

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

ABM ONSITE SERVICES-WEST, INC.

Employer

and

Case 19-RC-144377

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE
WORKERS, DISTRICT LODGE W24,
AFL-CIO¹

Petitioner

DECISION AND DIRECTION OF ELECTION

The above-captioned matter is before the National Labor Relations Board (“the Board”) upon a petition duly filed under § 9(c) of the National Labor Relations Act (“the Act”), as amended. Pursuant to the provisions of § 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I make the following findings and conclusions.²

I. SUMMARY

The Employer operates the baggage handling system at Portland International Airport (“the Airport”) in Portland, Oregon. The Employer employs 23 jammer technicians, 4 dispatchers, 4 supervisors, an administrative assistant, and a Facility Manager at the Airport. Petitioner filed the instant petition seeking to represent all full-time and regular part-time jammer technicians and dispatchers employed by the Employer at the Airport. The petitioned-for unit is comprised of approximately 27

¹ The names of the Employer and Petitioner appear as amended at hearing.

² The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of § 9(c)(1) and §§ 2(6) and (7) of the Act. At hearing, the parties agreed that, following the hearing, the Employer would search its records for certain documents subpoenaed by Petitioner and would produce such documents, if they existed, by January 27, 2015. The hearing officer ruled that any documents produced would be admitted as Board Exhibit 2. The Employer filed a motion for an extension of time to produce the documents and ultimately produced the documents on January 28, 2015. The documents have been received in the record as Board Exhibit 2, and the parties were given the opportunity to make any arguments concerning the relevance and materiality of the documents in their respective briefs. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.

employees. The Employer stated at hearing that it does not dispute the appropriateness of the petitioned-for unit in the event that it is found that the Employer falls under the jurisdiction of the Board.

However, the Employer contends that I should dismiss the petition because the Employer is subject to the Railway Labor Act (“the RLA”), and, thus, falls under the National Mediation Board’s (“the NMB”) jurisdiction. Alternatively, the Employer contends that I should refer this case to the Board so that it may seek an advisory opinion from the NMB on the jurisdictional issue in this case. Petitioner contends that the Employer is not subject to the RLA but instead falls under the Board’s jurisdiction. Accordingly, Petitioner requests that I direct an election in this case because there are no other issues preventing further processing of its petition.

I have carefully reviewed and considered the record evidence and the arguments of the parties at both the hearing and in their post-hearing briefs.³ I find that the Board has jurisdiction over the Employer based on the factual similarity of this case to cases in which the NMB has declined jurisdiction. Accordingly, I shall direct an election in the unit described below.

Below, I have set forth the record evidence relating to the factors that the NMB considers in determining its jurisdiction over employers. After the record evidence section, I have set forth my analysis of the appropriate legal standards and the application of those standards to the record before me. Following my analysis, I have set forth the details of the directed election and the procedures for requesting review of this decision.

II. RECORD EVIDENCE⁴

A. Overview of Employer Operations

The Employer has operated the baggage handling system at the Airport since it purchased Linc Facility Services, LLC (“Linc”) and assumed all of its contracts, including its contract with the Portland Airlines Consortium (“PAC”) to operate the Airport’s baggage handling system. The baggage handling system contract reveals that PAC was formed to operate and maintain the baggage handling system and is party to a “consortium agreement” related to the operation of the system with the Port of Portland (“the Port”), which operates the Airport and owns the baggage system. PAC is governed by a committee comprised of representatives of PAC’s General Manager and the airlines operating out of the Airport. PAC’s General Manager is responsible for

³ The Employer and the Union timely filed their respective post-hearing briefs.

⁴ The Employer called its Facility Manager and Branch Manager as witnesses. Petitioner called two dispatchers as witnesses. To avoid confusion later in this decision, the Facility Manager was initially employed by the Employer in its Airport operations as a supervisor prior to her promotion to the Facility Manager position in about 2014.

managing, coordinating, and administering the baggage handling system contract with the Employer.

Linc entered into the contract with PAC around August 2010, and the contract has been extended once since the Employer purchased Linc. The current contract is set to expire sometime in 2016. The date of the Employer's assumption of the PAC contract is unclear in the record, as the Employer's Facility Manager testified that the purchase of Linc occurred "some months after this contract was in agreement." However, a dispatcher testified that he was hired by Linc to work in his current position in October 2011, over a year after the 2010 contract had been executed.

In addition to operating the baggage handling system at the Airport, the Employer also provides janitorial, parking, facilities engineering, security, and landscaping services at various locations. It does not operate any baggage handling systems other than the system at the Airport, though it does provide janitorial services at some other airports. The record does not detail the number and types of contracts or the number and types of employees the Employer has in the Portland area.

At the Airport, in addition to the jammer technicians and dispatchers whom Petitioner seeks to represent, the Employer employs four supervisors, an administrative assistant, and a Facility Manager. The Facility Manager works out of an office at the Airport, which is provided to the Employer at no cost.

The Facility Manager reports to a Branch Manager, who works out of a separate branch office in Portland, which is not located at the Airport. The Branch Manager oversees the Employer's contracts in Oregon, Washington, Alaska, and Utah, including the contract to operate the baggage handling system at the Airport. A Human Resources Manager also works out of the branch office.

The Employer maintains an office and staff in San Francisco, California. The record does not reveal all the functions performed by the San Francisco office staff but does reveal that the office maintains certain personnel-related documents, such as tax forms, and employs an accounting clerk, who has fielded at least some questions about invoices the Employer provides to PAC.

B. Nature of the Work Performed

1. Construction and Operation of the Baggage Handling System

The Port, which owns the baggage handling system, completed construction of the south side of the baggage handling system and began operating it around November 2010. The north side of the system was completed and began operating around July 2011.

The baggage handling system was constructed to comply with baggage screening requirements of the United States Transportation Security Administration

("TSA"), which was established in 2001. The baggage system is comprised of a conveyor belt system that is approximately 5 miles long. The conveyor belt begins at the ticket counter, where airline employees tag passengers' checked baggage and place it on the belt. The belt carries the baggage into a secured area on the lower level of the Airport, where it is screened with TSA equipment and is sometimes selected for TSA screening in the checked bag resolution area. A computerized scanning system sorts and distributes baggage within the baggage handling system so that it reaches the appropriate airline bag wells. At the bag wells, airlines load baggage from baggage carousels onto their carts, which are connected to vehicles called "tugs" and taken to the appropriate airplanes for loading.

Several types of baggage are handled differently from the balance of baggage within the handling system. Oversized and odd sized baggage are tagged by the airlines at the ticket counter and then carried by passengers to the north or south side of the Airport and given to TSA agents for hand-screening. The TSA agents then put the baggage on a belt that carries it to an area where the Employer's jammer technicians load it onto an electric vehicle and take it to the correct bag well or to the airplane if needed. Late baggage, meaning baggage going through the baggage handling system close to the time of an airplane's departure, is transported by the Employer's jammer technicians directly from the ticket counter to the bag well or airplane, so that it can be loaded on time. Misrouted baggage, meaning baggage that the system is unable to route (e.g., because of the placement of a tag in a position where it cannot be scanned), goes to a run-out belt at the end of the system or sometimes reaches the wrong bag well. The Employer's jammer technicians use electric vehicles to move misrouted baggage to the correct bag well or to the airplane, if necessary.

2. Work Performed by Dispatchers

Dispatchers monitor the baggage handling system from a control room on the lower level of the Airport. There, they view an array of monitors that display different parts of the system and light indicators signaling something is holding up the system, like a jammed piece of baggage or a caught strap. When there is a bag jam on a conveyor belt, the belt stops, resulting in a delay in the movement of baggage and sometimes also resulting in baggage cascading back to the airlines' ticket counters and interfering with the airlines' ability to check in passengers. When dispatchers see a jam, they call jammer technicians on the radio and instruct them to clear the jam.

Dispatchers also field the jammer technicians' calls from a work area called the "manual encode station," where the jammer technicians manually scan and route baggage that the computerized scanners within the system cannot recognize. The jammer technicians tell the dispatchers that the system is not recognizing a piece of baggage, and the dispatchers gather information about the baggage, for example by contacting airline employees, in order to determine where the baggage should go.

Dispatchers also communicate with airline employees about any other issues within the baggage handling system that need to be resolved. For example, airline

employees call dispatchers when bags are missing from airline bag wells, and the dispatchers then communicate with jammer technicians, a supervisor, or the Facility Manager to find the lost bags. Dispatchers also directly communicate with PAC's General Manager, who sometimes visits the control room to ask about operational issues. Further, dispatchers communicate with the Port's maintenance operation control about any maintenance issues within the system and communicate with TSA agents as needed. Dispatchers are also responsible for providing or coordinating manual transporting of baggage ("portering"), when part of the baggage handling system is failing.

