

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

AIRWAY CLEANERS, LLC,

Employer,

Case No. 29-RC-153440

and

**LOCAL 32BJ, SERVICE EMPLOYEES
INTERNATIONAL UNION,**

Petitioner,

LOCAL 660, UNITED WORKERS OF AMERICA,

Intervenor.

**PETITIONER'S OPPOSITION TO INTERVENOR'S
REQUEST FOR REVIEW OF
THE DECISION AND DIRECTION OF ELECTION**

**Brent Garren, Esq.
Deputy General Counsel
Office of the General Counsel
SEIU Local 32BJ
25 West 15th Street
New York, New York 10011
(212) 388-3943 (telephone)
(212) 388-2062 (facsimile)
bgarren@seiu32bj.org**

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I. Introduction

Petitioner SEIU Local 32BJ submits this Opposition to Intervenor Local 660, United Workers of America's Request for Review, pursuant to NLRB Rules and Regulations § 102.67. Intervenor argues that the June 30, 2015 Decision and Direction of Election ("DDE") of the Regional Director, finding NLRB jurisdiction over a unit of all full- and part-time employees of Airway Cleaners, LLC ("Employer") at John F Kennedy International Airport ("JFK") and directing an election, should be reversed. The Employer does not join in the Request for Review. Intervenor raises two issues in its Request for Review: (1) the employees at issue fall under the jurisdiction of the Railway Labor Act ("RLA"), relying upon the argument that the Board's recent decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), which modified the Board's analysis in finding joint employer status, changed the legal standard for determining whether an employer is subject to NLRB jurisdiction; and (2) the Hearing Officer's failure to keep the record open for a second time in order to allow the Employer to produce further documents in response to Intervenor's subpoena constituted prejudicial error. As discussed further below, each argument is meritless and the Request for Review should be denied.

II. Procedural History

The issues underlying this case have been pending for over two years. In March 2013, another union (Local 621 UCTIE, which is not involved in the instant case) filed a representation petition for the Employer's workers at JFK Terminal 8 only. In August 2013, following a two-day hearing on jurisdiction, the Board referred the matter to the National Mediation Board ("NMB") for an advisory opinion as to whether the workers fell under the jurisdiction of the Railway Labor Act ("RLA"). In September 2014, the NMB issued an opinion finding that the

employees at Terminal 8 did not fall under RLA jurisdiction. *Airway Cleaners, LLC*, 41 NMB 262 (2014). In April 2015, the Board issued a decision concurring with the NMB's decision on jurisdiction, but nonetheless dismissed the petition, finding that the workers at Terminal 8 were covered by an existing collective bargaining agreement with Intervenor and that the current contract barred an election at that time. 362 NLRB No. 87 (2015).

Local 32BJ filed the instant petition on June 3, 2015, during the open period prior to the expiration of the current CBA, seeking to represent a unit consisting of all full- and part-time employees of the Employer at JFK Airport Terminals 1, 4, 7, and 8. Local 660 intervened, asserting that the workers fell under RLA jurisdiction. The Employer did not contest Board jurisdiction for purposes of this case. A Hearing Officer held a hearing in this matter on June 15, 2015, but the hearing was adjourned until June 22, 2015, to allow time for the Employer to respond to the Intervenor's subpoena for documents related to its RLA jurisdiction argument. Local 32BJ filed a special appeal of the decision to adjourn the hearing, which was denied. The hearing reconvened and was concluded on June 22, 2015, though Intervenor objected to the Hearing Officer's decision to close the record as the Employer had not produced every document responsive to Intervenor's subpoena. Intervenor filed a special appeal of the decision to close the record, which was denied. On June 30, 2015, the Regional Director issued the DDE at issue, finding that Board jurisdiction was proper and ordering an election be held on July 17, 2015, between Local 32BJ, Intervenor, and no union. Of the 678 eligible voters, 400 voted for Local 32BJ, 4 voted for Intervenor, and 4 voted for no union. Intervenor filed objections to the election, and a hearing was held on the objections on August 7, 2015. The Hearing Officer issued a report recommending dismissing the objections. On September 21, 2015, Intervenor filed the instant Request for Review of the DDE. Intervenor did not file exceptions to the Hearing Officer's

report, and on September 30, 2015, the Regional Director issued a Decision and Certification of Representative dismissing Intervenor’s objections and certifying Local 32BJ as the exclusive representative of “[a]ll full-time and regular part-time employees employed by Airway Cleaners, LLC at John F. Kennedy International Airport, but excluding all office employees, foremen, sales employees, executives, guards and supervisors as defined by the Act.” Decision and Certification of Representative at 1.

