



November 17, 2004

FLSA2004-21

Dear *Name**,

This is in response to your letter requesting an opinion on the application of the Fair Labor Standards Act (FLSA) to a specific affiliate (the Affiliate) of a group of airlines and to the U.S. holding company that owns the Affiliate. You wish confirmation that the Affiliate and holding company meet the Railway Labor Act's definition of "carrier" for purposes of applying Section 13(b)(3) of the FLSA. As you know, Section 13(b)(3) provides an overtime exemption for "any employee of a carrier by air subject to the provisions of Title II of the Railway Labor Act" (RLA).

You describe the Affiliate as the North American subsidiary of a global parent company (the Parent) that is the world's leading global distributor system (GDS) and technology provider. As such, it serves the marketing, sales, and distribution needs of the travel and tourism industries. You state that outsourcing has resulted in many of the traditional functions of the airlines, including their information technology (IT) systems, being handled by a few airline-related IT companies. These IT companies handle functions such as flight operation and schedule systems, baggage handling, passenger reservations, inventory management, departure control, financial recordkeeping and reporting systems. The Parent and its affiliates develop, market, and operate such systems.

You have further described the Parent as "...a leading application service provider (ASP) and IT provider to the airline industry" and state that currently 137 airlines use the company's sales system in their offices to provide passengers with reservations and related services. You state that "[B]oth airline offices and travel agencies are customers of the company, and using the company's GDS they are able to make bookings with 446 airlines representing more than 95 percent of the world's scheduled airline seats. The company's GDS data processing center serves more than 60,000 travel agency locations and more than 10,000 airline sales offices in over 200 markets worldwide. The Affiliate provides these services in North America through its marketing, sales, and technology employees."

You believe that the Affiliate and holding company qualify as "carriers" under the RLA and that their employees qualify for the Section 13(b)(3) exemption. You discuss your position in terms of the National Mediation Board's two-prong test in which (1) ownership or control is the first half of the test and (2) transportation-related service is the second half.

- (1) Regarding ownership or control: you state that the Affiliate is wholly owned by a U.S. holding company. The U.S. holding company is wholly owned by the Parent company. Sixty percent of the Parent is owned by a group of airlines and 40% is publicly traded. Based on this chain of ownership and the RLA's definition of a carrier to include "any company directly or indirectly owned or controlled by or under common control with any carrier," the first prong of the test is met.
- (2) Regarding the second prong, that services provided are related to transportation: you state that the Parent's IT services are utilized both by the airlines that are the partial owners of the Parent and also by unaffiliated airlines. Further, you state that "[T]hese air carriers depend on some of the systems and data provided by the company to operate their day-to-day flight operations in a safe and efficient manner."

You mention that the information technology services developed and marketed by the Parent "...include, *but are not limited to*, [italics added] services customized and specifically developed for the air-travel industry." In a telephone conversation with a member of my staff you explained that the GDS is also used to co-ordinate other modes of travel, such as travel by boat. Although you have not specified the significance or value of these air-transportation-related IT services relative to other services provided by the Parent, please note that if a review of the overall nature of the Parent's customers disclosed that the air-travel industry was *not* the Parent's primary focus, it would be difficult to concur that the second prong



of the test had been met. However, for the sake of this discussion, it is assumed that air-travel is the Parent's primary concern.

In support of your view that the Affiliate and holding company are carriers and that the two-pronged test has been met, you cite *Verrett v. The Sabre Group, Inc.*, 70 F. Supp. 2d 1277 (N.D. Okla. 1999), and *Thibodeaux v. Executive Jet International*, 328 F.3d 742 (11th Cir. 2003). These cases conclude that "a provider of customized management information services and computer reservation services to affiliated and non-affiliated airlines was a carrier subject to the RLA." 328 F.3d at 752 n. 39, citing *Verrett* 70 F. Supp. 2d at 1281-83. You find the situations in the Sabre case and the Affiliate's case to be virtually identical. Section 151 of the RLA relating to railroads (Subchapter I-General Provisions) defines "carrier" to include "...any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service in connection with the transportation...of property..."; 45 U.S.C. § 151. Section 181 of the RLA, (Subchapter II –Carriers by Air) extends the provisions of Subchapter I (except section 153) and the definition of "carrier" to cover air transportation. That section extends RLA coverage 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 of rendition of his service." 45 U.S.C. § 181

In a telephone conversation with a member of my staff, you described the airlines that own 60% of the Parent as large common carriers. Applying the Section 151 definition of a carrier to the common carriers by air that own the major portion of the global Parent, we conclude that the Affiliate would fall within the definition of "carrier." Based on this conclusion, we find that the employees are eligible for the Section 13(b)(3) exemption from the overtime provisions of the FLSA, provided they do not perform a substantial amount of nonexempt work (i.e., no more than 20% of the time worked may be devoted to work that does not bear a reasonably close relationship to the exempt type of transportation activities that bring the carrier under the RLA. See 29 CFR 786.1; Field Operations Handbook, ¶ 24jo1; opinion letter dated December 24, 1974.

You have given us very limited information regarding the holding company. To the extent that the holding company would satisfy the second prong of the National Mediation Board's test for assessing whether an entity is a carrier subject to the RLA, its employees who do not perform a substantial amount of nonexempt work also would qualify for exemption.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that the above information is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

Note: * The actual name(s) was removed to preserve privacy.