3. Work Performed by Jammer Technicians

Jammer technicians are positioned at six stations around the baggage handling system. On a position description introduced by the Employer, those six stations are called: south tub/ticket counter, north oversize, south oversize one, south oversize two, north matrix/north tub, and south matrix. Jammer technicians randomly draw their station assignments at the start of each shift but then rotate stations in a set manner about every 2 ½ hours.

The jammer technician at the south tub/ticket counter station is responsible for replenishing ticket counters with "tubs" used to carry baggage along the baggage handling system's conveyor belt; monitoring the ticket counters and assisting airlines with issues that might interfere with the operation of the baggage handling system, such as large groups with oversize luggage; and clearing jams, as needed.

The jammer technicians at the three oversize stations are responsible for picking up baggage from the run-out belt, oversize belt, and/or the checked bag resolution area and delivering them to the appropriate airline's bag well; monitoring bag wells for misrouted baggage and communicating with airline employees about where the bags need to go; clearing jams; moving stacks of tubs from the bag wells to a designated area from where the appropriate jammer technicians will then deliver the tubs to the ticket counters; and, when assigned to the north oversize and south oversize one stations, scanning baggage at the manual encode stations, as needed.

The jammer technicians at the two matrix stations are responsible for clearing jams as needed; checking the core of the baggage handling system for stray bags; assisting as needed; when assigned to the north matrix/north tub position, replenishing ticket counters with tubs by putting the tubs in a location designated by the airline; and scanning baggage at the manual encode stations, as needed.

C. Extent of Carrier Control

Below, I have set forth the record evidence related to the extent of carrier control over the manner in which the Employer conducts its business, the extent of carrier access to the Employer's operations and records, the carriers' role in personnel decisions, the degree of carrier supervision, the extent of carrier control over training,

and extent to which the employer's employees are held out to the public as carrier employees.

1. Carrier Control over the Manner in Which the Employer Conducts Business

a. Contractual and Financial Relationship between the Employer and PAC

The Employer's contract with PAC describes the scope of services to be provided by the Employer. The exhibit to the contract specifying the scope of services essentially describes the job duties of the Employer's dispatchers and jammer technicians. The contract provides that the Employer must maintain a response time of 3 minutes with a goal of 99% system availability, presumably meaning that the Employer must clear any jams within 3 minutes and keep the baggage handling system operating at least 99% of the time. The contract states that "[the Employer] at all times will be an independent contractor with full and complete responsibility for all of its employees and representatives... All such Personnel providing services to PAC are employees of the Contractor and not of PAC."

The contract, in turn, provides that PAC will pay the Employer "on an actual cost plus contractor 'mark-up' basis," meaning that PAC reimburses the Employer for the costs of labor, supplies, and materials and pays the Employer an additional percentage of such costs. The contract provides that the total amount to be paid over the first 3 years of the agreement, excluding renewals, will not exceed a certain annual amount without prior written agreement of the parties and approval of the committee that governs PAC. The Employer refers to the contract as a "cost plus" contract.

PAC provides the Employer with certain equipment, such as electric vehicles used to move baggage and industrial bicycles used to get around the baggage handling system. The Port owns the baggage handling system and provides Port radios used by the Employer's employees to communicate with each other, PAC's General Manager, Port maintenance employees, and TSA.

Each year, PAC's General Manager and the Employer's Branch Manager negotiate a major budget. The budget accounts for anticipated labor costs, including health and welfare and retirement benefit costs. The budget includes an overall labor cost for each month that is not broken down by employee, job classification, or type of labor expense. The Employer's Branch Manager typically attempts to include some reserve in the budget since the budget is often cut for various reasons. PAC's General Manager will not agree to include amounts PAC deems unnecessary. Throughout the year, when the need to adjust the budget arises, for example because of the loss of an airline or an anticipated decrease in the amount of baggage, PAC's General Manager discusses the need to adjust the budget with the Employer's Branch Manager.

Each month, the Employer submits an invoice to PAC's General Manager, who reviews it and raises any concerns with the Employer's Facility Manager or Branch Manager. The invoice shows the numbers of hours worked and pay for each employee each day, in addition to each employee's total health and welfare expenses for the month. It also shows other costs, such as the cost of equipment, supplies, materials, and services. PAC's General Manager must approve the invoice before the Employer is paid. When PAC's General Manager questions unexpected or high costs, he and the Employer's Branch Manager or Facility Manager negotiate the amount that will be paid.

PAC can terminate the contract in the event of default or unsatisfactory performance, if the Employer fails to cure the situation within 30 days of written notice from PAC. PAC can also terminate the contract for convenience with 60-day written notice to the Employer. However, PAC is required to provide certain remedies in the event of termination.

b. The Employer's Operational Procedures

The contract indicates that PAC, in coordination with the Employer, will establish all standard operating procedures and provide all operating manuals. Thus, PAC's General Manager created a baggage handling system operations manual outlining procedures for 30 separate aspects of that system, such as system start-up, checked luggage, firearms, locked baggage, baggage tubs, oversize items, and gasoline powered devices. The Employer introduced a copy of the table of contents from the manual, but did not introduce the procedures themselves based on an assertion that they include sensitive security information that cannot be disclosed under TSA regulations without written permission of the United States Secretary of Transportation.

Individual airlines occasionally request or give instructions about the operational procedures the Employer should follow. For example, around November 2014, PAC purchased carts for jammer technicians to transport tubs used to hold luggage on the baggage handling system from the lower level to the upper level of the Airport. About the same time, Alaska Airlines employees requested that the jammer technicians put the tubs in a new location when replenishing tubs at the Airline's ticket counter. However, jammer technicians initially refused the Airline's request and informed an Employer supervisor, who, in turn, informed the Employer's Facility Manager. Similarly, the Alaska Airlines employees raised the dispute with the Alaska Airlines General Manager, who requested a meeting with the PAC's General Manager and the Employer's Facility Manager. During that meeting, the Employer's Facility Manager conceded to the Airline's request that the tubs be placed in the new location.

On another occasion, Alaska Airlines purchased scanners for the oversize baggage area, because of concerns about missing and late oversize baggage, and requested that the Employer's jammer technicians scan the bags as they passed through that area. The Employer complied with that request until PAC's General Manager agreed the practice could be discontinued due to improvements in the Employer's operations. Alaska Airlines and United Airlines also requested that the

Employer's employees highlight the tags of bags from the run-out belt and possibly also the oversize belt, so that airline employees could easily identify such bags when they were put in the bag wells, and the Employer complied with that request.

Airline employees also regularly request that flights be switched from one bag well to another. Occasionally, some of these requests are made because the airline wants to improve the flow of baggage and avoid cascading and late baggage. The Employer has complied with such requests, which result in dispatchers changing the information in the baggage handling system so that the bags are correctly routed. For example, in December 2013, a Southwest Airlines supervisor came to the control room and expressed a concern about bags cascading at the Southwest Airlines ticket counter. The Employer's supervisor showed the Airline supervisor the cause for the cascading and during the next shift they worked to move some Southwest flights to a different side of the Airport to improve the flow of bags.

c. The Employer's Organizational Structure and Staffing

The record reveals that PAC is involved in determining the Employer's organizational structure and staffing to a degree. The contract provides: "[The Employer] will, upon request of the PAC General Manager, provide staffing plans for review and approval of PAC. All staffing plans will be submitted and approved prior to initiation and well in advance of any major holiday or area event." The contract further provides that "[t]he assigned labor will be stationed at [the Airport] in specified areas designated by PAC." The contract further authorizes the Employer and PAC to arrange for additional staffing during peak travel periods and for on-call staffing in extraordinary circumstances.

The Employer presented evidence of several examples showing PAC exercising its authority under these provisions of the contract. In particular, the Employer presented evidence that around 2012 or 2013, after airlines expressed concerns about cascading baggage at the ticket counters interfering with their operations, there was discussion of the elimination of an oversize technician job classification. It is unclear who initially proposed the elimination of that Employer position, but the Employer's Facility Manager testified that PAC's General Manager questioned the Employer about how operations would look after the change, whether the Employer could provide the required coverage after the change, and what the resulting budget would be. The PAC General Manager further stated to the Employer that he did not want any employees to be laid off as a result of the change. He then approved the change, leading to the training of the oversize technicians to become jammer technicians and the resulting elimination of the oversize technician classification.