III. Standard of Review

Pursuant to NLRB Rules and Regulations § 102.67(c), a Request for Review of a Regional Director’s decision regarding a representation petition will be granted “only where compelling reasons exist therefor.” Specifically, Board review may be granted only on one of the following grounds:

- (1) That a substantial question of law or policy is raised because of:
 - (i) The absence of; or
 - (ii) A departure from, officially reported Board precedent.
- (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

NLRB Rules and Regulations § 102.67(c). Intervenor’s Request for Review asserts that it is brought pursuant to all four of the enumerated grounds, but the substance of Intervenor’s argument implicates only subsections (1)(ii), as to its argument on the application of *Browning-Ferris Industries*, and (3), as to its argument on the Hearing Officer’s decision to close the record.

IV. Argument

Local 660 essentially seeks to relitigate issues that were repeatedly decided against it by the NMB and the NLRB. Indeed, most of the facts cited in the Request for Review are explicitly drawn from the record in the 2013 representation proceeding that resulted in both an NMB opinion and an NLRB decision finding NLRA jurisdiction over the Employer. Request for Review at 3-4. Most of the facts cited concern the Employer's relationship with American Airlines, which was the relationship directly at issue in the 2013 proceeding. *Id.* Intervenor also cites some facts regarding the Employer's relationship with the Terminal One Group Association ("TOGA"), but these facts were also presented at the 2013 proceeding. *Id.* at 4-7. The question of Board jurisdiction was thoroughly and vigorously litigated during the hearings both in 2013 and in 2015. Intervenor points to no change in the facts that would justify reversal of the Regional Director's decision finding jurisdiction, and indeed points to no facts distinguishing the finding of jurisdiction here from the Board's precedential decision finding jurisdiction over the Employer's workers in Terminal 8. Intervenor's novel attempt to apply *Browning-Ferris Industries* in an entirely different context is barred by controlling Board precedent. Finally, the Hearing Officer's decision to close the record, after one adjournment had already been granted, was eminently reasonable and far from prejudicial error. Quite simply, the Board has already squarely decided the issues presented in the Request for Review, and granting review would be an unnecessary use of the Board's limited resources and frustrate the employees' right to choose their bargaining representative.

1. Application of *Browning-Ferris Industries*

Intervenor makes the conclusory assertion that the Board's decision in *Browning-Ferris Industries* ("*BFT*") should result in the Board finding the airlines and their agents that contract

with the Employer to be joint employers and that therefore the Board lacks jurisdiction over the instant matter. This argument is essentially a non-sequitur, as joint employer status was never asserted or litigated in this matter, and even if joint employer status were found, it would have no impact on the Board's assertion of jurisdiction over *this* Employer.

First, and most critically, the Board has held that it “will not employ a joint employer analysis to determine jurisdiction.” *Management Training Corp.*, 317 NLRB 1355, 1358 n.16 (1995). In *Management Training*, the Board considered whether it should assert jurisdiction over a private corporation “with close ties to an exempt government entity.” 317 NLRB at 1355. The corporation was a “jobs corps” facility operated pursuant to a contract with the Department of Labor (“DOL”) under the Job Training Partnership Act, 29 U.S.C. § 1501 *et seq.* The corporation was required to include in the contract “(1) staffing tables listing job classifications and organizational charts as well as labor-grade schedules and salary schedules showing wage ranges, including the minimum and maximum wages for each grade and (2) a description of their personnel policies concerning compensatory time, overtime, severance pay, holidays, vacations, probationary employment, sick leave, raises, and equal employment opportunity” for DOL approval. *Id.* The proposed salary schedule “had to be supported by a wage and benefit comparability study to assure DOL that the proposals conformed to prevailing wage rates and benefits for persons providing substantially similar services in the area in which the job corps facility was located.” *Id.* Any proposed changes to any of the terms of the contract had to be approved in advance by DOL. *Id.* The Board found that it had jurisdiction over the corporation notwithstanding the extensive control of terms and conditions of employment possessed by DOL. In doing so, the Board reaffirmed that, where the facts of a given case might support a joint employer determination and one of the employers was exempt from the NLRA, the joint

employer analysis was “irrelevant” to the exercise of jurisdiction over the admittedly non-exempt entity: “The fact that we have no jurisdiction over governmental entities and thus cannot compel them to sit at the bargaining table does not destroy the ability of private employers to engage in effective bargaining over terms and conditions of employment within their control.” *Id.* at 1358 n.16. Because the non-exempt employer “must, by hypothesis, control some matters relating to the employment relationship, or else it would not be an employer under the Act,” the Board left it to the parties to determine whether the employer exercised sufficient control over the terms and conditions of employment to ensure meaningful bargaining. *Id.* at 1358. *Management Training* remains good law, and was in fact cited with approval in *BFI* itself. *BFI*, slip op. at 59 n.70 (“[T]he thrust of *Management Training* [is] that an employer subject to the Act is required to bargain over the significant terms of employment that it *does* control.”); *id.* at 95 n.121 (“*Management Training* remains the law today.”).

