

Nos. 15-1299 & 15-1347

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ABM ONSITE SERVICES – WEST, INC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
DISTRICT LODGE W24 AND LOCAL LODGE 1005**

Intervenor

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

(A) Parties and Amici: ABM Onsite Services – West, Inc. (“the Company”), petitioner/cross-respondent herein, was a respondent in the case before the Board. The Board is the respondent/cross-petitioner herein, and the Board’s General Counsel was a party in the case before the Board. The International Association of Machinists and Aerospace Workers, District Lodge W24 and Local Lodge 1005 (“the Union”), intervenor herein, was the charging party before the Board.

(B) Ruling Under Review: This case involves a petition for review and a cross-application for enforcement of the Board’s Decision and Order in Case No. 19-CA-153164, issued on August 26, 2015, and reported at 362 NLRB No. 179. The Board seeks enforcement of that order against the Company. This Decision and Order relies on findings made by the Regional Director of the Board’s Region 19 in a representation proceeding, with regard to which the Board denied the Company’s Request for Review. The Regional Director’s findings are contained in an unpublished Decision and Direction of Election issued on March 6, 2015, which is located at pages 542 to 573 of the Joint Appendix. The Board’s Order denying the Company’s Request for Review of the Decision and Direction of Election issued on April 2, 2015, and is located at page 608 of the Joint Appendix.

(C) Related Cases: This case was not previously before this Court or any other court. Board counsel are unaware of any related cases currently pending before, or about to be presented before, this Court or any other court.

s/Linda Dreeben
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Dated at Washington, DC
this 3rd day of February, 2016

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of ABM Onsite Services –
West, Inc. (“the Company”) to review, and on the cross-application of the National

Labor Relations Board (“the Board”) to enforce, a Board Order issued against the Company on August 26, 2015, and reported at 362 NLRB No. 179. (A 620-22.)¹ The Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. §§ 151, §158(a)(5) and (1)) (“the Act”) by refusing to bargain with International Association of Machinists and Aerospace Workers, District Lodge W24 and Local Lodge 1005 (“the Union”), after the Union was selected in a secret-ballot election to represent a unit of company employees.

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the Act (29 U.S.C. §160(a)). The Board’s Order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) (29 U.S.C. § 160(e)), which allows the Board, in those circumstances, to cross-apply for enforcement. The Company filed its petition for review on August 31, 2015. The Board filed its

¹ Citations are to the joint appendix filed on December 21, 2015. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

cross-application for enforcement on October 13. Both filings were timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

Because the Board's Order is based, in part, on findings made in an underlying representation proceeding, the record in that proceeding is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d), however, does not give the Court general authority over the representation proceeding, but instead authorizes review of the Board's actions in that proceeding for the limited purpose of deciding whether to "enforc[e], modify[] or set[] aside in whole or in part the [unfair labor practice] order of the Board." 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the rulings of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

STATEMENT OF THE ISSUE PRESENTED

Whether the Board properly found that the evidence is insufficient to show that the Company is an employer subject to the Railway Labor Act, and therefore the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the National Labor Relations Act and the Railway Labor Act are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

This case involves the Company's refusal to bargain with the Union after the Union was certified, following a representation election, as the exclusive collective-bargaining representative of the Company's jammer technicians and dispatchers at Portland International Airport ("the Airport"). The Board found that the Company's refusal violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A 621.)

The Company does not dispute its refusal to bargain. (Br. 1.) Instead, it contests the validity of the Board's certification on the grounds that it is not an employer within the meaning of the Act but rather is subject to the Railway Labor Act ("the RLA") and, therefore, the Board lacks jurisdiction.² (A 620.) The Board's findings in the representation and unfair labor practice proceedings, as well as the Decision and Order under review, are summarized below.

² Any employer subject to the RLA is excluded from the Act's coverage. 29 U.S.C. §152(2).

I. THE BOARD'S FINDINGS OF FACT

A. **The Company Contracts to Operate, with Its Own Employees, the Baggage-Handling System Managed by the Portland Airlines Consortium; the Company Maintains Its Own Supervisory Structure at the Airport**

The Company operates the baggage-handling system at the Airport in Portland, Oregon. The baggage system is comprised of an approximately 5-mile long conveyor belt beginning at the airline ticket counters and carrying baggage to a secure area for screening before a computerized scanning system distributes it to the appropriate airline bag wells for loading to carts. (A 545; 20-23.)

The Company has operated the baggage-handling system for the Portland Airlines Consortium ("PAC") since acquiring the prior contract holder, Linc Facility Services, LLC, and assuming all of its contracts. (A 544; 33, 224.) PAC itself was formed to operate and maintain the baggage-handling system, which began operating in two parts in November 2010 and July 2011 to comply with baggage-screening requirements of the U.S. Transportation Security Administration. (A 543-44; 16-17, 142-43, 379.) PAC is governed by a committee comprised of representatives of the airlines operating out of the Airport and PAC's General Manager. (A 543; 16-17, 213.) PAC's General Manager, John Imlay, is responsible for managing, coordinating, and administering the baggage-handling system contract with the Company. (A 543-44; 382.)

The Company operates the system with approximately 23 jammer technicians and 4 dispatchers. In addition to these employees, the Company also employs 4 supervisors, an administrative assistant, and a Facility Manager to oversee its operations and employees at the Airport. (A 542, 560; 16, 434.) The Facility Manager, Bonnie Wagoner, reports to a Branch Manager, who does not work at the Airport. (A 544, 560; 100, 222-23.) The Facility Manager also consults with the Company's offsite Human Resources Manager. (A 560; 195-99.) The Company 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. (A 544, 554; 194-95, 236.)

B. The Company is an Independent Contractor at the Airport and Negotiates a Budget for All Labor Costs

The PAC contract states that “[the Company] at all times will be an independent contractor with full and complete responsibility for all of its employees and representatives.” (A 547; 383.) Under the “cost plus” services contract, PAC reimburses the Company for the costs of labor, supplies, and materials and pays an additional percentage of such costs as mark-up. (A 547; 84, 417.) The Company uses certain equipment, such as electric vehicles, provided by PAC. (A 547; 29, 410.) Employees use radios provided by the Port of Portland, which owns the baggage-handling system. (A 547; 45, 407.)

The Company's Branch Manager and PAC's General Manager Imlay negotiate an annual budget accounting for comprehensive labor costs including wages, health and welfare benefits, retirement funds, and taxes. This overall labor cost is broken down by month but not by employee or job classification. While indicating that the Company will be reimbursed for all labor costs, the contract does not set wage rates or specify spending on health insurance and other benefits. (A 547, 552; 224-30, 417.) When a need to adjust the budget arises, for example because of a decrease in bag volume for the airlines, PAC's General Manager discusses such adjustments with the Company's Branch Manager. (A 547; 224.) To receive payment, the Company submits a monthly invoice showing the number 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 reimbursable equipment, supplies, materials, and services. (A 548; 83, 432-85.)

C. The Jammer Technicians and Dispatchers Operate the Baggage-Handling System within the Scope of Their Job Duties

The Company's contract with PAC describes the scope of services to be provided along with the job duties of the dispatchers and jammer technicians. (A 547; 406-08.) The Company must contractually maintain a response time of three minutes with a goal of 99% system availability. (A 547; 410.)

Dispatchers monitor the baggage-handling system from a control room to check for jams and belt stoppages, which they radio jammer technicians to fix. (A 545; 35-36.) Dispatchers also respond to jammer technicians' calls about manually scanned baggage for which dispatchers will contact airline employees as needed. (A 545; 47-49.) Airline employees who have baggage problems, such as bags missing from bag wells, in turn contact the dispatchers; one dispatcher indicated these calls come in to the control room between one to three times per week. (A 545, 561; 35-36, 48-49, 249-50.) 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 561; 47.) Dispatchers may also interact with PAC's General Manager Imlay when he visits the control room and the airport's maintenance operations employees as needed. (A 546, 561; 50, 247-48, 257-58.) Dispatchers indicated these visits or phone calls from PAC's General Manager may be once or twice a week at the most or as little as one time in five months. (A 561; 248, 258.) On one occasion, Imlay asked a dispatcher when would be a good time to shut down part of the conveyor system for maintenance. (A 595; 248.) On another occasion, Imlay asked a dispatcher for updates on the operation of the system after the installation of new programming on an x-ray machine (A 561; 257.)