The record further revealed that around 2014, the Employer transitioned to having one of its jammer technicians stationed at the airlines' ticket counters to prevent jams and other problems from the outset. The Employer's Facility Manager and supervisor initially suggested the change to PAC's General Manager. PAC's General Manager deliberated about the change and asked for a breakdown of what the

responsibilities of each new position would be if the suggested change were made. The Employer's supervisors created such a breakdown and explained it to PAC's General Manager, who ultimately agreed to give the Employer's suggestion a try.

The Employer also presented evidence of PAC's involvement in the decision to change the structure of the Employer's supervisory staff. Specifically, the Employer's Facility Manager testified that sometime between 2011 and 2014, PAC's General Manager told the Employer that PAC wanted the Employer to have management coverage throughout the Airport's operating hours. Consequently, the Employer transitioned from staffing a Facility Manager and two supervisors to staffing a Facility Manager, one supervisor, and four leads.

The Employer hired the Facility Manager along with additional jammer technicians and oversize technicians shortly before the north side of the baggage handling system became operational around July 2011. While the Facility Manager testified that "PAC reviewed and conferred with [PAC's General Manager] to make a decision to hire" in this instance, these hiring reviews and discussions likely occurred before the current Facility Manager was actually hired as supervisor, as details surrounding the involvement of PAC and its General Manager in these hiring decisions were not presented by the Employer.

Later, in 2014, after the Employer discharged its prior Facility Manager and promoted its current Facility Manager to that position from her supervisory position at the Airport, the Employer transitioned to having four supervisors instead of one supervisor and four leads. Although the Employer initially planned to post the vacant Facility Manager position, the Employer later decided to promote the supervisor to that position at PAC's General Manager's suggestion. PAC's General Manager also suggested transitioning to four supervisors from four leads to reduce overtime and provide greater coverage on the floor.

d. Scheduling

Airlines also influence scheduling of the Employer's operations. The contract provides that the baggage handling system normally operates 20 hours per day, 7 days per week. The Employer provides services from roughly 3:30 a.m., when the Airport opens, to 11:30 p.m., when the last flight departs. Currently, the Employer's dispatchers and jammer technicians generally work two 10-hour shifts spanning that timeframe. However, the schedule fluctuates based on the needs of the airlines. For example, employees sometimes work later because of a flight delay. Also, the Employer started some employees' shifts earlier because United Airlines decided to open its ticket counter earlier, at 3:00 a.m.

The Facility Manager also testified that the Employer periodically provides a proposed employee schedule to PAC's General Manager, who reviews the schedule and decides whether to approve it, as well as the staffing level. For example, in October 2014, the Employer's Facility Manager gave PAC's General Manager an

employee schedule restructuring certain shifts but not increasing the total number of employee hours. This prompted PAC's General Manager to question the schedule regarding whether the Employer could cut costs by eliminating a second vacation relief position. Eventually, PAC agreed to the Employer's proposed schedule without eliminating the second relief position.

PAC's General Manager is involved in decisions regarding whether the Employer's employees will work overtime. The contract provides that "[p]ayment for overtime work will be made only upon the prior written consent of the PAC General Manager, regardless of whether any such overtime work results in the payment of premium time." The Employer's Facility Manager testified that when she anticipates overtime due to a flight schedule or employee absence, she will notify PAC's General Manager, who then decides whether to approve the overtime.

At hearing, the Facility Manager was asked whether she reports overtime to PAC, after it has already accrued. The Facility Manager replied, "Well, yeah. It's on a need to know. It's an airline. They have delays." The Facility Manager stated, however, that if PAC's General Manager told her that an employee should go home early to avoid working overtime, she would have to comply with that request. The record does not establish if PAC's General Manager has ever requested such, or the regularity and/or frequency of such requests.

While the record establishes that the schedules of dispatchers and jammer technicians are influenced by airlines' flight schedules, the record does not establish how the Employer determines which particular employees will be assigned to the various shifts and the role, if any, that PAC plays in individual shift assignments. However, the Facility Manager testified to a conversation she had with PAC's General Manager regarding the transfer of a dispatcher prior to the current Facility Manager's ascension to her current position. Specifically, PAC's General Manager related that he had talked to a previous Employer Facility Manager about a dispatcher whose work was too slow, which led to the dispatcher being moved to a slower shift until his performance improved. Later, PAC's General Manager determined the dispatcher's performance had improved and that he could return to the faster shift. The dates of the dispatcher's shift transfers are not specified in the record.

As noted above, the record reveals that the jammer technicians randomly draw station assignments at the start of their shifts and then rotate stations every 2 hours. Yet, the record does not establish who made the decision to use that method for determining station assignments or whether PAC had any involvement in that decision.

e. Wage Rates and Employee Benefits

The contract states that PAC will pay the Employer for its actual labor costs, including "the actual wages, health and insurance benefits, Workers Compensation Insurance, FICA, Unemployment Insurance, Medicare, other incurred State, Federal, and local payroll and related taxes, and other costs directly attributable to the Personnel

incurred by [the Employer].” The contract does not set wage rates for employees, aside from stating that the Employer will compensate its employees at or above the Oregon State minimum wage. Although the Facility Manager testified that the contract provides that employees may receive wage increases of up to 3 percent per year, the contract does not include such a requirement. Moreover, the contract does not specify what health insurance and other benefits will be provided to the Employer’s employees. It also does not set an amount that the Employer can spend on wages, health insurance and other benefits. The contract states that if the Employer underpays employees, PAC can withhold from the Employer an amount sufficient to pay employees. Despite the lack of such a right in the contract, the Facility Manager testified that PAC makes the final decision about compensation.

As explained above, PAC and the Employer annually negotiate overall labor costs during the budgeting process. Wages, health and welfare costs, and 401(k) contributions are worked into the budget. The Employer’s Branch Manager testified that he and PAC’s General Manager discuss wage increases during the budgeting process each year. He further testified that when he requests a wage increase for the Employer’s employees, PAC’s General Manager determines whether to grant the increase based on whether PAC’s budget can accommodate it. The Branch Manager also testified that the Employer could not decrease staffing and increase pay rates, or increase staffing and decrease pay without approval of PAC’s General Manager.

The Employer’s Facility Manager has also raised the issue of wage increases outside the annual budgeting process, when operational changes have occurred. For example, the Employer eliminated oversize technician positions in 2012 or 2013, trained its oversize technicians to perform as jammer technicians, and increased their rates of pay to the starting pay rate for jammer technicians. Although she did not specifically recount any communications with PAC’s General Manager about the wage increase, the Facility Manager testified that PAC’s General Manager had to approve these changes. The Facility Manager also testified that around the same time, the Employer’s previous Facility Manager requested that PAC’s General Manager agree to a wage increase for all day shift employees because their shift was busier and because the oversize technicians who had cross-trained to become jammer technicians had received pay increases. PAC’s General Manager denied the pay increase because PAC’s budget could not accommodate a pay increase for all day shift employees. The Employer’s Facility Manager then requested that the jammer technicians who had not recently been elevated from oversize technician positions receive raises. The record does not reflect whether PAC’s General Manager agreed to this alternative proposed raise.

PAC’s General Manager was also involved in setting the salary of the Employer’s Facility Manager and four supervisors. When the Facility Manager was promoted from supervisor to her current position in 2014, after the discharge of the previous Facility Manager, the Employer’s Branch Manager suggested that the new Facility Manager be paid the same salary paid to the previous Facility Manager. However, PAC’s General Manager determined the successor Facility Manager should be paid a lower salary.

At the time of the Facility Manager's promotion, PAC's General Manager suggested that the Employer transition the four lead positions to salaried supervisors and suggested the supervisors' salary amounts. The Employer did as PAC suggested.

The Facility Manager testified that PAC's General Manager is also involved in decisions giving employees rewards beyond their regular compensation. For example, PAC's General Manager approved the purchase of holiday gift cards for employees and later questioned the Facility Manager about the amount listed on the Employer's invoice for the cards, which included an unexpected surcharge. PAC's General Manager asked that the Employer's "cost plus" percentage on the cost of the cards be waived, and the Employer agreed. The Facility Manager testified that she also must obtain PAC's General Manager's approval before purchasing meals or other food for employees for meetings or as a reward for working hard during contingency situations. The Facility Manager testified that PAC and its General Manager also agreed to a program under which every month, an "employee of the month" is given a \$25 gift card. It is unclear exactly how the employee of the month is selected or who selects the employee, but the Facility Manager testified that the selection is made based on employee suggestions and employee reports of good performance.

f. Personnel Policies

The Employer maintains its "Service Worker Policy Handbook," which includes policies related to attendance and time off, benefits, compensation, rules related to employment, equal employment opportunity, general work rules, health and safety, discipline, recruitment, and termination. The Facility Manager stated that the handbook policies are guidelines that will be bypassed if inconsistent with the terms of the PAC contract or with PAC's instructions. The record reveals that the Employer applies some policies from the handbook to the petitioned-for employees, including progressive discipline dealing with absenteeism.