The Board in *BFI* made quite clear that its decision did not “modify any other legal doctrine, create ‘different tests’ for ‘other circumstances,’ or change the way that the Board’s joint employer doctrine interacts with other rules or restrictions under the Act.” *Id.* at 94 n.120. The dissent in fact raised the very issue presented by the Request for Review - whether the Board’s new test for finding a joint employer relationship affected jurisdictional determinations under the Railway Labor Act - and the majority rejected the notion as among a “law-school-exam hypothetical of doomsday scenarios,” again citing *Management Training*. *Id.* at 95, 186. It is therefore clear that the *BFI* majority was aware of the very argument now advanced by Intervenor and concluded that its decision would not impact RLA jurisdictional determinations. Indeed, in a decision issued eight days before *BFI*, the Board found jurisdiction over a similar airline services contractor at Newark International Airport. *Allied Aviation Svc. Co. of New*

Jersey, 362 NLRB No. 173 (Aug. 19, 2015). It would be surprising to say the least had the Board's decision in *BFI* effectively overruled its *Allied Aviation* decision *sub silentio*.

Further, the *BFI* test for joint employer status under the NLRA asks a different question, with different standards and different consequences than determining RLA/NLRA jurisdiction. Board law deals with many completely distinct issues that involve very different standards even though they all involve some notion of "control." The joint employer and RLA jurisdiction questions both involve issues of control, but the nature, extent and object of the control differ greatly.

The NLRA joint employer test derives from the common law definition of employer. *BFI*, slip op. at 12. A joint employer relationship assumes that there is an arms-length relationship between two independent businesses. *NLRB v. Browning-Ferris Industries, Inc.*, 691 F.2d 1117, 1122 (3rd Cir. 1982) ("[A] finding that companies are 'joint employers' assumes in the first instance that companies are 'what they appear to be' - independent legal entities that have merely 'historically chosen to handle jointly . . . important aspects of their employer-employee relationship.'" (quoting *NLRB v. Checker Cab Co.*, 367 F.2d 692, 698 (6th Cir. 1966))). The result of a joint employer finding is that each employer is required to bargain the terms and conditions of employment "over which it possesses the authority to control." *BFI*, slip op. at 16. A joint employer determination does not require that one company "control" the other, but rather that they jointly determine terms and conditions of employment. The Board's test in *BFI* permits a broad range of contractual relationships to fall under the joint employer doctrine, as long as each employer possesses some control over terms and conditions of employment:

In some cases (or as to certain issues), employers may engage in genuinely shared decision-making, e.g., they confer or collaborate directly to set a term of employment. Alternatively, employers may exercise comprehensive authority over different terms and

conditions of employment. For example, one employer sets wages and hours, while another assigns work and supervises employees. Or employers may affect different components of the same term, e.g., one employer defines and assigns work tasks, while the other supervises how those tasks are carried out. Finally, one employer may retain the contractual right to set a term or condition of employment.

Id. at 69 n.80 (citations omitted).

In contrast, RLA jurisdiction is determined by Congressional intent in drafting and amending the RLA, not by the common law definition of employer. Congress extended RLA coverage to entities "controlled by" carriers to combat carriers' attempts to evade the RLA through wholly-owned subsidiaries and sham independent contractors. *See Reynolds v. Northern P. R. Co.*, 168 F.2d 934, 936 (8th Cir. 1948) (discussing the potential for sham independent contractors as "schemes devised to escape carrier taxes" under the Carriers Taxing Act of 1937, which drew its definition of "carrier" from the RLA), cert. denied, 335 U.S. 828 (1948). Congress specifically and repeatedly rejected RLA coverage for independent contractors who perform services for carriers. The Supreme Court in *Railroad Retirement Board v. Duquesne Warehouse Co.*, 326 U.S. 446, 451, n.6 (1946), underlined this point by citing the testimony of the drafter of the jurisdictional provision at issue: "I am inclined to believe that for the present it would be well not to go beyond carriers and their subsidiaries engaged in transportation [for RLA jurisdiction]." *See also Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 557 (1937) ("It is no answer, as petitioner suggests, that it could close its back shops and turn over the repair work to independent contractors. . . . It is petitioner's determination to make its own repairs which has brought its relations with shop employees within the purview of the Railway Labor Act."). The Courts of Appeals have repeatedly stressed that independent contractors are beyond the scope of the RLA and the other railway employment acts that borrowed the RLA's