Jammer technicians are positioned at six stations along the baggage-handling system. The six stations are referred to as south tub/ticket counter, north oversize, south oversize one, south oversize two, north matrix/north tub, and south matrix. They rotate positions every couple of hours or so after randomly selecting a starting position at the beginning of each shift. (A 546; 38, 58-59, 424.) Duties include replenishing tubs at airline ticket counters where they also communicate with airline employees and assist airlines with issues that may impact baggage handling such as large groups with oversize bags. (A 546, 561; 52-53, 424.) At the oversize stations, after passengers carry oversized and oddly shaped bags to a separate area for hand-screening, the jammer technicians monitor the belt where the bags are loaded and take the bags via electric vehicle to the correct bag well. (A 545; 28-29, 407-08.) From the bag wells, the airline employees load the bags on carts and take them to the planes or, in some instances, a jammer technician might transport a bag to a plane for loading by the airline. (A 545; 24, 28.) They move tubs from the airline bag wells for redistribution to the ticket counters and, as needed, scan bags at the manual encode stations. Jammer technicians may also directly transport late baggage and handle misrouted baggage that goes onto a run-out belt. (A 545; 30, 50, 60, 408.) At the matrix stations, jammer technicians clear jams, check the core of the baggage-handling system for stray bags, move tubs, and scan baggage as needed. (A 546; 60-64, 424.)

D. The Company Responds to Operational Requests

The contract indicates that PAC, in coordination with the Company, will establish all standard operating procedures and provide all operating manuals.

(A 548; 410.) Thus, PAC's General Manager created a baggage-handling system operations manual outlining procedures for 30 separate aspects of the system.

(A 548; 425-31.)

Individual airlines may also make specific operational requests. For example, jammer technicians may be asked to change the placement of tubs at airline ticket counters. In November 2014, a jammer technician initially refused an airline's request to move the tubs to a less safe location before the Facility Manager acceded to the airline's request. (A 548; 67-69.) For one airline, jammer technicians used handheld scanners for oversize baggage because of concerns over missing or late bags (a practice that the jammer technicians discontinued when the airline felt the situation was resolved). (A 548; 130-31.) Airline employees also regularly request that bags be switched from one flight to another by contacting the control room. (A 549; 138.) They may seek assistance from the dispatchers if there is a larger problem such as bags cascading at the counter. For example, in December 2013, a Southwest supervisor worked with a Company supervisor to reroute some Southwest baggage to the north side of the baggage-handling system to resolve a cascade problem. (A 549; 134-37, 535-36.)

E. The Company Creates Staffing Plans to Ensure Proper Coverage

Under the contract, the Company must, upon request, provide staffing plans for review and have initial staffing plans, as well as those for major holidays and events, approved by PAC. PAC also designates the specified areas where the employees are stationed. (A 549; 410.) In administering these provisions, the Company and PAC agreed to eliminate an oversize technician job classification and train those employees as jammer technicians. (A 549; 18-19, 86-87.) Likewise, in 2014, the Company's Facility Manager proposed stationing a jammer technician at the airline ticket counters to prevent jams and other problems. In response to a request from PAC's General Manager, the Company prepared a breakdown of the responsibilities of the new position, which was ultimately approved. (A 549-50; 212-13.) Similarly, PAC suggested changing the Company's supervisory structure from a facility manager, supervisor assistant, and four leads to a facility manager and four supervisors. At the same time, PAC suggested hiring the current Facility Manager at a lower salary than her predecessor instead of posting the position. (A 550, 552-53; 89-90, 233-34.)

F. The Company Schedules Employees to Meet Airline Schedules

The Company operates 20 hours per day, 7 days per week under the contract. (A 550; 407.) The unit employees work one of two ten-hour shifts during the 3:30 a.m. to 11:30 p.m. time period. (A 550; 39.) Schedule adjustments

are made to accommodate the airlines. For example, flight delays may push a shift later. Some employees have started at 3:00 a.m. because United started opening its ticket counter earlier. (A 550; 40, 126, 532.) Overtime must be approved per contract, which is done by the Company's Facility Manager notifying PAC's General Manager when she anticipates a need for overtime. (A 551; 217-18, 417.) However, due to flight delays, the Company sometimes reports overtime to PAC after it has already accrued. (A 551; 217-18.)

Periodically, the Company gives PAC a proposed employee schedule to review. In October 2014, the Company proposed changing certain employee shifts with no increase in total employee hours. PAC's General Manager responded with a question as to whether costs could be cut by eliminating a second vacation relief position but ultimately, the Company kept the position with PAC's agreement. (A 551; 214-15.)

G. The Company Maintains an Employee Handbook and Independently Issues Policy Changes to its Employees

The Company maintains an employee handbook that includes policies related to attendance and time off, benefits, and compensation; as well as rules related to employment, equal employment opportunity, general work rules, health and safety, discipline, recruitment, and termination. (A 553; 269-375.) According to the Facility Manager, the handbook policies are guidelines that will be bypassed if inconsistent with the terms of the PAC contract or with PAC's instructions.

(A 553; 148-49.) In practice, the Company applies at least some policies from the handbook to the unit employees, including progressive discipline dealing with absenteeism. (A 553; 197.)

The Company independently generates clarifications and changes to its policies and requires employees to sign acknowledgements of policy changes. For example, the Company required employees to acknowledge clarification of its procedure for reporting on-the-job injuries, a changed break policy, and a policy barring employees from lifting more than five tubs at a time for safety reasons. (A 553; 201-08, 376-77.)

H. The Company Provides Documents, Reports, and Statistics to PAC Detailing Its Operations under the Contract

The Company is required to provide PAC with access to a variety of documents under the contract. These include reports on Company 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. (A 554; 389-90, 409.)

At the end of each shift, dispatchers send a statistical report to the Facility Manager and PAC's General Manager about the operation of the baggage-handling system during the shift. (A 554; 46, 502-31.) The Company also maintains

records of the number of oversize bags for each airline and provides monthly and annual reports on those numbers to PAC. (A 554; 120, 493-501.)

I. The Company Hires its Employees But Seeks Input from PAC's General Manager

The contract requires that the Company “assign and maintain . . . an adequate staff of competent personnel, which is fully equipped and qualified to perform” the contracted services. It also provides that the Company is responsible for “diligently seeking to replace any departing ‘Key Personnel,’” and states that changes in unspecified key personnel must be approved by PAC. The contract does not provide PAC with the right to select employees for hire, reject hiring decisions made by the Company, or the right to be consulted with respect to hiring decisions. (A 555; 383.)

About three weeks before the hearing in this matter, the Company 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 Company's policy that at least ten applicants be interviewed for each job posting. No representative of PAC or any of the airlines participated in any of the interviews. (A 555; 162.) After the Facility Manager completed the interviews, she shared the candidates' information with PAC's General Manager and he 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 Company’s background check. (A 555; 163.) PAC’s General Manager then told the Facility Manager that they would see if the candidate timely made his appointments in that next step as many applicants did not follow through with the appointments.

(A 555; 164.)

Within the six months prior to the hearing, the Company also hired two employees without posting the openings or interviewing a pool of applicants. The employees were essentially referred by the Company’s Facility Manager and a supervisor. (A 555; 188.) 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 Company’s hiring process.

(A 556; 189, 193.)

J. The Company Can Be Required to Remove Employees from the Contract; PAC Has Given Input but Not Overruled Any of the Company’s Discharge Decisions

The contract provides that “PAC reserves the right to direct the [Company] to remove any personnel from the performance of [s]ervices from any position upon material reason therefore given in writing,” and that PAC reserves the right to request of removal of any employee should the employee’s “behavior, appearance, and professional, ethical, credential or licensing, etc., not meet th[e] requirements

of PAC.” (A 557; 383, 408.) The Facility Manager provided one example of an instance in which PAC or an airline requested the removal of an employee. In July 2011, after an employee struck an employee of another contractor, PAC’s General Manager arranged a meeting between a United Airlines manager, a company supervisor (now the Facility Manager), and the contractor’s manager. The Company’s supervisor spoke with the employee involved in the incident and then reported her discussions to the Company’s Facility Manager at the time, who then had an unspecified conversation with PAC’s General Manager. Following the discussion, the employee was fired. (A 557; 118, 167-69, 172, 175.) A personnel record documenting the discharge states that the “client” requested that the employee be “removed.” (A 557; 266.)

PAC has never overruled the Company’s decision to discharge an employee. (A 557; 183.) In 2013, multiple employees, including some with good work histories, were involved in an incident or incidents warranting discharge. (A 558; 185-86.) The Company decided to discharge the employees but completed a further investigation upon PAC’s request before ultimately discharging the employees. (A 558; 186.)

K. The Company Disciplines Its Employees and Answers PAC’s Inquiries about Employee Discipline

The contract does not give PAC authority to discipline the Company’s employees or obligate the Company to consult with PAC about discipline (A 558.)