Further, on several occasions, the Employer has independently generated acknowledgements of clarifications of its policies and changes to its policies and has required its employees to sign the acknowledgements. For example, the Employer generated an acknowledgement of a clarification of its procedure for reporting on-the-job injuries, an acknowledgement of a changed break policy, and an acknowledgement of a policy barring employees from lifting more than five tubs at a time for safety reasons. There is no evidence that PAC's General Manager was involved in any of these policy actions.

2. Carrier Access to the Employer's Operations and Records

PAC's General Manager's office is 5 steps away and adjacent to the office of the Employer's Facility Manager and both work the same schedule. PAC's General Manager accesses the control room and speaks with the Employer's dispatchers at least one to three times per week. In addition, he has access to the same Port radio

system used by dispatchers and jammer technicians in performing their work. Although the record does not establish how often PAC's General Manager accesses the areas where jammer technicians are stationed to work, it appears that airline employees and supervisors are regularly present in some of those areas, such as the ticket counter and bag wells.

The Employer is also required to provide PAC with access to a variety of documents under the contract, including reports on Employer operations; documents relating to its compliance with certain non-discrimination laws; documents showing employees' qualifications and training; documents showing its operations and maintenance safety plan; and reports of accidents resulting in injury or property damage.

At the end of each shift, dispatchers send to the Facility Manager and the PAC General Manager a statistical report about the operation of the baggage handling system during the shift. The report includes information such as the number of jams; the number of fail-safes (meaning multiple jams); the number of bags moved to the run-out belt; the number of bags that missed flights; lost items; baggage without tags; baggage that moved down the oversize belt late; and notes on any issues with the baggage handling system including information about employee attendance. The Employer also maintains records of the number of oversize bags for each airline and provides monthly and annual reports on those numbers to PAC.

As noted above, the Employer also provides PAC with a monthly invoice including a detailed breakdown of labor expenses, including the number of hours worked by each employee each day, the pay of each employee for each day, and each employee's total health and welfare expenses for the month. Although the record establishes that PAC receives detailed information about labor costs, the extent to which PAC has access to personnel records of the Employer's employees is unclear. The Employer maintains hard copies of certain employee records, such as certain tax forms, at its office in San Francisco, and maintains electronic copies of the same records at the Airport. It is unclear whether PAC can access the electronic copies maintained at the Airport, and, if so, how often it does so. The Facility Manager testified that the Employer does not provide PAC's General Manager with corrective action forms, unless requested to do so. The record does not establish the frequency or regularity with which PAC's General Manager requests and receives corrective action forms from the Employer.

3. Carrier Role in Personnel Decisions

a. Individuals Involved in Personnel Decisions

The Facility Manager testified that the Employer's Human Resources Manager, who, as explained above, works out of the Employer's branch office in Portland, serves as the Employer's local "first point of contact" for human resources issues. The Facility Manager testified, however, that she also sometimes discusses such issues with the

Employer's Branch Manager or PAC's General Manager. The specific involvement of these individuals in particular types of personnel decisions is described in detail below.

b. Hiring

The PAC contract requires that the Employer "assign and maintain...an adequate staff of competent personnel, which is fully equipped and qualified to perform the Services." It also provides that the Employer is responsible for "diligently seeking to replace any departing 'Key Personnel,'" and states that changes in key personnel must be approved by PAC. However, the contract and the record evidence do not reflect who, if anyone, has been designated as key personnel or whether that designation extends to any petitioned-for employees. The contract further states that the Employer will not discriminate based on certain protected classifications, it will recruit and hire applicants in a way that minorities and women are not underutilized, and the Employer will include a statement regarding equal employment opportunity on its job postings. The contract does not provide PAC with the right to select employees for hire, reject hiring decisions made by the Employer, or the right to be consulted with respect to hiring decisions.

Nonetheless, the Facility Manager testified that all hiring has to go through PAC's General Manager. She provided examples of two different procedures she has followed in hiring employees.

About 3 weeks before the hearing in this matter, the Employer hired a jammer technician following a posting of the opening. Prior to the hire, the Facility Manager interviewed all of the applicants, in accordance with the Employer's policy that at least ten applicants be interviewed for each job posting. The Employer's administrative assistant attended the interviews, and a supervisor stepped in and conducted one interview for the Facility Manager. No representative of PAC or any of the airlines participated in any of the interviews.

The Facility Manager testified that, after the interviews, she shared all applicants' resumes with PAC's General Manager and described each of the interviews to him. Although she does not explicitly state that she recommended the hire of the applicant who was ultimately hired, the Facility Manager testified that PAC's General Manager asked if she felt the eventual hire was a good candidate and if there were any issues. The Facility Manager replied that there was "a really good trust factor there" and that she thought they would go to the "next step" with the candidate, which involved getting fingerprints, obtaining a Port badge, and undergoing the Employer's background check. PAC's General Manager then told the Facility Manager that they would see if the candidate timely made his appointments in that next step.

Although it initially appeared in the record that the Facility Manager recommended to hire the applicant who was ultimately hired, she also testified that applicants, other than the one who was ultimately hired, were also sent for fingerprinting but that most of them did not follow through with their appointments. The Facility

Manager testified that PAC's General Manager told her that if those applicants were not being responsible, they would not go to the "next step." The record does not establish how or whether the Facility Manager and/or PAC's General Manager decided among the few applicants who followed through with getting fingerprints. Although the discussions about the ultimate hiring decision are not detailed in the record, the Facility Manager testified that PAC's General Manager had the "final say" in selecting the applicant who was ultimately hired.

Within the past 6 months, the Employer also hired two employees without posting the openings. The employees were essentially referred by the Employer's Facility Manager and a supervisor. Because the positions were not posted, the Facility Manager did not interview a pool of applicants for the two positions. The Facility Manager testified that she took information about the two applicants to PAC's General Manager and then interviewed them. However, she did not specify what information she shared with the PAC General Manager or what, if any, discussion she had with him about whether to interview the applicants. Regardless, following the applicants' respective interviews, they went through the Port badge process and then were given "hiring paperwork," including tax forms, to complete, as the final step of the Employer's hiring process.

The Facility Manager also testified that before the two applicants completed their hiring paperwork, PAC's General Manager came to the "office" and talked to them. The record does not establish whether this talk was planned in advance or what was said in the office. In any event, according to the Facility Manager, following the talk, PAC's General Manager said he was cautious about whether one of the applicants was good enough but told the Facility Manager to proceed with the hire of both applicants. The record does not reflect whether PAC's General Manager explained the reasons for his cautiousness concerning the one applicant to the Employer.

In addition to providing these two examples of the Employer's hiring process, the Facility Manager testified that there have been three occasions since October 2014 when PAC's General Manager has questioned her about whether she wanted to hire an applicant. He expressed concerns about one of the applicants because the employee had another job, which the General Manager thought constituted a conflict. His questions about the two other applicants are not described in the record. The record does not reflect whether the Facility Manager had recommended or selected the three applicants for hire before the questioning by PAC's General Manager, and it does not reflect whether any of the three applicants about whom he raised questions were ultimately hired.

Although the Facility Manager testified about the process she has followed in hiring several employees since she became Facility Manager in October 2014, the record does not establish what process was followed before she was promoted to her manager position from her supervisory position with the Employer. Further, the record does not establish what, if anything, requires the Facility Manager to consult with PAC's

General Manager about hiring decisions when the contract does not contain such a requirement.

c. Discharge

The contract provides that "PAC reserves the right to direct the [Employer] to remove any personnel from the performance of Services from any position upon material reason therefore given in writing," and, later, that "PAC reserves the right to request of the [Employer] removal of any of the [Employer's] employee(s), should the employee's behavior, appearance, and professional, ethical, credential or licensing, etc., not meet those requirements of PAC." As noted above, the contract also states that any changes in key personnel must be approved by PAC, but the contract and the record evidence do not identify personnel who are "key." The record does not reflect whether the Employer could transfer a removed employee to non-Airport positions in the Employer's other Portland area operations. It does reflect, however, that the Employer does not operate any baggage handling system other than the one at the Airport.

