



**NATIONAL MEDIATION BOARD**

WASHINGTON, DC 20572

(202) 692-5000

In the Matter of the  
Application of the

**INDEPENDENT RAILWAY  
SUPERVISORS ASSOCIATION**

alleging a representation dispute  
pursuant to Section 2, Ninth, of  
the Railway Labor Act, as  
amended

involving employees of

**BOMBARDIER TRANSIT SYSTEMS  
CORPORATION**

32 NMB No. 23

CASE NO. R-7037  
(File No. CR-6870)

DETERMINATION OF  
JURISDICTION -  
DISMISSAL

January 21, 2005

This determination addresses the application of the Independent Railway Supervisors Association (IRSA or Organization) alleging a representation dispute pursuant to the Railway Labor Act<sup>1</sup> (RLA or Act), 45 U.S.C. § 152, Ninth, (Section 2, Ninth) among “Track Supervisors, Electrical Systems Supervisors, Vehicle Supervisors, Plant Supervisors, Operations Center Supervisors, and Customer Service Supervisors” (Supervisors) at Bombardier Transit Systems Corporation’s (Bombardier) JFK International Airport AirTrain (JFK AirTrain).<sup>2</sup> At the time this application was filed, these

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<sup>1</sup> 45 U.S.C. § 151, *et seq.*

<sup>2</sup> Counsel for Bombardier clarified that the correct name of the employer/entity in question is Bombardier Transit Systems Corporation. Neither “JFK AirTrain” nor “Total Transit Systems” are legal entities. “JFK AirTrain” is the name of the light rail system that carries passengers to and from the

Supervisors were not represented by any organization or individual. However, the JFK AirTrain operations and maintenance employees they supervise are currently represented by the International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 589 (IBEW), under the National Labor Relations Act (NLRA).

For the reasons set forth below, the National Mediation Board (Board or NMB) finds that Bombardier and its JFK AirTrain employees are not subject to the RLA. Therefore, the Board dismisses the application.

### PROCEDURAL BACKGROUND

On September 29, 2004, IRSA filed an application alleging a representation dispute among Bombardier's Supervisors at the JFK AirTrain. The application was assigned NMB File No. CR-6870 in order to conduct a pre-docketing investigation, and Cristina A. Bonaca was assigned as the Investigator.

Both Bombardier and IRSA filed their initial position statements on October 28, 2004. The Investigator requested additional information which was provided by IRSA on December 1, 2004, and by Bombardier on December 3, 2004.

### ISSUE

Is Bombardier's JFK AirTrain subject to the jurisdiction of the RLA?

### CONTENTIONS

#### IRSA

IRSA contends that Bombardier's JFK AirTrain is a common carrier by railroad subject to the jurisdiction of the RLA, and not an "interurban, or suburban electric railway"

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terminals of JFK Airport. "Total Transit Systems" is an unincorporated division of Bombardier.

excluded from coverage under the Act. 45 U.S.C. § 151, First (Section 1, First). The Organization states: “AirTrain, as it connects passengers to the world and not just the neighborhood, is exactly the type of transportation system that Congress sought to regulate . . . . It is clear that AirTrain is a carrier under the RLA . . . .”

In the alternative, IRSA argues that Bombardier’s JFK AirTrain is subject to the RLA as a non-carrier because: 1) its Supervisors perform work traditionally performed by rail carriers, as they are first line Supervisors of hourly operations and maintenance employees including those who operate a train (from a control room), station agents, vehicle, plant and track maintenance employees; and 2) the JFK AirTrain is both owned and controlled by the Port Authority of New York and New Jersey (Port Authority).