The Facility Manager generally consults with the Company'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 Company's policies and the law. She occasionally consults with the Company's Branch Manager and PAC's General Manager "depending on the escalation" of the situation. (A 558; 196, 198.)

The Company's handbook incorporates a progressive disciplinary policy providing for the issuance of verbal warnings, written warnings, and suspension. However, the handbook allows the Company 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. (A 558; 358-62.) Only the Facility Manager 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. (A 559; 199.)

In January 2015, PAC's General Manager asked the Facility Manager if she had taken any disciplinary action against an employee who was having attendance problems. Upon learning that the employee was at a final disciplinary action level, he asked to be kept updated and said if the attendance situation did not improve,

the Company needed to take unspecified action. (A 559; 116.) The Facility Manager later informed him via email that the employee was at a final warning. PAC's General Manager replied, "Cool, thanks." (A 559; 490-92.)

L. The Company Promotes Employees and Discusses Promotions with PAC

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 unspecified key personnel. (A 560; 383.) Once or twice a year, the Company selects employees for promotions into dispatcher or supervisory positions. The Facility Manager informs PAC's General Manager of the employees the Company is considering for the promotion. The Facility Manager and PAC's General Manager then discuss the promotion candidates. (A 560; 184, 209.) They have been in agreement about which employee should be promoted to a dispatcher position on five or seven occasions. (A 560; 210.) In another two instances, PAC's General Manager suggested candidates other than the two initially recommended by the Company but eventually the Company's two selections were promoted, albeit on a temporary basis at PAC's request. (A 560; 211.) In the remaining one to three instances, the Company deferred to PAC's General Manager's suggestions. (A 560; 211-12.)

M. The Company is Responsible for Training the Unit Employees

The contract provides that the Company “will provide trained and qualified staff” and also that it will provide “fully trained on-site staff.” The contract further provides that the Company will provide, and maintain records of, baggage hygiene, safety, hazardous materials, Occupational Safety and Health Act, and environmental training. (A 562; 408-09.) PAC’s General Manager trains jammer technicians on bag hygiene but, under the contract, the Company remains responsible for providing all other training. (A 562; 79, 408.)

Experienced jammer technicians train new jammer technicians who undergo 3 weeks of training. During the first week, they are familiarized with each of the stations and 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. (A 562; 76-77.)

N. The Unit Employees Wear Uniforms with PAC’s Logo or Solid Black Sweatshirts; They May Wear Company T-shirts on Fridays

The contract provides that the “[Company] shall provide a uniform for each employee working under the PAC agreement. The [Company’s] uniform will have the PAC logo and employee name clearly visible on the uniform.” (A 562; 408.) Thus, the Company provides employees with uniforms, and PAC reimburses the

Company 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. (A 562; 112-13.) At the Company's suggestion, PAC approved employees wearing PAC logoed uniform sweatshirts or jackets that the employees can purchase or, if they cannot afford to purchase them, they may wear solid black sweatshirts. (A 563; 115.) When employees requested "casual Fridays," the committee governing PAC approved employees wearing t-shirts with the Company's name and jeans on Fridays, but did not approve a similar request for casual Mondays for employees who did not work on Fridays. (A 563; 113-14.)

II. THE BOARD PROCEEDINGS

A. The Representation Proceeding

The Union filed a petition with the Board seeking an election among the jammer technicians and dispatchers at the Airport. (A 542.) The Company did not dispute the appropriateness of the petitioned-for unit. (A 543; 13.) The Company asserted that the petition should be dismissed because it is not an employer subject to the Act but, rather, falls under the jurisdiction of the National Mediation Board ("the NMB") as an employer subject to RLA.

Following a hearing, the Board's Regional Director issued a Decision and Direction of Election finding that the Company's operations at the Airport are subject to the Board's jurisdiction. (A 542-73.) The Company requested review of

the Regional Director's decision, contending that it was an employer under the RLA and, in the alternative to dismissal of the petition, requested that the Board submit the case to the NMB for a jurisdictional decision. (A 574-606.) The Board (Chairman Pearce and Member McFerran, Member Miscimarra dissenting) denied the request for review. (A 607-08.)

The Board held a secret-ballot election on April 2, 2015. The employees voted in favor of union representation. (A 620.) On April 10, the Board certified the Union as the exclusive bargaining representative of the Company's jammer technicians and dispatchers. (A 620; 609.)

B. The Unfair Labor Practice Proceeding: the Company Refuses To Bargain with the Union

Following certification, the Company refused to comply with the Union's bargaining demand in order to contest the validity of the Board's certification. (A 621.) Pursuant to a charge filed by the Union, the Board's General Counsel issued a complaint alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A 620.) The General Counsel subsequently filed a motion for summary judgment, which the Company opposed, requesting dismissal of the unfair labor practice complaint on jurisdictional grounds. (A 620.)

III. THE BOARD'S DECISION AND ORDER

The Board (Chairman Pearce and Members Miscimarra and McFerran) granted the General Counsel's motion for summary judgment in the unfair labor practice proceeding. The Board found that it had "rejected in the underlying representation proceeding" the Company's argument that the Company is "subject to the Railway Labor Act." (A 620.) The Board thus determined that "issues raised by [the Company] were or could have been litigated in the prior representation proceeding." (A 620.) The Board also found that the Company did "not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor [did] it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding." (A 620.) Accordingly, the Board denied the Company's request to dismiss the complaint and found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the exclusive collective-bargaining representative of the unit employees. (A 620-21 & n.2.)

The Board's Order requires the Company to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. §157). (A 621.) Affirmatively, the Board's

Order requires the Company, upon request, to bargain with the Union and to post a remedial notice. (A 621.)

SUMMARY OF ARGUMENT

The Court is presented with one issue in this case: whether the Board properly found that the Company is an employer subject to the Act, not the RLA, because it is not under the meaningful control of carriers at the Airport. In making its jurisdictional determination that the Company is not subject to the RLA, the Board exercised its statutory authority to decide such questions without referring them to the NMB. The Board followed its practice of not referring cases that present a jurisdictional claim in a factual situation similar to a case where the NMB has previously declined jurisdiction. This Court has determined that the Board is not legally compelled to refer jurisdictional questions to the NMB and there is no sound basis for the Court to order the Board to do so.

The Board applied the NMB's test for determining whether an employer that is not a rail or air carrier is still subject to the RLA and analyzed the factors that the NMB has found relevant to determining whether an employer is controlled by or under common control with a carrier or carriers. First, the Board found that PAC, as a consortium of carriers, does not exert significant control over the Company's business operations because the nature and extent of PAC's control was typical of any contract for services and the NMB has not found jurisdiction in that instance.

The Board next found that PAC has limited access to the Company's operations and business records and, furthermore, the record did not show that PAC makes personnel decisions based on the information it can access. The Board also concluded that record evidence of PAC's involvement in personnel decisions did not rise to the level of significant control over labor relations that would confer RLA jurisdiction. Similarly, the Board found that PAC exercised a limited degree of supervision over the Company's employees and had limited involvement in training employees, both of which were insufficient to establish meaningful control. Finally, the Board found insufficient record evidence showing that Company employees were held out to the public as carrier employees.

Based on its consideration of each of the factors, the Board reasonably determined that the Company failed to establish that PAC has the degree of meaningful control over the Company that the NMB has determined would make it an employer subject to the RLA. Thus, the Board has jurisdiction over the Company based on the factual similarity of this case to cases in which the NMB has declined jurisdiction.

Furthermore, contrary to the Company's contention, the Board's decision is not inconsistent with NMB precedent in a recent case analyzing RLA jurisdiction, despite the parties in the case not contesting jurisdiction. Additionally, the Company's citation to the Board's recently revised joint employer test in no way

undermines the Board's application of the NMB's test here. The Company's assertion that the RLA's purpose and legislative history require a different result here is not properly before this Court as it was not argued to the Board. In any event, the Board applied the test established by the NMB in carrying out its responsibility to interpret and apply the RLA. On the record as a whole, the Board found that the Company failed to show that PAC exercises meaningful control that the NMB looks for in cases of this nature.

ARGUMENT

WHETHER THE BOARD PROPERLY FOUND THAT THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT THE COMPANY IS AN EMPLOYER SUBJECT TO THE RLA, AND THEREFORE THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

Section 7 of the Act (29 U.S.C. § 157) gives employees the right to choose a collective-bargaining representative and to have that representative bargain with the employer on their behalf. Employers have the corresponding duty to bargain with their employees' chosen representative, and a refusal to bargain violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)).³ The Company's sole challenge to the Board's Order is jurisdictional. According to the

³ Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C § 158(a)(1). A violation of Section 8(a)(5) of the Act produces a "derivative" violation of Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Company, it is a derivative carrier subject to the RLA, and thus is not subject to the provisions of the Act. The Company conceded before the Board, and does not contest on appeal (Br. 1), that if it is subject to the Act, it is obligated to bargain with the Union as the representative of the unit employees. Accordingly, it is undisputed that the Board is entitled to enforcement of its Order if, under the NMB's test set forth below, the Company is not an employer subject to the RLA. *See Pearson Educ., Inc. v. NLRB*, 373 F.3d 127, 130 (D.C. Cir. 2004).