The Facility Manager testified that PAC's General Manager actually makes the "final decision" on any discharge. Specifically, when the Employer wants to discharge an employee, the Facility Manager relays the employee's conduct or performance issues to the PAC General Manager and informs him that the next step is discharge. The Facility Manager then asks the General Manager, "What do you feel about this?" The General Manager then "says yes or no" and has the final say in deciding whether to approve the discharge.

The Facility Manager provided one example of an instance in which PAC or an airline requested the removal of an employee. According to the Employer's Facility Manager, in July 2011, after an employee struck an employee of another contractor, PAC's General Manager arranged a meeting between a United Airlines manager, the Employer's current Facility Manager, who was a supervisor at that time, and the contractor's manager. The Employer's current Facility Manager (then a supervisor) spoke with the employee involved in the incident and then reported her discussions to the person who was then the Employer's Facility Manager, who then spoke to PAC's General Manager. The record does not reveal what was said in the discussion between the previous Employer Facility Manager and PAC's General Manager, but following the discussion the employee was fired. A personnel record documenting the discharge states that the "client" requested that the employee be "removed." Since the record does not precisely establish when the Employer purchased Linc and assumed the contract, it is unclear whether the Employer held the contract at the time of this 2011 discharge. Indeed, personnel records related to the discharge are on a Linc form and Linc letterhead.

Although the Facility Manager testified that PAC has never overruled the Employer's decision to discharge an employee, she testified that there was one occasion when PAC's General Manager requested that she re-investigate before discharging a number of employees. Specifically, the Facility Manager testified that in

2013, multiple employees, including some with good work histories, were involved in an incident or incidents warranting discharge. The nature of the incident(s) and the steps taken to investigate are not detailed in the record. In any event, the Employer decided to discharge the employees, and, according to the Facility Manager, PAC's General Manager said, "[W]ait a minute. Reinvestigate. I'm really surprised this employees – these employees were involved." The Facility Manager testified that the Employer then fully investigated, and later "[PAC's General Manager] said go ahead" with the discharge actions. The record does not reflect what information the Employer provided to PAC's General Manager about the additional investigation, and it does not reflect the details underlying the discussion in which PAC's General Manager said to proceed with the discharges.

Although the Facility Manager testified that the Employer discharges about 5 to 10 employees each year, the Employer did not provide evidence of PAC or an airline requesting the removal of any employee other than the employee discharged for striking a contractor's employee in 2011. The Employer also did not provide any examples of PAC being involved in any discharge decisions aside from the discharge decisions described above. Moreover, the Employer did not introduce documents or written communications related to the discharge of any employee other than the employee who was discharged for striking a contractor's employee in 2011.

d. Discipline

The contract does not say that PAC is authorized to discipline the Employer's employees or that the Employer is obligated to consult with PAC about discipline. The Facility Manager testified that she generally consults with the Employer's Human Resources Manager before issuing any discipline beyond counseling to ensure that the circumstances warrant discipline and that the discipline is in compliance with the Employer's policies and the law. The Facility Manager also testified that she occasionally consults with the Employer's Branch Manager and PAC's General Manager "depending on the escalation." The record does not establish at what level of escalation the Facility Manager deems it necessary to consult with the Employer's Branch Manager or PAC's General Manager about conduct or performance issues requiring action short of discharge. The record also does not reflect the nature and extent of these consultations.

The Employer's handbook incorporates a progressive disciplinary policy providing for the issuance of verbal warnings, written warnings, and suspension. However, the handbook allows the Employer to use any form of discipline deemed appropriate under the circumstances, including termination. It also incorporates a 43-item non-exclusive list of offenses that are cause for disciplinary action including discharge. The record does not specify whether these policies apply to the employees in the petitioned-for unit, though, as noted above, the Facility Manager generally noted that the handbook provides guidelines covering those employees. Further, the Employer does apply its handbook's policies concerning progressive discipline and increasing levels of employee absenteeism to the petitioned-for employees.

The Facility Manager testified that only she and the employees being disciplined typically sign corrective action forms, though a supervisor will sign a corrective action form as a witness if an employee does not want to sign it. The Employer's Human Resources Manager also sometimes signs corrective action forms. The Facility Manager testified that PAC's General Manager does not sign corrective action forms and does not typically see them unless he requests to see them. As noted above, the Employer did not present evidence concerning how many times, if at all, PAC's General Manager has asked to see corrective action forms.

The Employer provided only one specific example of an instance in which PAC's General Manager became involved in a discussion related to the discipline of an employee. Around January 2015, PAC's General Manager asked the Employer's Facility Manager if she had taken any disciplinary action against an employee who was having attendance problems. The Facility Manager replied that the employee was at a final disciplinary action level. PAC's General Manager then asked the Facility Manager to update him on the matter and said if the attendance situation did not improve, the Employer needed to take action but the record does not reveal whether he specified the level of action to take.

An email exchange related to this discussion reflects that, on January 12, 2015, the Employer's administrative assistant asked the Employer's Human Resources Manager what level of discipline to issue to the employee, who had already received an informal and formal warning for attendance and had some additional attendance issues that were not relied upon in issuing those prior warnings. On January 15, 2015, the Employer's Human Resources Manager sent a reply email stating that the employee should be given a final warning for her next occurrence and should be told that her next call-out would result in discharge, unless her absence was due to sickness for which she provided a doctor's note. The same day, the Facility Manager forwarded the Human Resources Manager's email to PAC's General Manager and stated: "[t]o answer his question about [the employee's] performance and attendance," the employee had been given certain discipline, and the Employer had been given certain directions from Human Resources if the problem did not improve. PAC's General Manager replied, "Cool, thanks."

In sum, the record does not reveal whether PAC's General Manager's question about the employee prompted the inquiry to the Employer's Human Resources Manager, whether his question was asked after the inquiry was made, and/or after the Employer's Human Resources Manager's response was emailed. Regardless, the Facility Manager testified she often has conversations of this sort or about an employee's performance with PAC's General Manager and that such conversations occur on a daily basis.

e. Promotions

The contract does not provide PAC with the right to select employees for promotion or the right to be consulted about such matters, except to the extent that PAC has the right to approve changes to key personnel as noted above. Yet the contract and the record do not identify, who, if anyone, has been designated as key personnel.

Nonetheless, the Facility Manager testified that PAC's General Manager makes the final decision on promotions. Specifically, the Facility Manager testified that about once or twice a year, the Employer selects employees for promotions into dispatcher or supervisory positions. When that happens, the Facility Manager informs PAC's General Manager of the employees the Employer is considering for the promotion. The Facility Manager and PAC's General Manager then discuss the promotion candidates. The Facility Manager testified that PAC's General Manager "has the final say" in such promotions.

The Facility Manager testified that the Employer has selected a new dispatcher about ten times since she was hired. Although the record is not clear on this point, it appears that the Facility Manager and PAC's General Manager were in agreement about which employee should be promoted to a dispatcher position on five or seven occasions. In another two instances, PAC's General Manager suggested candidates other than the two initially recommended by the Employer but eventually the Employer's two selections were promoted, albeit on a temporary basis at PAC's request. The record does not disclose whether the temporary basis ever converted to a permanent basis. In the remaining one to three instances, the record reflects that the Employer deferred to PAC's General Manager's suggestions but it is not clear whether a disagreement arose or whether, after consultation, the Employer merely acquiesced to PAC's suggestion(s). The employer provided no documents relating to these promotions.

As explained above, the Employer's Branch Manager testified that in 2014, after the Employer discharged its Facility Manager, the Employer initially planned to post the Facility Manager position, but PAC's General Manager suggested that the Employer's supervisor be promoted to the position without it being posted, and the Employer complied with that suggestion. PAC's General Manager also concluded that the Employer should transition to having four supervisors by eliminating the four lead positions, to which the Employer agreed.

4. Degree of Carrier Supervision

The Employer maintains its own supervisory hierarchy to oversee its operations and employees at the Airport. The Employer's dispatchers and jammer technicians report to four supervisors and a Facility Manager who are employed by the Employer and work at the Airport. The Facility Manager reports to the Employer's Branch Manager and consults with its Human Resources Manager.

However, the Facility Manager testified that she takes direction from PAC through its General Manager. She stated that his office is next to hers, and they work the same schedule. She further testified that she continuously communicates with PAC's General Manager in person or by email about a variety of subjects, including daily operational needs; flight changes; the cause of problems like cascading or missing bags; changes to employee schedules to accommodate flight schedules; coverage and scheduling when employees are calling off; the need to hire employees to accommodate airline needs; and necessary disciplinary action.