The Organization states that the Port Authority operates and owns, as a subsidiary, the Port Authority Trans-Hudson Corporation (PATH) which operates a “carrier” under the RLA. In addition, IRSA contends that the Port Authority exercises extensive control over the JFK AirTrain, including control over: service requirements; the number of employees to be hired; and the direct supervision of and the authority to hire and fire the Operations and Maintenance Director, who is the immediate supervisor for the 19 Supervisors at issue. Further, the Organization states that the Port Authority has complete access to all JFK AirTrain records and requires Bombardier to file monthly reports detailing certain JFK AirTrain operations. Additionally, IRSA states that the Port Authority established the initial qualifications and training programs for each employment title at the JFK AirTrain, and continues to review and approve any and all modifications to qualifications and training programs.

In addition, IRSA contends that the Supervisors at issue are not management officials.

Finally, the Organization argues that the fact that a single unfair labor practice (ULP) charge was filed in Region 29 of the National Labor Relations Board (NLRB) against

Bombardier in connection with the JFK AirTrain, and later withdrawn, is insufficient to establish NLRB jurisdiction.

Bombardier

Bombardier urges the Board to deny IRSA's application for a representation investigation among the Supervisors at the JFK AirTrain. Bombardier asserts that the Board lacks jurisdiction for a number of reasons.

First, Bombardier contends that the RLA only covers statutorily-defined carriers, and that the JFK AirTrain Bombardier operates and maintains is an interurban electric railway -- specifically excluded from coverage under the Act.

Second, Bombardier argues that IRSA cannot successfully assert that it, as a non-carrier, is subject to the RLA. To do so, IRSA must show: 1) that Bombardier's Supervisors perform work traditionally performed by rail carrier employees; and 2) that Bombardier is directly or indirectly owned or controlled by, or under common control with, a carrier or carriers -- and IRSA cannot satisfy either element of the test. Bombardier asserts that carrier employees do not traditionally supervise the "operation and maintenance of a remote-controlled interurban electric railway." In addition, Bombardier argues that the Port Authority does not "control" Bombardier within the meaning of the term in the second prong of the test.

Third, Bombardier asserts that the NLRB has exercised jurisdiction over the JFK AirTrain operations, as well as the AirTrain that Bombardier operates at Liberty International Airport in Newark, New Jersey (Newark AirTrain).

Finally, even if the Board were to conclude it had jurisdiction over the Supervisors at issue, Bombardier contends that these employees are management officials and ineligible for representation under the RLA.

FINDINGS OF LAW

Determination of the issues in this case is governed by the RLA, as amended, 45 U.S.C. § 151, *et seq.* Accordingly, the Board finds as follows:

I.

Section 1, First of the Act provides:

The term "carrier" includes any railroad subject to the jurisdiction of the Surface Transportation Board, any express company that would have been subject to subtitle IV of title 49, United States Code . . . and any company which is directly or indirectly owned or controlled or under common control with any carrier . . . which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation . . . and handling of property transported by railroad . . . . *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.

II.

IRSA is a labor organization and/or representative as provided by 45 U.S.C. § 151, Sixth, and § 152, Ninth.

III.

45 U.S.C. § 152, Fourth, gives employees subject to its provisions "the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to

determine who shall be the representative of the craft or class for purposes of this chapter.”

IV.

45 U.S.C. § 152, Ninth, provides that the Board has the duty to investigate representation disputes and shall designate who may participate as eligible voters in the event an election is required.

STATEMENT OF FACTS

Bombardier and JFK AirTrain

The “Air-Rail Transit Consortium” was a partnership formed for the building of the JFK AirTrain which completed construction in 2003. The Consortium included Bombardier and four construction companies, including: Slattery Associates, Inc., Perini Corporation, Karl Koch Erecting Company, Inc., and Skanska (USA) Inc. None of the four construction companies are involved in the operation of a railroad or airline.

Bombardier is an American corporation and a wholly-owned subsidiary of Bombardier, Inc., a Canadian corporation based in Montreal, Quebec, Canada. Bombardier, Inc. has three main businesses: aircraft manufacturing, railroad equipment manufacturing, and finance. Neither Bombardier or its parent company owns or operates any railroads or airlines that operate in interstate commerce.