definition of “carrier.” *E.g., Kelm v. Chicago, St. P., M. & O. Ry. Co.*, 206 F.2d 831, 834 (8th Cir. 1953) (“[T]he proponents of the bill introduced in Congress to amend the Carriers Taxing Act of 1937 sought to enlarge its coverage and to make it applicable to independent contractors . . . and their employees doing railroad work, by expanding the definition of ‘employer’ to expressly cover such contractors. No one reading the legislative proceedings resulting in the rejection of that proposed change can have any doubt that Congress intended to deny the extensions of coverage proposed.”); *Nicholas v. Denver & RGWR Co.*, 195 F.2d 428, 430 (10th Cir. 1952) (finding it “clear” that “an independent contractor and his employees [are] not employees of a railroad company for purposes of employment tax under the Carriers Taxing Act”); *Martin v. Federal Security Agency*, 174 F.2d 364, 365-66 (3rd Cir. 1949) (finding a railroad carrier’s control of terms and conditions of employment irrelevant to the question whether a nominally independent contractor falls under RLA jurisdiction); *Reynolds*, 168 F.2d at 941 (noting that Congress repeatedly rejected amendments to the RLA that would have brought independent contractors under its jurisdiction). *See also Dobbs House, Inc. v. NLRB*, 443 F.2d 1066 (6th Cir. 1971) (finding an independent food service contractor to airlines to be under NLRA, not RLA, jurisdiction).

The RLA jurisdiction test is a different type of question, asking not whether two employers jointly determine terms and conditions of employment in some fashion but rather whether a carrier controls an ostensibly independent entity in a less than arms-length relationship. There is no RLA jurisdiction under a “typical subcontractor relationship” with an airline. *Allied Aviation*, slip op. at 2. The degree of carrier control and integration required to find RLA jurisdiction in fact brings the standard much closer to the Board’s standard for finding a single employer relationship rather than a joint employer relationship. *See Dow Chemical Co.*,

326 N.L.R.B. 288 (1998) (“In determining whether two nominally separate employing entities constitute a single employer, the Board looks to four factors—common ownership, common management, interrelation of operations, and common control of labor relations. . . . [S]ingle-employer status depends on all the circumstances, and *is characterized by the absence of the arm's-length relationship found between unintegrated entities.*” (footnotes omitted) (emphasis added)). As the Third Circuit in *Browning-Ferris Industries* noted, while the joint employer and single employer doctrines both “approach the issue of ‘who is the employer,’” they do so “from two different viewpoints,” and “[a]s such, different standards are required for each.” 691 F.2d at 1122. The same is true of the RLA jurisdictional determination.

Thus, the nature and extent of control needed for NLRA joint employer status is a completely different issue than the nature and extent of control by a carrier required for RLA jurisdiction. The jurisdiction test looks at whether the airline controls the contractor and its personnel decisions on a closer than arm's length basis. The joint employer test looks at whether two employers co-determine terms and conditions of employment. Based on binding Board precedent, the explicit language of *BFI*, and the nature of the NLRA/RLA jurisdictional determination, the fact that *BFI* changed the test for a finding of a joint employer relationship is simply irrelevant to the question of Board jurisdiction.

2. The Hearing Officer’s decision to close the record

The Hearing Officer’s decision to close the record at the hearing on June 22, 2015, was fully justified. As noted above, the hearing had already been adjourned from June 15, 2015, over the objection of Local 32BJ, to allow the Employer to respond to Intervenor’s subpoena duces tecum, which had been served on the evening of the Friday preceding the Monday hearing. Tr. 17. Prior to the June 22 hearing, the Employer had produced the “vast majority” or “90 percent”

of the documents requested in the subpoena. Tr. 33, 47. Intervenor had an opportunity to review all the documents produced. Tr. 33. Intervenor also had an opportunity to make an offer of proof regarding both the documents already produced and the documents that had not yet been produced. Tr. 34-40, 73-75.