A. Standard of Review

The Board's interpretation of the Act must be upheld if reasonably defensible. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (applying reasonably defensible standard to interpretation of "employee"); *see also Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (Board's construction of the Act need not be "the *best* way to read the statute; rather, courts must respect the Board's judgment so long as its reading is a reasonable one"). Its findings of fact and application of law to facts are conclusive if supported by substantial evidence in the record considered as a whole. *See* 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Indeed, the Board's factual findings "may be reversed only if the record is 'so compelling that no reasonable factfinder could fail' to find" to the contrary. *Steelworkers Local 14534 v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 481 n.1,

483-484 (1992)). The Board’s expertise in labor relations and its congressionally mandated role in interpreting the Act lend weight to its application, in the labor context, of the NMB’s multi-factor test for whether an employer is controlled by, or under the common control of, a carrier or carriers.⁴

B. Principles of Board Jurisdiction and the NMB’s Test for Whether a Non-Airline Employer is Subject to the RLA

The Supreme Court “has consistently declared that in passing the ...[Act], Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause.” *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963). The term “employer” in the Act excludes “any person subject to the Railway Labor Act.” 29 U.S.C. §152(2). The term “employee” in the Act excludes “any individual employed by an employer subject to the Railway Labor Act.” In cases discussing the statutory definition of “employee,” the Supreme Court has made clear that Congress tasked the Board

⁴ In its standard of review section, the Company cites (Br. 18) a case that involves the Board’s interpretation of a non-labor statute wholly outside its area of expertise. *See SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015) (Board’s interpretation of the Federal Vacancies Reform Act governing Presidential appointees). The Company goes on (Br. 19) to cite cases involving agencies interpreting statutes other than those they administer. *See, e.g., Johnson v. U.S. R.R. Retirement Bd.*, 969 F.2d 1082 (D.C. Cir. 1992); *Dep’t of Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988). Unlike in those cases, the Board here did not interpret another agency’s statute. The Board applied the NMB’s established test for determining whether an employer that is not an air carrier is subject to the RLA.

with construing the NLRA's definitions. *Sure-Tan*, 467 U.S. at 891 (citation omitted). The Court has admonished the Board to "take care that exemptions from [Board] coverage are not so expansively interpreted as to deny protection to workers the [NLRA] was designed to reach." *Holly Farms*, 517 U.S. at 399.

The burden of proving the applicability of the RLA exemption should fall on the party asserting it. The applicable rule of statutory construction states that the party claiming the benefit of such an exception must demonstrate its applicability. *See FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); *accord U.S. v. Regenerative Sciences, LLC*, 741 F.3d 1314, 1322 (D.C. Cir. 2014). Specifically, in determining the burden of proof for exemptions to the definition of employee under the Act, the Supreme Court has applied "the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *NLRB v. Ky. River Community Care, Inc.*, 532 U.S. 706, 711 (2001) (quoting *Morton Salt*, 334 U.S. at 44-45). This conclusion is reinforced by the Company's natural advantage in adducing proof as to its operations and contract. *See, e.g., NYU Med. Ctr. v. NLRB*, 156 F.3d 405, 413 (2d Cir. 1998).

The Board has the statutory authority to resolve jurisdictional matters without referral to the NMB. *United Parcel Serv., Inc. v. NLRB*, 92 F.3d 1221, 1225 (D.C. Cir. 1996); *accord Dobbs Houses, Inc. v. NLRB*, 443 F.2d 1066, 1072

(6th Cir. 1971). The NMB does not have “primary jurisdiction” over resolving jurisdictional issues, nor is there a hierarchy placing the NMB in front of the NLRB in resolving jurisdictional questions. *UPS*, 92 F.3d at 1225. 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 Sys.*, 337 NLRB 708, 708 (2002).

When an employer is not a rail or air carrier engaged in the transportation of freight or passengers, the NMB applies a two-part test to determine whether the employer is subject to the RLA. First, the NMB considers whether the nature of the work performed is the type of work traditionally performed by employees of rail or air carriers. Second, the NMB determines whether the employer is directly or indirectly controlled by, or under common control with, a carrier or carriers. *See* 45 U.S.C. § 151 (extending RLA jurisdiction to entities that are “directly or indirectly controlled by or under common control” of common carriers). Both parts of the test must be satisfied for the NMB to assert jurisdiction. *Menzies Aviation, Inc.*, 42 NMB 1, 4-5 (2014); *Airway Cleaners*, 41 NMB 262, 267 (2014); *Air Serv Corp.*, 39 NMB 450, 454-55 (2012).

To determine whether there is carrier control over an employer under the second prong of the test, the NMB looks to several factors, including the extent of the carrier’s control over the manner in which the employer conducts its business;

access to the employer's operations and records, the carrier's role in personnel decisions, including hiring, firing, and discipline; degree of carrier supervision of the employer's employees; control over employee training; and the extent to which the employer's employees are held out to the public as carrier employees. See *Menzies*, 42 NMB at 5; *Airway Cleaners*, 41 NMB at 268; *Air Serv*, 39 at 456.

In assessing the factors, the overall question is whether the carrier or carriers exercise "meaningful control" in the ways indicated rather than simply the type of control found in any contract for services. *Menzies*, 42 NMB at 7 (finding "extent to which the carrier controls the manner in which *Menzies* conducts its business is no greater than that found in a typical subcontractor relationship"); *Bags, Inc.*, 40 NMB 165, 170 (2013) (finding type of control no different from that "found in almost any contract between a service provider and a customer"); *Aero Port Servs., Inc.*, 40 NMB 139, 143 (2013) ("Because [the employer] contracts with these carriers to provide services, it is expected that the carriers will specify the parameters of what services are necessary."). Thus, if the carrier exercises control no greater than that exercised in a typical subcontractor relationship, an employer will not be found to fall under the NMB's jurisdiction. *Menzies*, 42 NMB at 6-7; *Airway Cleaners*, 41 NMB at 268. Employer acquiescence to carrier requests in isolated instances, particularly when not required by contract, is not sufficient to

establish “jurisdictionally significant control over labor relations.” *Airway Cleaners*, 41 NMB at 268.

C. The Board Correctly Determined that the Company is an Employer within the Meaning of the Act Because It is not Under the Meaningful Control of PAC

Applying the test for carrier control, the Board concluded that, while the Company’s employees perform work of a nature traditionally performed by air carrier employees, PAC does not exert meaningful control over the Company and, thus, the Company is not subject to the RLA at the Airport.

The Company’s employees perform baggage-handling services, which the NMB has determined is work of a nature traditionally performed by air carrier employees. *See Menzies*, 42 NMB at 5 (finding ground services work at airport including baggage handling is work traditionally performed by employees of air carriers). The Board found that the Company’s dispatchers and jammer technicians perform such work and, thus, the first prong of the jurisdictional test is met for the Company to be an employer under the RLA.

The Board reasonably determined (A 571) that the Company “failed to establish” the meaningful control the NMB requires under the second prong of the test, which also must be met for RLA jurisdiction.⁵ The Board found that PAC did

⁵ The parties in this case were on notice that the Company bore the burden of proof to establish that it was subject to the RLA based on the Hearing Officer’s unchallenged statement at the hearing that “[a]s the [Company] contends that the

not exercise meaningful control over the Company under the six factors in that second prong.⁶

1. PAC does not exert significant control over the Company's business operations

The Board reasonably found (A 566) that the nature and extent of PAC's control over how the Company conducts business does not constitute meaningful control under NMB standards. Carrier control over business operations including services to be performed and standards to be met as well as staffing levels and scheduling are considered under this factor. *Air Serv Corp.*, 33 NMB 272, 285 (2006). However, the NMB has determined that carrier requirements related to an employer's business operations will not establish RLA jurisdiction if the requirements are typical of any contract to provide services. *Menzies*, 42 NMB at 5; *Bags*, 40 NMB at 166-67; *Aero Port*, 40 NMB at 143.