Bombardier operates the JFK AirTrain, an electricity-powered light railway that runs from two locations in Queens, New York (Jamaica and Howard Beach) to JFK (also in Queens, NY), and which began operations on December 17, 2003. Bombardier operates the JFK AirTrain pursuant to a contract with the Port Authority, which owns the railway’s equipment and the tracks on which it runs. Prior to the construction of the JFK AirTrain, cabs, buses, limousines, and private cars provided transportation to and around JFK. Bombardier’s website describes the JFK AirTrain and states: “Under contract

with the Port Authority of New York and New Jersey, USA, the AirRail Transit Consortium (ARTC) is responsible for the turnkey design and construction of the driverless Advanced Rapid Transit (ART) system to access New York's JFK International Airport. The mandate includes operations and maintenance for up to 15 years following implementation.”

Bombardier's JFK AirTrain is a fully automated driverless light railway system. The JFK AirTrain has 10 stations and 8.1 miles of track. The 10 stations are elevated on pre-cast, post-tensioned concrete segments. They are fully enclosed, heated and air-conditioned, with platform doors, wide escalators, large glass elevators and moving walkways to connect them to the airline terminals. The JFK AirTrain system is controlled by a moving block signaling network and run under automatic train control (ATC), which transmits details of each train's location back to the central control hub from where the whole system is monitored. Trains are also equipped with a two-way radio for communication with the control center.

The JFK AirTrain: is not physically connected to any railroad; carries no freight or mail, only passengers; has no engineers or conductors on board; and is operated by remote control from an operations center located at JFK. A map from the Port Authority website shows that the JFK AirTrain has three service routes: 1) the Airline Terminal route, which is the Inner Loop with stops at the JFK Terminals; 2) the Howard Beach route, the starting point of the line where there are connections to the MTA [Metro Transit Authority] New York City Transit [NYCT] subway; and 3) the Jamaica Station route, where there are connections to the Long Island Rail Road [LIRR], MTA NYCT subway, and local buses.

#### Bombardier's JFK AirTrain Employees

The Supervisors at JFK's AirTrain are employed solely by Bombardier. Bombardier is the only entity that: hires, disciplines, evaluates, and discharges the Supervisors; directs and manages their work; and pays for their salaries and benefits. According to the October 26, 2004 declaration of Nathaniel Ham, Operations and Maintenance Director of the

JFK AirTrain, no other entity exercises any control over the Supervisors' hiring, discipline, evaluations, firing, and management. Nathaniel Ham further stated:

The other entities the Union names in its application, AirRail Transit Consortium, Slattery Associates, Inc., Perini Corporation, Karl Koch Erecting Company, Inc., and Skanska (USA) Inc., do not hire, discipline, evaluate, or discharge any of the supervisors, direct or manage the supervisors' work, or compensate the supervisors in any way. Nor does the Port Authority of New York and New Jersey perform any of those activities.

Bombardier employs 139 employees in its operation of the JFK AirTrain, including the 19 Supervisors at issue here. All JFK AirTrain employees receive pay checks issued by Bombardier. The employees managed by the Supervisors include: customer service agents; storekeepers; plant tradespersons; track technicians; support shop technicians; electronic technicians; vehicle service technicians; vehicle technicians; and operations center operators. The non-supervisory operations and maintenance employees at Bombardier's JFK AirTrain are covered by a collective bargaining agreement between Bombardier and the IBEW, effective March 1, 2003-February 29, 2008.

The Supervisors are assigned to the following areas: six are stationed at the Operations Center; six at Customer Service; three at Maintenance; one in the Track Department; two in the Electronics Department; and one in the Plant area. Further, according to the declaration of Nathaniel Ham, the Supervisors have substantial managerial authority including the power to: dismiss or discipline employees or effectively recommend the same; supervise; authorize and grant overtime; establish assignments of employees under their management; and create policy within their departments. The Supervisors' authority is not constrained by operating or policy manuals.



