U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

August 17, 2004 **FLSA2004-9NA**

Dear ***Name****,*

This is in response to your request for an opinion on the application of the overtime provisions of the Fair Labor Standards Act (FLSA) to one of your clients.

Your client is a private employer that maintains three aircraft and leases a fourth aircraft to another corporate entity with which your client maintains an affiliate relationship. The aircraft include a Falcon 2000, a Falcon 900B, a Falcon 900EX, and a Falcon 20. They are used in the interstate and international transportation of company executives, senior managers, and sometimes customers and brokers. You state that the aircraft operations are an integral part of your client's business but do not state whether that business is providing air carrier service to the public. Your client does not have an air taxi and commercial operations (ATCO) certificate or an ATCO letter of registration from the Federal Aviation Administration. The aircraft are voluntarily operated in accordance with the Federal Aviations Regulations (FAR) Part 135 regulations for common carriers, rather than the less stringent regulations of FAR Part 91 for private carriers.

You ask whether your client qualifies for the FLSA overtime pay exemption for an employer which is a "carrier" subject to the Railway Labor Act, and mention two court cases which have given interpretations of that Act -- Verrett v. The Sabre Group, Inc., 70 F.Supp. 2d 1277, 1281 (N.D. Okla. 1999), and Delpro Co. v. Brotherhood Railway Carmen, 519 F.Supp. 842 (D. Del. 1981), aff'd 676 F.2d 960 (3rd Cir. 1982), cert. denied, 459 U.S. 989, 74 L.Ed 2d 384, 103 S.Ct. 343 (1982). More specifically, you ask whether flight attendants and flight dispatchers employed by your client would then be exempt from overtime pay requirements of the FLSA. You explain that duties of these employees are typical of those employees who have traditionally held these positions.

Section 13(b)(3) of the FLSA exempts from its overtime pay requirements, but not its minimum wage requirement, "any employee of a carrier by air subject to the provisions of Title II of the Railway Labor Act." Title II applies 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.

The National Mediation Board, which administers the Railway Labor Act, has taken the position that any carrier that has been issued an ATCO certificate or an ATCO letter of registration by the Federal Aviation Administration and is engaged in interstate operations is a common carrier by air and subject to the Railway Labor Act (RLA). See Elliot Flying Service, Inc., 9 NMB 146, 1981 WL 138611. Further, the courts have held that a carrier that does not hold such a certificate or letter may still be an air carrier subject to the RLA if the carrier holds itself out to the public as being willing to transport for hire, indiscriminately. See Thibobeaux v. Executive Jet International, Inc., 328 F.3d 742 (5th Cir. 2003).

These factors lead us to conclude that the carrier does not meet this common law definition of a common carrier for purposes of the RLA. Nothing in your letter indicates that your client holds itself out as an air carrier to the public, or a definable segment of the public, as being willing to transport for hire and to do so indiscriminately for those who meet the required terms. Based on these findings, your description of your client's use of the aircraft, and the absence of either an ATCO certificate or an ATCO letter of registration, it is our position that your client is not a common carrier subject to the Railway Labor Act. Thus, no one engaged in the described flight operations, including the flight attendants and flight dispatchers about whom you inquire, would be eligible for the overtime exemption found in Section 13(b)(3) of the FLSA.

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 the above information is responsive to your inquiry.

Sincerely,

Barbara Relerford
Office of Enforcement Policy
Fair Labor Standards Team

***** *Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*