The Company's contractual obligations as to performance and operating procedures permit PAC to exert a degree of influence over the Company that is no greater than that exercised by airlines over employers in cases where the NMB has

[Board] lacks jurisdiction, it is the [Company]'s burden to present evidence on why this petition should not go forward.” (A 12.) Before this Court, the Company has not challenged the Board's allocation of the burden of proof, which was in conformity with accepted rules of statutory construction. *See Morton Salt*, 334 U.S. at 44-45; *Ky. River*, 532 U.S. at 711.

⁶ All of the factors listed by the Company (Br. 16) as relevant to the carrier control test were considered by the Board (and the Company does not contend otherwise) despite any variances in how the factors are recited.

declined jurisdiction. (A 566.) Under the parties' contract, the Company must provide specific baggage-handling services with a set response time, follow operational procedures set by PAC, comply with airlines' operational requests, meet approved staffing levels, and schedule employees to meet airline schedules. (A 565-66; 383, 407, 410.) In *Menzies*, upon which the Board relied (A 566), the NMB declined jurisdiction over an employer with a similar business arrangement. There, the employer was required to follow airline standards for uploading bags and to meet specific performance metrics with airline auditors inspecting employees' work and identifying deficiencies to be corrected. 42 NMB at 2-4. The airline had sole discretion to approve staffing levels and could require the employer to accommodate airline schedule changes with 30 days' notice. *Id.* at 4. The Company's relationship with PAC provides the Company with a similar level of autonomy over its own business operations as that found in *Menzies*.

As shown here, the Board took into account (A 565-66) the evidence that the Company cites (Br. 24-26) regarding staffing, scheduling, and performance standards. The Board reasonably found (A 566) that it did not rise to the level of control necessary for RLA jurisdiction. *See id.* at 2-4; *see also Bags*, 40 NMB at 170 (no meaningful control where overall staffing and hours set by initial contract bid, carriers' schedule dictate staffing levels and shift assignments, and carrier has right to fine employer for performance issues); *Aero Port*, 40 NMB at 143 (no

meaningful control where carriers specify number of employees needed for given job, shifts when they are needed, and extent to which employees will be supervised; and noting that “[b]ecause [the employer] contracts with these carriers to provide services, it is expected that the carriers will specify the parameters of what services are necessary”).

Furthermore, the record evidence does not show that PAC dictates all the terms of matters such as staffing. Rather, contrary to the Company’s contentions (Br. 23-24), the evidence shows that the parties work together to resolve issues. For example, in 2012 or 2013, PAC and the Company discussed how to resolve problems with bag jams and cascading at ticket counters. (A 549; 19.) Following those discussions, the Company created a plan to cross-train employees and make schedule changes, to which PAC ultimately agreed. (A 549; 85-86.) Similarly, in 2014, the Company proposed stationing a jammer technician at the airline ticket counters to prevent jams and other problems from starting. (A 549-50; 212-13.) The Company’s supervisors prepared a breakdown of job duties inclusive of the change and presented it to PAC’s General Manager who agreed to try the new staffing pattern.⁷ (A 550; 213.)

⁷ The evidence with respect to scheduling and overtime is further illustrative of the ambiguous record as to PAC’s control over business operations. The Facility Manager first described her role in an overtime situation as explaining “what happened” to PAC’s General Manager when there was a need for overtime. She also indicated that she would sometimes provide an explanation after the fact with

Although PAC influences the Company's operations through the budgeting process, the Board reasonably determined (A 566) that such control 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."⁸ Contrary to the Company's assertion (Br. 40-41) that the Board failed to address evidence of PAC controlling employee compensation, the Board noted (A 566) that the Company cited to facts underlying the cost-plus nature of its contract for services and the ensuing budgeting process as evidence of PAC's control. However, the Board did not find those facts dispositive as they evidenced a relationship typical of a service contract.⁹ (A 566.) Indeed, the NMB has not

the understanding that "it's an airline" and "they have unexpected delays." (A 551; 217-18.) She then made sure to note that if the General Manager told her to send someone home because PAC did not want to pay overtime, she would make sure to do that but did not give any examples of that occurring. (A 551; 218.) Thus, the record does not establish if PAC's General Manager has ever made such a request, or the regularity and/or frequency of such requests.

⁸ The Company emphasizes (Br. 31-34) PAC's role in determining wage rates. The record shows that the Company and PAC negotiate an annual budget including labor costs, for which the Company is wholly reimbursed by PAC, that is broken down by month but not by employee or job classification, nor does the contract set wage rates or specify spending on health insurance and other benefits. (A 547, 552; 224-30, 417.)

⁹ For example, the Company cites (Br. 23) to PAC's discretion as to the Company's staffing levels, which as the Company notes, is "due to the 'cost plus' nature of the parties' relationship." The Company gives as an example (Br. 23) PAC's decision in the 2015 budget negotiations not to approve additional staffing for the holiday season. The Company's Branch Manager indicated (A 226) that

found such carrier control rises to the level necessary to confer RLA jurisdiction. *See Menzies*, 42 NMB at 2-6 (finding airline auditing employer budget, approving staffing levels, and preparing report cards to determine incentive payments to be typical of any contract for services).

2. PAC has limited access to the Company's operations and business records

The Board reasonably concluded (A 567) that PAC's limited access to the Company's operations and records is insufficient to establish meaningful control over the Company. Additionally, the Board found insufficient evidence in the record to establish that PAC makes personnel decisions based on the information that it can access. (A 567.) The Board's determination is consistent with the NMB's findings that the mere ability to access documents or audit and inspect operations is not unusual in a service contract and is not indicative of carrier control where the employer retains the decision-making power as to whether to take action against an employee for an audit or inspection result. *Menzies*, 42 NMB at 5.

As the Board reasonably found, there is insufficient evidence that PAC or the airlines access the Company's work areas for the purpose of inspecting operations. As to how often PAC's General Manager visits the dispatchers' work

this decision was due to how the jammer technician position was restructured. Irrespective of the reason, PAC's desire to keep costs down by limiting staffing is no different from the usual expectation in a contract for services.

area in the control room, the evidence is “contradictory” as the dispatchers themselves, who are in a far better position to know when the General Manager makes an appearance, testified that his visits are relatively limited.¹⁰ (A 566; 247-48, 257-58.) A night shift dispatcher characterized the extent of his work interactions with General Manager Imlay as “pretty rare,” perhaps as little as one time in the past five months (to ask when would be a good time to shut down part of the conveyor system for maintenance), including both in-person as well as phone calls to the control room. (A 561; 248.) A day shift dispatcher testified that he generally was contacted by Imlay once or twice a week, including for matters such as Imlay seeking updates on system operations after the installation of new programming on an x-ray machine. (A 561; 258.) In contrast, the Facility Manager’s testimony that Imlay goes into the control room daily was made with the caveat that “I guess I don’t keep track of when he goes down often or not” and no basis for her knowledge of his whereabouts was given other than her office’s proximity to his office, neither of which is adjacent to the control room.¹¹ (A 561, 566; 151.)

¹⁰ Credibility determinations are not made in investigatory pre-election hearings such as the hearing in this case. *See Grace Indust., LLC*, 358 NLRB No. 62, slip op. at 5 n.24 (2012) (citing *Marian Manor for the Aged & Infirm, Inc.*, 333 NLRB 1084, 1084 (2001)). Thus, the Board did not rely (A 566) on credibility resolutions but rather the weight of the evidence in making factual findings such as this one.

¹¹ PAC’s General Manager did not testify at the hearing.

In any event, there is no evidence that Imlay visits the jammer technicians' work areas with any regularity or that he is ever physically present where they perform work. (A 561, 567.) The record also does not indicate how often Imlay interacts with the jammer technicians. (A 561.) As for the airlines, while there is evidence that airline employees share work space with unit employees such as at the ticket counters, there is no evidence that airline employees are accessing unit employee work areas to inspect or monitor their work. (A 567.)

In terms of business records, PAC has access to a variety of documents pertaining to the Company's operations. However, as the Board found (A 567), whether PAC can access electronic copies of personnel records maintained at the Airport, and, if so, how frequently it accesses them is unclear. Thus, based on all of the above, the Board determined that PAC's access to the Company operations and records is similar to the access present in cases in which the NMB declined jurisdiction.

3. PAC's involvement in the Company's personnel matters is insufficient to establish meaningful control

The Board reasonably determined (A 569) that the contract does not give PAC control over personnel matters. Based on the evidence in the record, it "lacks specific controls over the multitude of personnel actions (e.g., hire, discipline, discharge, promote, transfer, assign, etc.) that the [Company] makes in running its Airport operations." (A 569.) As to PAC exercising control in practice, the Board

noted “instances of PAC’s limited involvement in the [Company’s] personnel decisions” that, based on the record as a whole, demonstrated insufficient involvement to establish meaningful control over the Company. (A 569.)