In fact, Intervenor's offer of proof, like its Request for Review, relied entirely upon instances of employee discipline that were already part of the record of the 2013 representation case. Tr. 37-38 (discussing disciplinary records relating to American Airlines), 38-40 (discussing disciplinary and policy records relating to TOGA). No part of Intervenor's offer of proof differed in kind or in substance from the evidence presented at the 2013 hearing. As the Hearing Officer noted, "all the materials that [Intervenor] point[ed] to, those four examples, were in the previous case," and "the previous record is replete with all that stuff." Tr. 52. As was conceded by Intervenor's counsel at oral argument, both the documents produced and those that had yet to be produced related to the same issue, discipline of employees. Tr. 73-75. All that was missing were the records from a few instances of discipline involving a single airline. Tr. 73. Counsel for the Employer agreed with the Hearing Officer that "those materials [not yet produced] are just further examples of what has been put in before." Tr. 53. Counsel for Intervenor stated that "yeah, generally speaking, I think they would be the same." Tr. 75. Given two opportunities to make an offer of proof and to present witnesses, Intervenor produced at the June 22, 2015 hearing evidence that was cumulative both with respect to the record of the 2015 hearing itself and with respect to the record of the 2013 proceeding. *See* Tr. 60-61 ("[T]hat seems to me to be cumulative. You gave three examples. They would just be more examples of the same, the airlines told them something.").

The Hearing Officer admitted into the record the entirety of the proceedings from the 2013 representation case, No. 29-RC-099871. Tr. 36. The record from the prior proceeding included documents on the *precise incidents* that Intervenor cited in its offer of proof regarding the documents not produced by the Employer. Tr. 41. Under these circumstances, the Hearing Officer rightly concluded that an adjournment was unnecessary because any additional evidence would be cumulative at best. Indeed, as the Regional Director noted in his Order denying Intervenor's special appeal, "the Employer and Intervenor agreed that the paper personnel records would be of very similar character to those already turned over to the Intervenor and that the evidence that would be entered into the record would be, at best, additional examples of the evidence already in the record." Order Granting Intervenor's Request to File Special Appeal and Denying Special Appeal (June 26, 2015) at 2.

Intervenor was given a full and fair opportunity to present evidence regarding the jurisdiction of the Board in this proceeding. The Hearing Officer granted a one-week adjournment, notwithstanding the fact that the record from the prior proceeding contained ample documentation regarding the disciplinary incidents that Intervenor sought to present as evidence of airline control. In the Regional Director's Order denying Local 32BJ's special appeal of the decision to close the record, Intervenor was put on notice that it would be "required to provide another much more detailed Offer of Proof at the beginning of the hearing on June 22, 2015, about what evidence that it will specifically seek to adduce to establish that the Board does not have jurisdiction over the Employer's terminal operations." Order Granting Intervenor's [sic] Request to File Special Appeal and Denying Special Appeal (June 18, 2015) at 3. Instead, Intervenor's offer of proof at the June 22, 2015 hearing relied upon exactly the same evidence already considered in the 2013 proceeding. Pursuant to NLRB Rules & Regulations § 102.67(b),

if the Regional Director finds that an election should be held, it must be scheduled on the “earliest date practicable.” Keeping the record open to allow the Employer to produce further documentation of the same type already presented both in the earlier proceeding and in the instant proceeding would have unreasonably delayed the election and prejudiced the rights of the employees involved to have a swift determination of union representation. The evidence would have been cumulative and unnecessary. The Hearing Officer was fully justified in his decision to close the record, and due to the cumulative nature of the evidence not presented, Intervenor simply could not have suffered any harm, much less harm rising to the level of a due process violation, from the failure to keep the record open.

V. Conclusion

For the reasons stated above, Local 32BJ respectfully requests that the NLRB dismiss Intervenor’s Request for Review.

Dated: October 6, 2015

Respectfully submitted,


Brent Garren, Deputy General Counsel
Service Employees International Union
Local 32BJ
25 West 18th Street
New York, New York 10019
(212)388-3943
bgarren@seiu32bj.org

Attorneys for Petitioner

CERTIFICATION

I, Brent Garren, hereby certify that on October 6, 2015, I served a copy of the attached Petitioner's Opposition to Intervenor's Request for Review of the Decision and Direction of Election by e-mail on the following people at the e-mail addresses indicated:

James. G. Paulsen, Regional Director
NLRB Region 29
James.Paulsen@nrlb.gov

Henry Powell, Board Agent
NLRB Regional 29
[Henry .powell@nrlb.gov](mailto:Henry_powell@nrlb.gov)

Ian Bogaty, Esq.
Counsel for Airway Cleaners
bogaty@jacksonlewis.com

Bryan C. McCarthy, Esq.
Counsel for Local 660
bcm@bcmassociates.org



Brent Garren