 NMB 392 (2003); *Aeroground, Inc.*, 28 NMB 510 (2001); *Miami Aircraft Support*, 21 NMB 78 (1993). For the reasons discussed below, the record in the instant case does not establish that any carrier exercises sufficient control over Air Serv's shuttle operations at LGA to support a finding of RLA jurisdiction.

Air Serv's shuttle operations at LGA are provided pursuant to an agreement between Air Serv and LAAMCO. Air Serv does not contract directly with any common carrier by air. Air Serv argues that it is under the control of LAAMCO, which is a consortium of all carriers operating out of LGA, and therefore is under the control of carriers through LAAMCO. There is, however, insufficient record evidence that LAAMCO exercises the requisite degree of control over Air Serv's employees to justify a finding of RLA jurisdiction.

Under its contract, Air Serv provides transportation on a set schedule seven days a week and 24 hours a day. The carrier members of LAAMCO may set and unilaterally alter pick-up sites. The agreement also provides for monetary penalties for a missed route or an Air Serv driver found sleeping while on the job. The agreement for shuttle services also grants LAAMCO the right to audit Air Serv's records related to the invoices submitted by Air Serv. Air Serv owns and is responsible for the maintenance and upkeep of its buses. Air Serv must also obtain fuel for its shuttle buses. Neither LAAMCO nor any carrier member of LAAMCO shares workspace or equipment with Air Serv. Air Serv employees occupy a separate and distinct place within the Marine Terminal. According to Air Serv, it rents office space from LAAMCO at LGA and uses a break room provided by LAAMCO.

Air Serv supervises, trains, determines the wages of, and evaluates its own employees. With regard to hiring, Air Serv asserts that it "specifically determined whether it would hire an Air Serv Account Manager at LGA based on approval from the carriers." There is no evidence or assertion, however, that carrier approval is required to hire shuttle service employees. Air Serv also asserts that "carriers exert total control over whether an Air Serv employee will even remain on the LGA account," but offers no evidence in support of that assertion. Air Serv further contends that carrier employees "indirectly supervise" shuttle service employees by reporting complaints or observed misconduct. In support of this assertion, Air Serv provided an email exchange between USAir and Air Serv regarding a complaint about erratic driving. In response to the carrier complaint, Air Serv promised to investigate. There is no evidence, however, that discipline of any kind resulted from that investigation. Air Serv also states that it placed a driver on a "final written warning" based on a report from LAAMCO that the driver was smoking while his bus was idling in violation of Air Serv policies. In both instances, the carrier and LAAMCO merely reported that an incident occurred. Neither the carrier nor LAAMCO requested that a specific action be taken. Air Serv determined how to proceed without further input from either USAir or LAAMCO.

LAAMCO requires that Air Serv employees maintain "appearance standards that shall give the general public the best impression of LAAMCO and air transport," but they are not held out to the public as LAAMCO, LGA or carrier employees. Air Serv employees wear Air Serv uniforms adorned with the Air Serv logo.

In contrast to the instant case, the record before the NMB in prior decisions regarding Air Serv demonstrated significant and substantial control exercised by air carriers over the manner in which Air Serv conducted its business. In *Air Serv Corp.*, 33 NMB 272 (2006), the NMB found substantial control where United dictated a minimum level of staffing and its flight schedules affected the work schedules of Air Serv's SFO employees; United provided the equipment and supplies used by Air Serv employees; United provided rent-free office space; United had access to Air Serv's personnel, maintenance and training records and conducted periodic audits; United trained Air Serv's trainers and provided training materials; and United dictated the service procedures to be followed by Air Serv employees and imposed financial penalties for failure to comply with these procedures. United reported and requested investigation of conduct by Air Serv employees and there was evidence that Air Serv complied with United's requests regarding discipline of employees and work assignments. 33 NMB at 287-288.

The NMB found the exercise of significant control in *Air Serv Corp.*, 35 NMB 201 (2008), where FedEx: provided rent free office space and office equipment; determined the number and type of shuttle buses and provided the fuel to operate the buses; determined the hours of shifts and could unilaterally adjust the schedule; retained final authority to approve or reject an applicant based on the results of FedEx's security process; dictated grooming standards for employees; conducted audits and required certain records to be maintained; and effectively recommended discipline or termination of employees.

Finally, in *Air Serv Corp.*, 38 NMB 113 (2011), the carriers exerted substantial control over Air Serv's security operations by: dictating the staffing, scheduling, job duties and performance standards; approving overtime; retaining access to Air Serv's training, job performance and billing records and conducting regular audits; and effectively recommending discipline, discharge, and promotion of Air Serv employees.

Here, the service agreement does provide for audits and financial penalties for certain instances of non-performance. The carrier members of LAAMCO are able to specify pick up and arrival sites and alter those sites unilaterally. They do not however effectively recommend hiring, promotion, discipline or discharge. They also do not directly supervise or evaluate Air Serv employees, authorize overtime, set wage rates, or provide equipment and tools. Neither LAAMCO nor any air carrier mandate specific personal appearance standards or require Air Serv employees to wear LGA or carrier insignia. Accordingly, the record and the submissions of Air Serv and Stevens establish that neither LAAMCO nor any carrier exercises sufficient control over Air Serv to subject it to RLA jurisdiction.

CONCLUSION

Based on the record in this case and for the reasons discussed above, the NMB's opinion is that Air Serv and its shuttle service employees at LGA are not subject to the RLA.

By direction of the NATIONAL MEDIATION BOARD.

Mary L. Johnson
General Counsel

Copies to:

Anne G. Purcell
John A. Lambremont
Benson E. Pope
Meagan E. Jones
Joshua Parkhurst