While “it is expected that the carriers will specify the parameters of what services are necessary,” RLA jurisdiction requires “significant control over labor relations,” including “significant control over the hiring, firing, and discipline” of an employer’s employees. *Aero Port*, 40 NMB at 143. A carrier’s referral or reporting of problems with employee conduct to their employer is insufficient to find RLA jurisdiction where the decision to discharge or discipline an employee is made by the employer. *Id.* (airline reporting of contractor employees for discipline “is not the type of meaningful control over labor relations that is necessary for RLA jurisdiction”); *accord Airway Cleaners*, 41 NMB at 269 (“one instance of complying with a carrier request to retrain an employee does not establish ...the meaningful control over personnel decision[s] required to establish RLA jurisdiction”). When an airline reports employee performance problems to the employer, but the employer “determines the appropriate discipline following its own discipline process,” this is also insufficient to find RLA jurisdiction. *Menzies Aviation, Inc.*, 42 NMB 1, 6 (2014).

As the Board found (A 567), the contract here is similar to contracts that the NMB has determined do not establish carrier control over personnel decisions. As

the Board first explains, the unit employees are employees of the Company and not PAC. Further, the contract does not confer any right on PAC to hire, discipline, or discharge unit employees but merely requires the Company to maintain qualified personnel to perform the contracted-for services. While the contract gives PAC the right to request that employees be “removed from the performance of [s]ervice[s],” a carrier does not exercise meaningful control over an employer unless the carrier itself makes or effectively recommends disciplinary action or discharge. *See Menzies*, 42 NMB at 6-7; *Airway Cleaners*, 41 NMB at 268. The Board acknowledged (A 568) that the Facility Manager testified that she consults with PAC’s General Manager about personnel decisions, but the Company has no contractual obligation to do so and there is insufficient evidence that these consultations are “anything more than voluntary in nature.”

Although the Company insists (Br. 27, 46) that PAC’s General Manager has the “final say” in hiring decisions, the evidence did not establish that PAC has a significant role in interviewing applicants and the Company presented no evidence that PAC has ever overruled a Company hiring decision. The Facility Manager admitted that PAC’s General Manager did not interview applicants. While the Facility Manager testified that she discussed the applicants with Imlay in a recent round of hiring jammer technicians from a public posting, the nature of

his feedback was to say that they would see if a candidate timely followed through on the next steps in the hiring process. (A 568; 164.)

In late 2014, PAC's General Manager did not meet with or discuss with the Facility Manager the hiring of two jammer technicians. PAC's General Manager met the two individuals when they came in to fill out their final hiring paperwork, but the record does not indicate whether he spoke to them by plan or by chance, nor is the nature or extent of their conversation known. (A 568; 188-93.) Given the proximity of PAC's General Manager to the Facility Manager's office, the Board found that "a limited and inconsequential chance encounter" was "equally plausible" as any speculative conclusion that PAC was more involved in the hires than the record indicated. As such, the Board reasonably found (A 568), that PAC had no "meaningful involvement" in their hire.

As indicated above, the contract gives PAC authority to request removal of an employee from baggage-handling services. However, the record does not establish whether that removal would effectively result in the employee's discharge or whether that individual could be transferred to another Company location.¹² (A 568.) In any event, the Board found (A 568) only one instance in

¹² The Company claims (Br. 10, 28) that removal from the contract results in termination because the Company has no other business at the Airport. As the Board found (A 557), however, the record does not reflect whether the Company could transfer a removed employee to non-Airport positions in the Company's other Portland area operations. In any event, the NMB has relied on the right of

the record of an employee being removed at an airline's request (due to hitting an employee of a different contractor) and even then the Company conducted an independent investigation prior to the employee's discharge. The Board found (A 568) no evidence of PAC ever reversing the Company's decision to discharge an employee.¹³ On one occasion, the Company acquiesced to PAC's request for a further investigation into an incident involving multiple employees with good work histories.¹⁴ Despite PAC's initial hesitation, the Company ultimately discharged the individuals. Furthermore, the Board relied (A 568) on the NMB's determination that carriers reporting disciplinary matters to employers who then conduct their own investigations does not on its own confer RLA jurisdiction. *See Huntleigh USA Corp.*, 40 NMB 130, 136-37 (2013); *Air Serv Corp.*, 39 NMB 450, 457 (2012). As the Board reasonably found (A 568), the Company "clearly" conducts its own investigations into disciplinary matters before taking action.

removal where employers have presented evidence that employees were terminated upon request of a carrier to remove them from services. *See, e.g., Aircraft Servs. Int'l*, 32 NMB 30, 33-34 (2004).

¹³ The Company insists (Br. 28) that PAC's General Manager must approve all discharges. While the Facility Manager testified (A 180-82) that in the few months that she had been facility manager, discharges would "go by" PAC's General Manager and she would ask him how he felt about it, there is nothing in the record indicating that this practice was required or that it was anything other than her choice.

¹⁴ Regarding this incident, the Facility Manager characterized PAC's General Manager's involvement as "ask[ing] us to take a little bit more time to investigate, to make sure before we let that person go, multiple people." (A 186.)

The Board found (A 569) insufficient record evidence to establish that PAC exercises meaningful control over the Company's promotion decisions. As indicated previously, the contract provides no right to PAC to approve or decide on promotions. While the Facility Manager testified in a "conclusory manner" that she "defers" to PAC's General Manager on promotions to dispatcher, the Board found (A 568) that the record indicates they "usually agree" on who is promoted or, in some instances, the Company's choice prevailed on an undefined temporary basis.¹⁵ (A 568-69; 210-11.) When PAC's General Manager recommended an employee other than the one initially chosen by the Company, there is no evidence that the General Manager directed that his choice be promoted. (A 568-69.) The Facility Manager herself put in place a system of posting dispatcher positions rather than solely relying on recommendations. (A 210.) Overall, the Company

¹⁵ As to the three instances when the Facility Manager reported that PAC's General Manager chose one person over another for the dispatcher position, the Facility Manager could not recall when that occurred. (A 212.) The Company states (Br. 27) that PAC's General Manager "approved" the promotion of two dispatchers on a trial basis. The Facility Manager testified that the General Manager "actually asked" to put the employees in the dispatcher position on a temporary basis. (A 212.) The Company cites (Br. 28) the example of a dispatcher who was promoted by the Company's former facility manager and told at the time of his promotion that the facility manager "had discussed [the promotion] with [PAC's General Manager], and that he agreed I would be a good fit, and that we would proceed on a temporary basis." (A 256.) No additional evidence was presented as to the nature of the temporary basis, the involvement of PAC's General Manager in the promotion, or anything to support the Company's statement (Br. 28) that the former facility manager "had to discuss" the promotion with him.

has opted to consult with PAC on promotions and, in some instances, has acquiesced to PAC's suggestions, while at other times has effectively rejected those suggestions. The Board reasonably determined (A 569) that the equivocal evidence does not establish meaningful control over promotion decisions.¹⁶

The Board found (A 569) that the evidence shows PAC has no "material degree" of involvement in the Company's disciplinary decisions. The Board reasonably determined (A 569) that one instance of PAC's General Manager inquiring about an employee's attendance problem was insufficient to establish its involvement in discipline of employees.¹⁷

¹⁶ In 2014, PAC's General Manager suggested the promotion of the Facility Manager to her current job from a supervisory position rather than the Company posting the vacant facility manager position as it had planned. (A 560; 233.) While the Company characterizes (Br. 24) the decision as happening "at PAC's insistence," the Company's Branch Manager testified (A 233) to a conversation between himself and PAC's General Manager discussing the possibility: "He said ...I think we can go ahead and put Bonnie in that position and...we talked about her skills, we talked about...how long she's been doing the job, and...he really felt strongly about putting Bonnie into that position." Such involvement in a promotion is not dispositive of carrier control under NMB precedent. In its recent *Airway Cleaners* decision, the NMB found that hiring a general manager following an airline's recommendation and based on previous employment with the airline was neither surprising nor evidence of meaningful control over personnel matters. 41 NMB at 268; *accord Air Serv*, 39 NMB at 457 (employer assertion that account manager hired based on air carrier approval not dispositive with no evidence carrier approval required to hire unit employees).

¹⁷ When asked about how often she would have conversations with PAC's General Manager about an employee's performance, the Facility Manager responded "It can go in spurts. It could be—it could be daily. Often." (A 117.) Despite this broad although ambiguous statement, she gave only one example of the General

Furthermore, as to PAC's role in personnel decisions overall, the Company produced no documentary evidence showing PAC "actually or ultimately deciding any personnel matters" related to the unit employees despite a relatively high turnover of Company employees at the Airport. Given the lack of controls in the contract and the limited record evidence of PAC's involvement in personnel decisions, the Board reasonably determined that the record fails to establish PAC's meaningful control over the Company's personnel decisions.