IRSA contends that the Operating and Maintenance Director is the immediate supervisor for the JFK AirTrain Supervisors. IRSA argues that the Supervisors are “first line supervisors of hourly production and maintenance employees . . . and are not managers as they cannot hire nor fire, cannot assign overtime without prior approval, cannot discipline but can only draft changes that must be reviewed and approved by higher level supervision, cannot spend AirTrain’s funds and cannot create carrier policy.” However, the Organization’s assertions were not supported by any declaration or supporting evidence.

#### Bombardier’s Agreement with the Port Authority

In 1921, New York and New Jersey entered into a bi-state compact creating the Port Authority. The Port Authority manages and maintains the bridges, tunnels, bus terminals, airports, PATH, and seaport that are critical to the bi-state region’s trade and transportation capabilities. The PATH is a wholly-owned subsidiary of the Port Authority and operates an interstate railway system.

The Port Authority has an operations and maintenance contract with Bombardier covering the “New York Airport Access Program, Jamaica-JFK with Howard Beach Light Rail System,” effective April 29, 1998. The contract provides, in relevant part, as follows:

- Article 3.1, Contractor’s Responsibilities, provides that Bombardier is responsible for “recruiting, hiring, and employing all operations and maintenance personnel,” and “implementing organizational processes and procedures such as drug testing, labor policies, rostering, training, etc.”
- Article 3.1 provides that Bombardier is responsible for all work necessary for operating and maintaining the JFK AirTrain system. Bombardier is required to give the Port Authority access to all

information necessary to verify Bombardier's compliance with the terms of the contract.

- Article 3.3.1 provides that Bombardier “shall assign . . . a General Manager, who shall be directly employed by [Bombardier], to be responsible for overseeing and directing the operation and maintenance services . . . . The Port Authority retains the right to approve [Bombardier's] selection of the General Manager . . . . [and he/she] may not be removed without the prior written consent of the Port Authority. The General Manager shall be responsible to the Port Authority and shall cooperate with the Port Authority. . . .”
- Articles 3.3.3 and 3.3.4 require that Bombardier submit monthly System Assurance and Service Monitoring Reports, and monthly management reports detailing the performance of the JFK AirTrain System to the Port Authority. In addition, Bombardier is required to keep detailed records and inventory data to permit Port Authority to review compliance.
- Articles 4 and 5 provide that the contract is extendable in three five-year periods at the option of the Port Authority.

## DISCUSSION

### I.

#### Jurisdiction

Bombardier contends that the Board should decline to exercise jurisdiction in this matter because the NLRB has already exercised jurisdiction over Bombardier's JFK AirTrain and the Newark AirTrain. Specifically, Bombardier refers to April 2004, when NLRB Region 29 investigated a ULP charge filed against Bombardier. The charge alleged that Bombardier

“has unilaterally changed the terms and conditions of its contract with [IBEW], by allowing non-union employees to perform unit work [at the JFK AirTrain].” The charge was withdrawn in June of 2004. Bombardier also notes, in support of its contention, that the NLRB investigated two ULPs and held multiple elections at the Newark AirTrain.

The fact that the NLRB has previously asserted jurisdiction is not determinative, because there is no evidence that the jurisdictional issue was raised by any party in proceedings before the NLRB. *See Inter-Rail Transport of Jacksonville, LLC*, 31 NMB 478, 483 (2004). In recent years, the NLRB has chosen to refer unresolved jurisdictional questions to the NMB and abide by its decision. *See Signature Flight Support/Aircraft Serv. Int’l, Inc.*, 32 NMB 30 (2004); *John Menzies, PLC d/b/a Ogden Servs., Inc.*, 31 NMB 490 (2004); *International Cargo Marketing Consultants d/b/a Alliance Air*, 31 NMB 396 (2004).