Further, PAC's General Manager occasionally visits the control room to check on operations or to ask about an issue with the baggage handling system. The Facility Manager testified that PAC's General Manager visits the control room daily, but it is unclear how often she actually observes the General Manager in the control room. A day shift dispatcher testified that PAC's General Manager generally visits the control room during the day shift about one to three times per week. A night shift dispatcher testified that PAC's General Manager rarely comes to the control room during the night shift and that the last time the dispatcher remembered the General Manager coming to the control room was about 5 months before the hearing in this case.

The examples the dispatchers gave of situations where PAC's General Manager visited the control room involved the Manager asking for updates or information on operational issues. For example, on one occasion, he asked a dispatcher when would be a good time to shut down part of the conveyor system for maintenance. On other occasions, he asked a dispatcher for updates on the operation of the system after the installation of new programming on an x-ray machine. The record also does not reveal whether PAC's General Manager ever directs the work of dispatchers. As for jammer technicians, the record does not reveal whether PAC's General Manager is ever physically present in the areas where jammer technicians perform their work, how often he interacts with jammer technicians, or whether he ever directs their work.

Dispatchers and jammer technicians interact with airline supervisors and employees while performing the Employer's work. For example, airline employees call dispatchers about issues with the baggage handling system that need to be resolved, such as bags missing from airline bag wells. Dispatchers also call airline employees to gather information to determine where baggage should go if the baggage handling system is unable to route it. A dispatcher testified that he receives calls from airline employees one to three times per week. Jammer technicians also communicate with airline employees at the ticket counter and bag wells to resolve questions about where to route baggage.

5. Carrier Control over Training

The contract provides that the Employer “will provide trained and qualified staff” and also that it will provide “fully trained on-site staff.” The contract further provides that the Employer will provide baggage hygiene, safety, hazardous materials, Occupational Safety and Health Act, and environmental training. Baggage hygiene involves assessing the condition of baggage and determining how best to place it on the conveyor belt to ensure that it will go through the system without any problems. The contract also requires the Employer to maintain certain records of its training. The Facility Manager testified that PAC’s General Manager trains jammer technicians on bag hygiene but, under the contract, the Employer remains responsible for providing all other training.

The Facility Manager testified that a training manual outlines the operation of the baggage handling system, but, as noted above, the manual was not submitted into the hearing record. Although the contract does not include any requirement that the Employer’s training materials be reviewed or approved by PAC, the Facility Manager testified that the Employer provides PAC’s General Manager with a copy of any training materials before distributing them to the Employer’s employees. She also testified that jammer technicians can make changes to training materials based on changes in the Employer’s operations, but any significant changes need to be approved by PAC’s General Manager. The record does not establish how often PAC’s General Manager has reviewed training materials, whether he has ever rejected any changes, or what specific types of changes have been presented to him. The Facility Manager further testified that when the Employer commenced operation of the baggage handling system on the Airport’s north side, the Employer’s management had to modify its training materials and PAC’s General Manager then approved the modifications.

The Facility Manager testified that the training of new jammer technicians is largely conducted by experienced jammer technicians. Further, jammer technicians undergo weeks of training following their hire. During the first week, they are familiarized with each of the stations and on operational needs; during the second week, they train with an experienced jammer technician; and during the third week, they shadow other jammer technicians. They then take a test created by jammer technicians, talk to a supervisor about whether they need additional training, and complete a walkthrough.

6. Extent to Which the Employer’s Employees Are Held Out to Public as Carrier Employees

The contract provides that the “[Employer] shall provide a uniform for each employee working under the PAC agreement. The [Employer’s] uniform will have the PAC logo and employee name clearly visible on the uniform.” Thus, the Employer provides employees with uniforms, and PAC reimburses the Employer for the uniforms. The uniforms consist of shirts with PAC’s logo on them. PAC also provides reimbursement for the cost of black work pants and work boots. At the Employer’s

suggestion, PAC also approved employees wearing PAC logoed uniform sweatshirts or jackets that the employees can purchase, or, if they cannot afford to purchase the uniform sweatshirts or jackets, they may wear solid black sweatshirts. The record does not detail the number of employees who have purchased and worn PAC's sweatshirts and jackets relative to the employees opting to wear their own black sweatshirts.

Recently, when employees requested to have "casual Fridays," the committee governing PAC approved employees wearing t-shirts with the Employer's name and jeans on Fridays. Employees also requested to have "casual Mondays" because some employees do not work Fridays. However, PAC's General Manager denied that request.

III. ANALYSIS

Section 2(2) of the Act defines "employer" to exclude from the Act's coverage "any person subject to the Railway Labor Act." Under the RLA, the NMB has jurisdiction over common rail and air carriers engaged in interstate or foreign commerce. With respect to determinations whether to assert jurisdiction over an employer potentially covered by the RLA, "[t]here is no statutory requirement that the Board first submit a case to NMB for opinion prior to determining whether to assert jurisdiction." *Spartan Aviation Industries*, 337 NLRB 708, 708 (2002) (citing *United Parcel Service*, 318 NLRB 778, 780 (1995)). It has been the Board's practice to refer the issue of jurisdiction to the NMB in cases where the issue is doubtful. *Federal Express Corp.*, 317 NLRB 1155 (1995). The Board gives "substantial deference" to NMB decisions in making jurisdictional determinations. *DHL Worldwide Express*, 340 NLRB 1034 (2003). However, the Board "will not refer a case that presents a jurisdictional claim in a factual situation similar to one in which the NMB has previously declined jurisdiction." *Spartan Aviation Industries*, supra.

When an employer is not a rail or air carrier engaged in transportation of freight or passengers, NMB applies a two-part test in determining whether the employer is still subject to the RLA. First, NMB determines whether the nature of the work is the type 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. *Air Serv Corp.*, 39 NMB 450 (2012), *reconsideration denied* 39 NMB 477 (2012); *Talgo, Inc.*, 37 NMB 253 (2010); *Bradley Pacific Aviation, Inc.*, 34 NMB 119 (2007); *Gate Gourmet*, 34 NMB 97 (2007).

Here, there is no contention and no evidence that the Employer flies aircraft or is directly or indirectly owned by a carrier, and would consequently be subject to the NMB's jurisdiction. Thus, I will now turn to analyzing first, the nature of the work performed and second, the extent and nature of PAC's control of the Employer.

A. Nature of the Work Performed

The NMB has determined that baggage handling service is work of a nature traditionally performed by employees of air carriers. *Menzies Aviation, Inc.*, 42 NMB 1, 2, 4-5 (2014); *John Menzies, PLC, d/b/a Ogden Servs., Inc.*, 31 NMB 490, 504 (2004); *Boeing Airport Equipment, Inc.*, 7 NMB 396, 397 (1980). Because the Employer provides baggage handling services, I find that the Employer's dispatchers and jammer technicians perform work of a nature traditionally performed by employees of air carriers.

Petitioner argues that the Employer does not perform services traditionally performed by air carriers. While Petitioner concedes that transporting baggage from the ticket counter to airlines' bag wells is work traditionally performed by airlines, it argues that the work performed by the Employer is distinguishable here because the Employer's primary function is to operate a baggage handling system owned and/or operated by the Port, which system was constructed in order to comply with screening requirements of TSA, which was not established until 2001. Petitioner further notes that the system is maintained by Port employees.

However, Petitioner cites no authority to support this line of argument. Further, the fact that baggage handling has been the subject of security and safety regulation by a relatively new governmental entity (*i.e.*, TSA), does not change long-standing NMB case law, cited above, that focuses simply on the nature of the work to determine whether that work is traditionally performed by employees of air carriers. Petitioner characterizes the petitioned-for unit of employees' work as nothing more than operating a system owned and maintained by the Port. However, that characterization fails to account for several important and undisputed facts, chief among them are the following two. First, the record reveals that a significant amount of baggage is frequently handled and transported by the jammer technicians beginning at the airlines' counters and ending at the airlines' bag wells or planes for loading. Second, the baggage handling system was built for and its operations contracted to the airlines by the Port to allow the airlines to move its customers' baggage to the planes for loading. In short, Petitioner's arguments here have no legal or factual merit.

B. Extent and Nature of Carrier Control

The following factors are relevant to determining whether an employer is controlled by or under common control with a carrier or carriers:

1. carrier control over the manner in which the employer conducts its business;
2. carrier access to the employer's operations and records;
3. carrier role in personnel decisions;

4. degree of carrier supervision;
5. carrier control over training; and
6. extent to which the employer's employees are held out to the public as carrier employees.