4. PAC's limited degree of supervision over Company employees is insufficient to establish meaningful control

The Board reasonably determined (A 569-70) the record indicated that PAC's General Manager exerted only a limited degree of supervision over the Company's employees that is insufficient to establish meaningful control over the Company. The Company has its own supervisory employees to whom the unit employees report. The Company's Facility Manager and supervisors provide

Manager inquiring about whether an employee had been disciplined and that was after the fact. (A 559; 116.) The Facility Manager further testified that she occasionally consults with the Company's Branch Manager and PAC's General Manager about discipline "depending on the escalation." (A 558; 196.) However, as the Board found (A 558), the record fails to show "at what level of escalation the Facility Manager deems it necessary" to make such consultations or does it "reflect the[ir] nature and extent." The Company did not put on such evidence despite a 43-item non-exclusive list of infractions in its progressive discipline policy allowing the Company to use any form of discipline deemed appropriate under the circumstances. (A 558; 359-61.)

written instructions and information for the dispatchers and jammer technicians on daily operations sheets prepared by the Company. (A 123-24, 532.)

The Board found (A 569) that the record evidence “does not establish that PAC or individual airlines are authorized to direct or supervise the work of dispatchers or jammer technicians.” In practice, requests or directions from PAC or the airlines are handled by PAC’s General Manager or other supervisors who seek to resolve any issues with the Facility Manager. For example, when an airline directed jammer technicians to place tubs in a new location at their ticket counter, the jammer technicians reported the issue to their supervisor and the ultimate resolution of the requested change came from consultations at the management level. (A 569; 67-69.) Likewise, with respect to jammer technicians temporarily using handheld scanners for oversize baggage for Alaska Airlines because of concerns over missing or late bags, the evidence does not show that airline employees supervised the jammer technicians in this task but rather that PAC’s General Manager and the Company’s management worked to remedy the situation. (A 548; 130-31.)

Similarly, a supervisor from Southwest Airlines worked with a supervisor from the Company to reroute some of Southwest’s flights to a different ticket counter to prevent cascades and jams. (A 549; 134-37, 535-36.) The Company describes (Br. 30) this incident as a Southwest supervisor coming “directly to the

control room to instruct [Company] employees to correct the issue.” The Facility Manager, however, testified that the supervisor “came down to the control room and wanted to know what we could do to fix this problem and kind of wanted to see what was going on...[s]o [we] took her into the control room and showed her what was going on.” (A 135.) The Company also states (Br. 30) that unit employees moved some of Southwest’s flights “[p]er the airline’s direction” whereas the Facility Manager testified (A 137) that “we wanted Southwest to move some flights over to a [different] ticket counter” to remedy the problem.

Furthermore, the Company characterizes (Br. 29) a dispatcher’s testimony as supporting the broad assertion that PAC and airline employees “direct” unit employees “on a daily basis.” The dispatcher testified (A 249) that he takes calls in the control room from airline employees, maybe three times per week, and tells them where to find lost bags. The dispatcher provides this information by looking in the electronic system or directing a jammer technician to physically look for the bag. The Company cites no case law for the proposition that responding to an individual’s informational question is tantamount to being “directed” or “supervised” by that individual. On the record as a whole, PAC’s supervision or direction of unit employees is insufficient to establish meaningful control over the Company.

5. PAC's limited involvement in training Company employees is insufficient to establish meaningful control

The Company has a contractual obligation to provide certain training for its employees at the Airport. The Company has its experienced jammer technicians largely conduct all training for new jammer technicians. The experienced jammer technicians also contribute to training materials and prepared the test for new employees as well as revised it when PAC's operations manual changed. (A 562; 159.) The Board found (A 570) no evidence that PAC provides any training other than bag hygiene training conducted by PAC's General Manager. While the Facility Manager testified that she seeks PAC's approval of some training materials (those with "significant changes"), there is no evidence of any contractual requirement to obtain approval. (A 562; 159.) Furthermore, the record does not establish how often PAC's General Manager has reviewed training materials or whether he has ever rejected any changes. (A 562.) Thus, PAC's limited involvement in employee training is insufficient to establish meaningful control over the Company.

6. There is insufficient evidence establishing that Company employees are held out as carrier employees

The Board found (A 570) insufficient record evidence to show that the unit employees are held out to the public as carrier employees. Dispatchers and jammer technicians are issued uniform shirts with PAC's logo and may purchase

sweatshirts or jackets with the logo. On any day, employees can opt to wear their own solid black sweatshirts or jackets. On Fridays, employees can wear t-shirts with the Company's logo. There is no record evidence as to what options each employee has chosen or how many of them have purchased PAC logo items. Furthermore, to the extent that PAC specifies that employees wear particular uniforms or other clothing, the NMB has found that "[a]ll contracts specify certain standards that a company must follow in performing services for a carrier," including those related to appearance. *Menzies Aviation, Inc.*, 42 NMB 1, 4 (2014) (citing *Bags, Inc.*, 40 NMB 165, 166-67 (2013)).

In any event, as the Board found (A 570), it is unclear how much interaction the unit employees have with the public given that their work area is largely confined to the secure area in the lower level of the Airport, which is not open to the public. At the ticket counters and oversize baggage screening areas where passengers go with their baggage, airline employees and TSA agents are primarily responsible for interacting with passengers. Therefore, the Board reasonably determined that the record as a whole contains insufficient evidence to establish that Company employees are held out as PAC or airline employees to the public.

After considering each factor in the carrier control test, and the evidence in the record as a whole, the Board reasonably determined that "the degree of control

that PAC has over the [Company] 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 [Company] subject to the RLA.” (A 570.)

The Board acknowledged that, on the surface, PAC’s control appeared to be more extensive than permitted by the contract. However, the Board also found (A 570) that the Facility Manager’s stated practice of deferring to PAC on many issues was supported largely by her conclusory testimony without the support of concrete examples or documentary evidence (such as contract provisions). *Cf. Beverly Enters.-Massachusetts, Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999) (noting that statutory exceptions to Board’s jurisdiction require actual evidence “visibly translated into tangible examples”) (citing *Oil, Chemical & Atomic Workers Int’l Union v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971)). The Board reasonably concluded (A 571) that the Company “failed to establish the meaningful control that the NMB looks for in cases of this nature” and, furthermore, the NMB has recently found no RLA jurisdiction “in similar cases, on similar facts.” *See Menzies*, 42 NMB at 2-6; *Airway Cleaners*, 41 NMB 262, 263-69 (2014); *Bags, Inc.*, 40 NMB at 166-70.

D. The Company's Arguments are Without Merit

1. The Board did not err by deciding the jurisdictional question

The Company continues to incorrectly assert (Br. 20-21) that the Board should have referred this case to the NMB for a finding as to jurisdiction. As this Court has determined, the Board has no such obligation. *United Parcel Serv., Inc. v. NLRB*, 92 F.3d 1221, 1222 (D.C. Cir. 1996) (holding that the Board is not “legally compelled” to certify questions of jurisdiction to NMB). This Court found no “sound basis on which we might order, as the petitioner asks us to do, the [Board] to defer challenges to its jurisdiction to the NMB.” *Id.* at 1225 (citing *Dobbs Houses, Inc. v. NLRB*, 443 F. 2d 1066, 1072 (6th Cir. 1971) (“observing that ‘there is no statutory requirement that [a] question of jurisdiction be submitted for answer first to the [NMB]’ and concluding that the Board had no other obligation to do so”). Thus, “[s]tatutory provision, precedent, and practice do not suggest that [the Court] can take it upon [itself] to establish some judicially-enforceable agency hierarchy in these matters.” *UPS*, 92 F.3d at 1225.

Furthermore, the Board's decision here not to refer this case to the NMB was not arbitrary. As this Court recognized in *UPS*, the Board practice of referring jurisdictional questions to the NMB has well-established exceptions. *Id.* As applicable here, and as the Board noted (A 563), 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 Indust.*, 337 NLRB 708, 708 (2002); *see also Air California*, 170 NLRB 18, 18-19 (1968) (not referring case because it resembled an already-decided matter). As the Company recognizes (Br. 20), the Board has stated that “occasional departures” from referring cases to the NMB may be “justified” and has reserved the particular need to refer cases to “very difficult questions of interpretation under the RLA.” (Br. 20 (quoting *Fed. Express Corp.*, 317 NLRB 1155, 1155 (1995).) Where, as here, the NMB has already interpreted the applicable language of the RLA, set forth a multi-factor test for determining jurisdiction, and declined jurisdiction after applying that test to factually similar cases, the Board’s decision not to refer a case is not arbitrary.