## II.

### Applicable Legal Standards

Under Section 151, First, an entity may be a carrier either directly, by operating a railroad, or indirectly as a subsidiary or derivative carrier. *North Carolina State Ports Auth.*, 26 NMB 305, 316 (1999); *see also Federal Express Corp.*, 23 NMB 32, 74-5 (1995). A derivative or subsidiary carrier is one that is “directly or indirectly owned or controlled by or under common control with any carrier by railroad.” Section 1, First.

## III.

### Is Bombardier’s JFK AirTrain A Carrier Under Section 1, First, Of The RLA?

In order to be a carrier by railroad under Section 1, First, of the RLA, most entities must be subject to the Interstate Commerce Act (ICA), 49 U.S.C. § 10101, *et seq.* An entity which provides “common carrier railroad transportation for

compensation” is a rail carrier under the ICA. 49 U.S.C. § 10102(5). However, rail operations engaged solely in intrastate transportation are excluded from coverage, unless the transportation is a link in the interstate transportation of goods and passengers. See *The Railway Labor Act* at 69 (Douglas L. Leslie et al. eds., 1995); *Staten Island Rapid Transit Operating Auth. v. ICC*, 718 F.2d 533 (2d Cir. 1983).

Excluded from the RLA’s definition of a carrier is “any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation.” Section 1, First.

This particular exclusion is limited to an electrified railroad line, if the line so operated is not otherwise used directly or indirectly in the movement of freight and passengers associated with a general system of [interstate] transportation subject to the ICA. Where a line connects with a general rail system and is used to connect with service over that system, then the proviso would not apply.

See *The Railway Labor Act*, above, at 71.

Bombardier’s JFK AirTrain is excluded from the RLA’s definition of a carrier, as it falls within the proviso excluding a “street, interurban, or suburban electric railway.” Section 1, First. Both the Board and the courts have held that electric passenger trains operating entirely within the City of New York, and therefore not engaged in interstate commerce, are “interurban electric railways” not subject to the RLA. See *Yang v. New York City Transit Auth.*, 2002 WL 313199119 (E.D.N.Y.) (City transit authority was not a “carrier” within meaning of the RLA; transportation system operated by transit authority was solely within the city, entirely electric, and did not connect with any steam-railroad system); *Railway Labor Executives’ Ass’n v. Interstate Commerce Comm’n*, 859 F.2d 996 (D.C. Cir 1988) (Court upheld the ICC’s finding that the Staten Island Rapid Transit Operating Authority’s (SIRTOA) past participation in the interstate system did not render it a carrier for purposes of the RLA where it no longer had a legal right or obligation to

allow passage of interstate freight over its line); *Metropolitan Transp. Auth.*, 8 NMB 1 (1980) (Board held that it does not exercise jurisdiction over the New York City Transit Authority).

IRSA argues that the JFK AirTrain does not fall within the proviso excluding interurban electric railways because: “AirTrain is designed not for commutation within a suburban or urban region but, rather, as a shuttle service connecting New York City Transit Authority and Long Island Rail Road passengers to the Airport and, in doing so, connecting those passengers to the global transportation network.” Further, the Organization contends that AirTrain: “does not serve communities or even cities. Rather it serves a regional or global transportation network . . . as it connects passengers to the world and not just the neighborhood.”

The Board considered a similar argument in *UTDC Transit Servs., Inc.*, 17 NMB 343 (1990), where one of the participants argued that Tri-County Rail was not a carrier under the RLA, because it was an intrastate rail service not subject to the ICA. *Id.* at 344. The Board noted: “Though the Interstate Commerce Act appears to exempt transportation of goods or passengers exclusively within the boundaries of a single state, such transportation is covered if it is a link in the interstate transportation of goods or passengers.” *Id.* at 358. Tri-County Rail’s commuter trains ran only during morning and afternoon rush hour, made 17 stops including Miami, Fort Lauderdale/Hollywood, and West Palm Beach Airports, and did not have an interline arrangement with the airports or air carriers. *Id.* at 346. The Board found that Tri-County Rail’s passengers were generally not in the stream of interstate commerce, as it was one of many options passengers might use to get to the airports. *Id.* at 361; *see also U.S. v. Yellow Cab*, 332 U.S. 218, 231-32 (1947) (In establishing principles for when a passenger is in the stream of interstate commerce, and considering the status of taxi cabs which delivered passengers between railroad stations, the Court noted: “What happens prior or subsequent to that rail journey . . . is not a constituent part of the interstate movement. The traveler has complete freedom to arrive at or leave the station by taxicab, trolley, bus . . . . From the standpoints of time and continuity, the taxicab