Bradley Pacific Aviation, Inc., 34 NMB at 130; *Gate Gourmet*, 34 NMB at 98; *Signature Flight Support/Aircraft Serv. Int'l., Inc.*, 32 NMB 30, 38-39 (2004); *John Menzies, PLC d/b/a Ogden Ground Servs., Inc.*, 30 NMB 405, 418 (2003). These factors provide guidance as to what facts may be considered in analyzing the extent of carrier control, but they "are not an all-inclusive 'test.'" *DHL Worldwide Express, Inc.*, 30 NMB 431, 437 (2003).

In assessing the factors, the question is whether the carrier exercises "meaningful control" as opposed to the type of control found in any contract for services. *Menzies Aviation, Inc.*, 42 NMB at 6-7; *Airway Cleaners, LLC*, 41 NMB 262, 268 (2014); *Bags, Inc.* 40 NMB 165, 170 (2013). An employer will not be found to fall under the NMB's jurisdiction where the control exercised by the carrier is no greater than the type of control exercised in a typical subcontractor relationship. *Menzies Aviation, Inc.*, 42 NMB at 6-7; *Airway Cleaners, LLC*, 41 NMB at 268. Isolated instances of employers acquiescing to air carrier requests that they take particular actions are not sufficient to establish "jurisdictionally significant control." See *Airway Cleaners, LLC*, 41 NMB at 268.

Below, I will address each of the factors considered in determining whether an air carrier exercises meaningful control over an employer to make the Employer, here, subject to the RLA.

1. Carrier Control over the Manner in Which the Employer Conducts Business

Carrier control over aspects of business operations such as services to be performed, performance standards to be met, and staffing levels and scheduling, are considered in assessing the degree of carrier control over the manner in which an employer conducts business. *Air Serv Corp.*, 33 NMB 272, 285 (2006); *Signature Flight Support/Aircraft Service Int'l, Inc.*, 32 NMB at 39. However, the NMB has found that carrier requirements related to an employer's business operations alone will not establish that an employer is subject to the RLA if the requirements are typical of any contract to provide services. *Menzies Aviation, Inc.*, 42 NMB at 5; *Airway Cleaners*, 41 NMB at 269; *Bags, Inc.*, 40 NMB at 166-167.

Here, the record reveals that the Employer must meet various carrier requirements including, providing services specifically described in the contract; meeting performance measures specified in the contract; following operational procedures developed by PAC; complying with airlines' operations-related requests;

meeting staffing levels approved by PAC; and scheduling employees to meet airlines' schedules. Although the PAC contract and PAC's General Manager influence to a degree, the way the Employer conducts its operations, that degree of influence is no greater than the influence exercised by airlines over employers in cases where the NMB has declined jurisdiction. See *Menzies Aviation, Inc.*, 42 NMB at 2-5; *Airway Cleaners*, 41 NMB at 269; *Bags, Inc.*, 40 NMB at 166-167. For example, in *Menzies Aviation, Inc.*, the NMB declined jurisdiction over the employer even though it was controlled to the following degree: it was required to follow standards dictated by an airline regarding unloading bags and to meet specific performance metrics; the airline's auditors inspected its employees' work and identified deficiencies to be corrected; the airline had the sole discretion to approve staffing levels; and the airline could require the employer to accommodate any changes in the airline's flight schedule with 30 days' notice.

As for the cost plus nature of the PAC contract and the parties' related budget negotiating process, the Employer cites to the facts underlying that process as evidence of meaningful control by PAC. However, the control here is largely no different than in any service contract situation where one side seeks more money for its services while the other side seeks to hold down what it pays for the services. Thus, the process may vary from contract to contract, but the dance effectively remains the same between the service provider and the purchaser of the services. See *Menzies Aviation, Inc.*, 42 NMB at 2 – 6 (finding the relationship between an employer and an airline to be typical of any contract for services when the airline audited the employer's budget, approved its staffing levels, and prepared report cards that determined the amount of employees' incentive payments).

In light of the above and the record as a whole, I find that the nature and extent of control exercised by PAC over how the Employer conducts its business, does not constitute meaningful control under NMB standards.

2. Carrier Access to the Employer's Operations and Records

A carrier's access to an employer's documents and its ability to inspect or monitor employer operations are relevant to an assessment of carrier control. *Air Serv Corp.*, 33 NMB at 285. However, the NMB has found that the mere ability to access documents and audit or inspect operations is not unusual in a contract for services, particularly when the power to decide whether to take some sort of personnel action against an employee based on information found in an audit or inspection remains with the employer. *Menzies Aviation, Inc.*, 42 NMB at 5.

Here, while PAC's General Manager works in close proximity to the Employer's Facility Manager, the record evidence is contradictory regarding how often the General Manager actually visits the dispatchers' work area, as two dispatchers testified the General Manager's visits were relatively limited, while the Facility Manager testified such visits occurred daily. While not making credibility resolutions here, it appears that the dispatchers are in the far better position to testify to access by the General Manager than the Facility Manager from her position. In any event, the record fails to disclose

whether the General Manager visits the jammer technicians' work areas with any significant regularity or frequency. Regarding the airlines' access to work areas, the record reveals that any access that occurs is largely due to the airlines sharing work space with the petitioned-for employees rather than due to the airlines accessing the petitioned-for employees' work areas to inspect or monitor their work.

As for access to Employer records, the record reveals that PAC has access to a variety of documents related to the Employer's operations. However, the extent to which PAC has access to personnel records and the frequency with which it accesses such records appears to be more limited.

In light of the above and the record as a whole, I find that PAC's limited access to the Employer's operations and records is insufficient to establish meaningful control over the Employer. Further, the record reveals insufficient evidence establishing that PAC decides to take personnel actions based on the operations or records that it can access. Rather, the record establishes that the access present in this case is similar to cases in which the NMB declined jurisdiction.

3. Carrier Role in Personnel Decisions

Recent NMB decisions suggest that the degree of carrier control over personnel decisions is perhaps the most critical factor in distinguishing between a typical subcontractor relationship and significant actual carrier control. *Menzies Aviation, Inc.*, 42 NMB at 6-7; *Airway Cleaners, LLC*, 41 NMB at 268. The NMB closely assesses whether the carrier has actual authority to make or effectively recommend personnel decisions in analyzing this factor. For example, where a carrier has the authority to request removal of an employee from an account or reports misconduct or performance problems to an employer but does not itself make or effectively recommend disciplinary action or discharge, the carrier will not be found to exercise meaningful control over personnel decisions. *Menzies Aviation, Inc.*, 42 NMB at 6-7; *Airway Cleaners, LLC*, 41 NMB at 268. Further, where a carrier reports misconduct to an employer but the employer conducts its own investigation before disciplinary action, the carrier's reports will not be found to establish control over personnel decisions. *Bags, Inc.*, 40 NMB at 169; *Huntleigh USA Corp.*, 40 NMB 130, 138-139 (2013); *Aero Port Services, Inc.*, 40 NMB 139, 142-143 (2013). However, where the evidence establishes that the air carrier actually makes personnel decisions or effectively recommends them, the NMB has considered such evidence sufficient to establish carrier control. *PrimeFlight Aviation Servs., Inc.*, 34 NMB at 182-183; *Signature Flight Support/Aircraft Serv. Int'l., Inc.*, 32 NMB at 39.

Here, the PAC contract is similar to contracts the NMB has found not to establish carrier control over personnel decisions. The contract states that the employees providing services under the contract are employees of the Employer and not PAC. Further, it does not give PAC the right to hire, discipline, or discharge the Employer's employees, but merely requires the Employer to maintain competent, qualified personnel and gives PAC the right to request that employees be "removed...from the

performance of Service.” While the Facility Manager testified that she consults with PAC’s General Manager about some personnel decisions, the Employer does not have a contractual obligation to do so, and the evidence is insufficient to establish that these consultations are anything more than voluntary in nature.

With respect to hiring, although the Facility Manager testified that PAC’s General Manager has the “final say” concerning hiring decisions, the evidence did not establish that PAC has a significant role in interviewing applicants for hire or that PAC has ever overruled a hiring decision made by the Employer. As for the specific example provided in the record involving the hire of two applicants referred to the Employer by its Facility Manager and supervisor, the record does not disclose that PAC had any meaningful involvement in the selection of the applicants for hire. While there is testimony that the applicants were discussed with PAC’s General Manager before they were interviewed, the nature of that discussion was not detailed in the record. As for testimony that PAC’s General Manager talked to the applicants while they were filling out their hiring paperwork, the record does not reveal whether the talk was planned or scheduled and does not reveal the nature and extent of that talk. Indeed, the proximity of PAC’s General Manager’s and the Facility Manager’s respective offices make a limited and inconsequential chance encounter involving the two applicants as equally plausible in the circumstances of this case as any other speculative conclusion argued by the Employer.