2. The Board’s decision is consistent with NMB precedent

The Company relies (Br. 44-46) on the NMB’s decision in *Gateway Frontline Servs.*, 42 NMB 146 (2015), as support for its claim that the Board should have found the Company subject to the RLA at the Airport. The Company fails to mention, however, that unlike in this case, RLA jurisdiction was not disputed in *Gateway*. The employer and the union that it had voluntarily recognized both contended that the employer was subject to the RLA, and the union filing an application with the NMB took no position on the issue. *Id.* at 147-48.

As the Company recites (Br. 45), in *Gateway*, the NMB concluded that, “Although many of the contract provisions...are typical of those found in any contract for services, the carriers have a level of control over [the employer]’s personnel decisions greater than that seen in recent cases where the [NMB] has not exercised jurisdiction.” *Id.* at 151. The NMB noted that the employer “does not independently determine the appropriate discipline for its employees; rather, it acquiesces to the carriers’ discipline requests, even when Gateway managers request less severe discipline for employees.” *Id.* at 152. The NMB went on to state that this “greater control over discipline at Gateway is related to a greater level of direct carrier supervision over Gateway employees than seen in cases where the [NMB] has not found jurisdiction.” *Id.* For example, employees are trained to approach airline supervisors when addressing passenger complaints and the employer is required to forward all complaints to the carriers for their own resolution. *Id.*

In contrast to the employer in *Gateway*, the Company disciplines its own employees and PAC does not directly supervise its employees. As discussed above, the Board reasonably determined that PAC has no “material degree” of involvement in the Company’s disciplinary decisions. (A 569.) The Company can point to no evidence in the record indicating that the Company acquiesces to PAC’s disciplinary requests, or that PAC has made specific requests as to

discipline. In the one instance of an employee being terminated based on PAC's request (for hitting another airport employee), the Company still conducted its own investigation of the incident before discharging the employee. (A 568.) At most, the record shows that on one occasion, the Company further investigated a situation upon the request of PAC before following through with its own decision to discharge employees. (A 568.) Furthermore, PAC does not directly supervise the Company's employees, who take complaints or issues, such as a concern over the placement of tubs at a ticket counter, to their own supervisors for resolution. (A 569.)

3. The Board properly discharged its decision-making duties

The Company mischaracterizes (Br. 47) the Board's determination (A 565-66, 570) that factors found in a "typical subcontractor relationship" are not demonstrative of carrier control as "an unwarranted and unexplained departure" (Br. 47) from precedent. To the contrary, the Board relied on the NMB's precedent in making its determination. *See Menzies*, 42 NMB at 7 ("extent to which the carrier controls the manner in which [the employer] conducts its business is no greater than that found in a typical subcontractor relationship"); *Airway Cleaners*, 41 NMB at 268 (same).

To bolster its argument that indicia of a subcontractor relationship should support a finding of carrier control, the Company cites (Br. 48-53) to the Board's

joint employer test. The joint employer test is undisputedly not before this Court for review in this case where the jurisdictional question is governed by the NMB's carrier control test. Applying that carrier control test, the Board rendered a decision consistent with cases where the NMB has declined jurisdiction because the facts of this case are most similar to those cases. The Board's application of the carrier control test is in no way dependent upon reconciling that test with the Board's own joint employer test.

Likely because the Board's revised joint employer test postdated its Decision and Order in this case, no party in this case drew an analogy between the joint employer and carrier control tests prior to the Company's brief to this Court. As such, the Board was not given an opportunity to respond to the Company's assertions. However, the two tests start from different guiding principles—the joint employer test under the Act is based on the common law definition of employer and the carrier control test under the RLA is based on the statutory definition of a “carrier.” *See* 45 U.S.C. § 151 (“The term carrier includes . . . any company which is directly or indirectly owned or controlled by or under common control with any carrier”); *Browning-Ferris Indust. of California, Inc.*, 362 NLRB No. 186, slip op. at 2 (2015) (in joint employer determination “initial inquiry is whether there is a common-law employment relationship with the employees in

question”) (citing *NLRB v. Browning-Ferris Indust. of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982)).

Furthermore, irrespective of any arguments as to the joint employer test, the Board is entitled to a presumption of regularity in its decisionmaking. The crux of the Company’s argument is found in its assertions that the Board’s determination was “preordained” (Br. 42, 45) and the Company is now “expos[ing]” the “notoriously pro-union” (Br. 38) Board’s “outcome-driven result.” (Br. 53.) The Company’s attack on the Board’s decision-making process cannot be squared with the settled principle that courts afford adjudicatory agencies like the Board a “presumption of regularity,” and will presume that public officials have properly discharged their decision-making duties absent “clear evidence to the contrary.” *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926); *see also Nat’l Ass’n of Motor Bus Owners v. FCC*, 460 F.2d 561, 566 (2d Cir. 1972) (“it is not the province of the courts to inquire into the *bona fides* of agency action or to label administrative determinations a facade”).

4. The Company’s argument that the risk of a strike requires a different result is not properly before this Court

Finally, the Company incorrectly asserts (Br. 53-54) that the RLA’s purpose and legislative history are grounds for reversing the Board’s decision. The Company contends (Br. 54) that the Board failed to take into account the RLA’s goal of eliminating disruptions to commerce and posits that a strike by its

employees would be more detrimental to airport operations than a strike by airline employees. The Company made no such argument to the Board and, as such, this Court is without jurisdiction to consider the Company's claim. 29 U.S.C. §160(e) (“[n]o objection that has not been urged before the Board...shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances”); *see also Bally's Park Place v. NLRB*, 646 F.3d 929, 938 n.7 (D.C. Cir. 2011). Additionally, as this Court has explained, “a party must raise all of his available arguments in the representation proceeding rather than reserve them for an enforcement proceeding.” *Pace Univ. v. NLRB*, 514 F.3d 19, 23 (D.C. Cir. 2008) (collecting cases).

In any event, the Company's declaration (Br. 54-55) that Congress modified the definition of “carrier” to bring companies like it under the RLA ignores the fact that Congress entrusted the NMB to interpret and apply the RLA. The NMB has done so through its well-established test for whether a non-airline employer subject to the RLA. Furthermore, Congress also entrusted the Board with the promotion of industrial peace, thus demonstrating the common goals of the RLA and the Act. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674 (1981) (“A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce.”) (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)). Therefore, after determining

that this case presented a jurisdictional claim in a factual situation similar to instances where the NMB declined jurisdiction, the Board applied the NMB's test to the evidence on the record as a whole and found insufficient evidence that PAC has meaningful control over the Company.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

s/Usha Dheenan

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National Labor Relations Board

February 2016

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ABM ONSITE SERVICES-WEST, INC.)	
)	
Petitioner/Cross-Respondent)	Nos. 15-1299, 15-1347
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	19-CA-153164
)	
and)	
)	
INTERNATIONAL ASSOCIATION OF)	
MACHINISTS AND AEROSPACE WORKERS,)	
DISTRICT LODGE W24 AND LOCAL LODGE)	
1005)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,883 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
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Dated at Washington, DC
this 3rd day of February, 2016

STATUTORY ADDENDUM

Relevant provisions of the **National Labor Relations Act**, as amended (29 U.S.C. §§ 151, et seq.):

Section 2(2) (29 U.S.C. § 152(2)):

The term “employer” includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time

Section 7 (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a)(1) (29 U.S.C. § 158(a)(1)):

It shall be an unfair labor practice for an employer –
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

Section 8(a)(5) (29 U.S.C. § 158(a)(5)):

It shall be an unfair labor practice for an employer –
(5) to refuse to bargain collectively with the representatives of his employees

Section 10(e) (29 U.S.C. § 160(e)):

The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice occurred or wherein such person resides or transacts business, for the enforcement of such order . . . No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive

Section 10(f) (29 U.S.C. § 160(f)):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia. . . .

Relevant provisions of the **Railway Labor Act**, as amended (45 U.S.C. §§ 151, et seq.):

45 U.S.C. § 151:

When used in this chapter and for the purposes of this chapter—

First. The term “carrier” includes any railroad . . .and any company which is directly or indirectly owned or controlled by or under common control with any carrier. . . .

45 U.S.C. § 181:

All of the provisions of subchapter I of this chapter . . . are extended to and shall cover every common carrier by air

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INTERNATIONAL ASSOCIATION OF)	
MACHINISTS AND AEROSPACE WORKERS,)	
DISTRICT LODGE W24 AND LOCAL LODGE)	
1005)	
)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 3rd day of February, 2016