trip might be quite distinct and separate from the interstate journey.”).

Similar to the Tri-County Rail, Bombardier’s JFK AirTrain falls within Section 1, First’s, proviso excluding interurban electric railways because it is an entirely electric passenger railway which operates solely in Queens, New York, and does not cross any state lines. The passengers on the JFK AirTrain are traveling solely within one borough of New York City, and the JFK AirTrain is only one method of arriving at the airport, as passengers can drive or utilize taxi cabs or buses. *UTDC Transit Servs., Inc., above*, at 361. Further, the JFK AirTrain does not have tracks physically connected to a “general steam-railroad,” and does not carry freight or allow the passage of freight over its tracks. In sum, based on the above discussion, Bombardier’s JFK AirTrain is not a carrier for purposes of the RLA.

#### IV.

#### Is Bombardier’s JFK AirTrain A Non-Carrier Subject To The Jurisdiction Of The RLA?

When an employer is not a rail or air carrier engaged in the transportation of freight or passengers, the Board applies a two-part test in determining whether the employer and its employees are subject to the RLA. *Aircraft Servs. Int’l Group, Inc.*, 31 NMB 361, 370 (2004); *AvEx Flight Support*, 30 NMB 355, 361 (2003); *UTDC Transit Servs., Inc., above* at 352-53. First, the Board determines whether the nature of the work is that traditionally performed by employees of rail or air carriers -- the function test. Second, the Board determines whether the employer is directly or indirectly owned or controlled by, or under common control with a carrier or carriers -- the control test. Both parts of the test must be satisfied for the Board to assert jurisdiction. *Id.*

Neither Bombardier or its parent company owns or operates any railroads or airlines that operate in interstate commerce, and as such, Bombardier does not operate a carrier subject to the RLA. Therefore, to determine whether Bombardier's JFK AirTrain is subject to the RLA, the Board must consider the nature of the work performed by its employees and the degree of control exercised by a rail carrier.

A. Bombardier's JFK AirTrain Employees Perform Work Traditionally Performed By Employees Of Rail Carriers

Bombardier's JFK AirTrain Supervisors manage all operations and maintenance employees, including: customer service agents; storekeepers; plant tradespersons; track technicians; support shop technicians; electronic technicians; vehicle service technicians; vehicle technicians; and operations center operators. The JFK AirTrain Supervisors oversee the operation and maintenance of an automated electric railway that takes passengers to and from the airport and to destinations within the airport.

The JFK AirTrain employees provide railway service operations and maintain the equipment required to provide electric railway service -- functions that are essential to the operation of the railway. The work of the JFK AirTrain Supervisors is work traditionally performed by employees of rail carriers. See *UTDC Transit Services, Inc.*, 17 NMB 343, 350 (1990). Therefore, the Board finds that the work performed by Bombardier's JFK AirTrain Supervisors meets the first part of the two-part test.

B. Bombardier's JFK AirTrain Is Not Directly Or Indirectly Owned Or Controlled By A Carrier

With regard to the second part of the test, the Board examines whether a carrier either owns or exerts a material degree of control over the entity in question, for that entity to be deemed a carrier. See Section 1, First ("The term carrier includes . . . any company which is directly or indirectly owned or controlled by or under common control with any carrier. . . ."); *C.W.S., Inc.*, 17 NMB 371, 372-73 (1990). To determine

whether there is carrier control over a company, the Board 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 decisions; degree of supervision of the company's employees; and control over employee training. *International Cargo Marketing Consultants d/b/a Alliance Air*, 31 NMB 396, 407 (2004); *John Menzies PLC d/b/a Ogden Ground Servs.*, 30 NMB 405, 418 (2003); *Miami Aircraft Support*, 21 NMB 78, 81 (1993).