Regarding discharges, although the contract authorizes PAC to request that the Employer remove employees from services, the record does not establish whether an employee’s removal from services would effectively result in the employee’s discharge, or whether the Employer has other positions to which it could transfer removed employees in its Portland area operations. Further, the record only establishes that one employee has actually been removed at the request of an air carrier, and, in that one instance, an independent investigation was conducted by the contractor before the employee was discharged. Moreover, it appears that the discharge at issue likely occurred before the Employer purchased Linc and assumed the contract. There is also no evidence that PAC has ever reversed a decision by the Employer to discharge an employee. Although, on one occasion, the Employer acquiesced to a request by PAC that it conduct further investigation before discharging employees with good work histories, the Employer ultimately discharged those employees. However, the NMB has not found RLA jurisdiction simply because the carriers report disciplinary matters to the employer where the employer conducts its own investigation. See *Bags, Inc.*, 40 NMB at 169; *Huntleigh USA Corporation*, 40 NMB at 138. Here, the Employer clearly conducts its own investigations of employees subject to removal, discharge and/or discipline.

As for promotions, the Facility Manager testified, in a conclusory manner, that she defers to PAC’s General Manager in deciding which employees to promote to dispatcher. However, the record reveals that the Employer and PAC’s General Manager usually agree on the individuals promoted. In the limited instances when PAC’s General Manager suggested the promotion of an employee other than the one

initially recommended by the Employer, the record does not establish that PAC's General Manager directed that his choice(s) be promoted. Rather, the record reflects that in two instances, the Employer's choices prevailed, albeit on a temporary basis that was not defined in the record. In one to three instances, the Employer ultimately promoted the employee recommended by PAC's General Manager. Notably, the PAC contract provides no clear right to PAC to approve or ultimately decide promotions. On the basis of the foregoing and the record as a whole, I find that the Employer has opted to consult with PAC regarding promotions and, in some instances has opted to acquiesce to PAC's General Manager's suggestions and in other instances effectively rejected PAC's suggestions. In sum, the record fails to establish that PAC exercises meaningful control over the Employer's promotion decisions.

With respect to discipline, the evidence does not establish that PAC has any material degree of involvement in disciplinary decisions. The evidence the Employer presented of one instance in which PAC's General Manager questioned the Facility Manager about the attendance of an employee is insufficient to establish such involvement.

In considering this factor, I note the record reveals a relatively high turnover of employees in the Employer's Airport operations. Yet the Employer produced no documents showing PAC actually or ultimately deciding any personnel matters related to employees performing baggage handling services during the years the Employer has contracted with PAC. Further, the PAC contract largely lacks specific controls over the multitude of personnel actions (e.g., hire, discipline, discharge, promote, transfer, assign, etc.) that the Employer makes in running its Airport operations. While I have noted above record instances of PAC's limited involvement in the Employer's personnel decisions, I find based on the record as a whole that PAC's involvement in such personnel matters is insufficient to establish meaningful control over the Employer. See *Aero Port Services Inc.*, 40 NMB at 142-143.

4. Degree of Carrier Supervision

The Employer's dispatchers and jammer technicians report directly to supervisors employed by the Employer. Although there is evidence that PAC's General Manager occasionally asks dispatchers for updates on operational issues and that dispatchers and jammer technicians work with airline employees to resolve issues within the baggage handling system, the record does not establish that PAC or individual airlines are authorized to direct or supervise the work of dispatchers or jammer technicians. Rather, it appears that requests or directions from PAC or individual airlines are communicated to PAC's General Manager who seeks to resolve any issues with the Employer's Facility Manager. Indeed, in one instance when an airline directed jammer technicians to place tubs in a new location, the jammer technicians, rather than complying with the direction, reported the issue to an Employer supervisor. That issue was later resolved at the managerial level rather than via direct supervision by the involved airline. In sum, the record reveals a limited degree of

supervision by PAC that is insufficient to establish meaningful control by it over the Employer.

5. Carrier Control over Training

Under the contract, the Employer is responsible for providing certain training to its employees. There is no evidence that PAC provides any training other than bag hygiene training conducted by PAC's General Manager. Although there is evidence that the Employer seeks PAC's General Manager's approval of at least some of its training materials, there is no evidence that the Employer is contractually required to do so. Further, the training the Employer conducts for new jammer technicians is largely conducted by experienced jammer technicians. Further, the record does not disclose that the training has anything more than a minimal impact on the petitioned-for employees' terms and conditions of employment. Thus, the record reveals that this limited degree of carrier involvement in training of the Employer's employees is insufficient to establish meaningful control over the Employer.

6. Extent to Which the Employer's Employees Are Held Out to Public as Carrier Employees

The record reveals that dispatchers and jammer technicians wear shirts with PAC's logo on them, except on "casual Fridays," when employees are permitted to wear t-shirts with only the Employer's logo on them. Employees may also purchase uniform sweatshirts or jackets with the PAC logo. However, employees can opt to instead wear their own solid black sweatshirts or jackets. The record does not specify the number of employees who have purchased and/or worn PAC sweatshirts and/or jackets. Regardless, the PAC logo clothing worn by the jammer technicians do not identify them as employees of any individual airline. It is also unclear how much interaction employees in the petitioned-for unit have with the public, as those employees largely perform their work in the secured area in the lower level of the Airport, and as it appears that airline employees and TSA agents are primarily responsible for interacting with airline passengers at the ticket counter and oversize baggage screening areas.

In light of the above and the record as a whole, I find insufficient evidence to establish that the petitioned-for employees are held out as carrier employees.

7. Conclusion

Considering each of the factors addressed above, I find that the degree of control that PAC has over the Employer is contractually no greater than the type of control exercised in a typical subcontractor relationship and does not constitute meaningful control such as to render the Employer subject to the RLA. I recognize that, in practice, PAC's control appears on the surface more extensive than the PAC contract would permit. However, that practice was largely unsupported by any other documentary evidence or by concrete examples setting forth sufficient details. Instead, the practice was largely supported by conclusory testimony by one witness for the

Employer that failed to establish the meaningful control that the NMB looks for in cases of this nature. Further, the NMB has recently found that it lacks jurisdiction in similar cases, on similar facts. Thus, I shall not refer this case to the NMB, as the Employer argues. See *Menzies Aviation, Inc.*, 42 NMB 1; *Airway Cleaners, LLC*, 41 NMB 262; *Bags, Inc.* 40 NMB 165; *Spartan Aviation Industries*, 337 NLRB at 708.

IV. CONCLUSION

In light of the above and the record as a whole, I find that the Employer is subject to the Act and falls under the Board's jurisdiction. Accordingly, I shall direct an election in the following appropriate unit (the Unit):

All full-time and regular part-time jammer technicians and dispatchers employed by the Employer at the Portland International Airport in Portland, Oregon; excluding office and clerical employees, administrative assistants, professional employees, managerial employees, guards and supervisors as defined in the Act.⁵

There are approximately 27 employees in the Unit found appropriate.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Subregion 36 among the employees in the Unit at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the Unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **International Association of Machinists & Aerospace Workers, District Lodge W24, AFL-CIO**.

⁵ The Unit is described in substantial conformity with the parties' stipulation at hearing. Further, I have deleted the exclusion of "leads" as the record reveals that the Employer no longer employs that classification in its Airport operations. Further, I have excluded the administrative assistant employed at the Airport as neither party asserts that classification should be included in the Unit.

A. LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Acting Officer in Charge for Subregion 36 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Subregion shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in Subregion 36 of the National Labor Relations Board, 1220 SW 3rd Ave., Suite 605, Portland, Oregon 97204, on or before **March 13, 2015**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (503) 326-5387. Since the list is to be made available to all parties to the election, please furnish a total of four copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

B. NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, § 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

C. RIGHT TO REQUEST REVIEW

Under the provisions of § 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street NW, Washington, DC 20570. This request must be received by the Board in Washington by **5:00 p.m. (ET) on**

March 20, 2015. The request may be filed through E-Gov on the Board's web site, <http://www.nlr.gov>, but may not be filed by facsimile.⁶

DATED at Seattle, Washington on the 6th day of March, 2015.



Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

⁶ To file a request for review electronically, go to www.nlr.gov and select the "File Case Documents" option. Then click on the E-file tab and follow the instructions presented. Guidance for E-filing is contained in the attachment supplied with the Regional office's original correspondence in this matter, and is also available on www.nlr.gov under the E-file tab.