IRSA cannot successfully establish ownership or control by a carrier by asserting that Bombardier owns or controls the JFK AirTrain, because neither Bombardier or its parent company are carriers as defined by the RLA. Therefore, the Organization makes an alternative argument that the JFK AirTrain is instead owned and controlled by the Port Authority. While IRSA acknowledges that the Port Authority is not a carrier for purposes of RLA jurisdiction, it notes that the PATH is a wholly-owned subsidiary of the Port Authority that operates an interstate railway system. *See Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990); *Port Authority Trans-Hudson Corp.*, 28 NMB 35 (2000) (Railway Independent Transit Union certified as representative of PATH's Carmen).

However, this argument fails because while the Port Authority may own PATH, a railway carrier operating in interstate commerce, the Port Authority itself is not a "carrier" for purposes of the RLA. PATH is only one of the many subsidiary entities that the Port Authority, a non-carrier, owns and operates. The Board has held that common ownership of a carrier and a non-carrier by a non-carrier holding company is insufficient to satisfy the ownership requirement. *See TNT Skypak, Inc.*, 20 NMB 153, 159 (1993); *Eastern Aviation Serv., Inc.*, 5 NMB 53 (1970).

Moreover, while the contract between the Port Authority and Bombardier evidences some control over Bombardier's operation of the JFK AirTrain, the bulk of control remains with Bombardier. Bombardier issues the pay checks to its



employees at the JFK AirTrain and is responsible for: recruiting, hiring, and employing all operations and maintenance personnel; implementing organizational processes and procedures including drug testing, labor policies, and training; and all work related to operating and maintaining the JFK AirTrain system. Further, Nathaniel Ham, Operations and Maintenance Director of the JFK AirTrain, stated that PATH does not “hire, discipline, evaluate, or discharge any of the supervisors, direct or manage the supervisors’ work, or compensate the supervisors in any way.”

While the contract provides that the General Manager of the JFK AirTrain, with overall supervisory responsibility for operation and maintenance services, must be approved by the Port Authority and is “responsible” to the Port Authority, the General Manager is still selected and paid by Bombardier. Furthermore, the General Manager is responsible to the Port Authority in the same manner that Bombardier is responsible to the Port Authority -- namely in performance of the terms of the contract. Bombardier is the ultimate employer of all JFK AirTrain employees -- including all Supervisors, and the General Manager.

The contract requires that Bombardier give the Port Authority access to certain information, and provide them with monthly reporting of the JFK AirTrain system. However, the fact that the Port Authority monitors the performance of the JFK AirTrain system and can access records if needed, does not equate to substantial control over Bombardier’s management and operation of the JFK AirTrain system and its employees.

Therefore, based on the above discussion, Bombardier’s JFK AirTrain is neither directly or indirectly owned or controlled by a carrier.

#### CONCLUSION AND DISMISSAL

The Board finds that Bombardier’s JFK AirTrain is not a carrier as defined in Section 1, First. The issue of whether Bombardier’s JFK AirTrain Supervisors are management

officials does not need to be addressed. Accordingly, Bombardier's JFK AirTrain does not fall under the Board's jurisdiction. Therefore, the case is docketed as NMB Case No. R-7037, and IRSA's application is dismissed.

By direction of the NATIONAL MEDIATION BOARD.

A handwritten signature in cursive script that reads "Mary L. Johnson".

Mary L. Johnson  
General Counsel

Copies to:

Paul P. Rooney, Esq.

David L. Weissman, Esq.

Charles Curtin

Howard Wien, Esq.