

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

**ALLIED AVIATION SERVICE COMPANY OF NEW JERSEY**

**Petitioner/Cross-Respondent**

v.

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

and

**LOCAL 553, INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

**Intervenor**

---

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

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**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: Allied Aviation Service Company of New Jersey (“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. Local 553, International Brotherhood of Teamsters (“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. 22-CA-127150, issued on August 19, 2015, and reported at 362 NLRB No. 173. 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 22 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 The Regional Director’s findings are contained in an unpublished Decision and Direction of Election issued on May 7, 2012, which is located at pages 1059 to 1089 of the Joint Appendix. The Board’s Order denying the Company’s Request for Review of the Decision and Direction of Election issued on June 5, 2012, and is located at page 1141 of the Joint Appendix. In that Order, the Board permitted certain employees to vote by challenged ballot in the election. The Board’s Decision and Order before this Court also relies on

findings made by an administrative law judge in an unpublished Recommended Decision on Challenged Ballots that issued on January 15, 2013, and is located at pages 1300 to 1316 of the Joint Appendix. The Board's Decision and Certification of Representative, ruling on the Company's exceptions to the judge's decision, issued on December 3, 2013, and is located at pages 1358 to 1360 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.

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Dated at Washington, DC  
this 14th day of March, 2016

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**UNITED STATES COURT OF APPEALS  
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**Nos. 15-1321 & 15-1360**

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**v.**

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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 Allied Aviation Service Company of New Jersey (“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 19, 2015, and reported at 362 NLRB No. 173. (A 1400-03.)<sup>1</sup> 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 Local 553, International Brotherhood of Teamsters (“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 September 11, 2015. The Board filed its cross-application for enforcement on October 21. Both filings were timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

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<sup>1</sup> 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.

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 ISSUES PRESENTED**

The ultimate issue in this case is whether the Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Union as the exclusive collective-bargaining representative of an appropriate unit of employees. The resolution of this issue turns on several subsidiary questions:

1. Whether the Board properly found that the evidence is insufficient to show that the Company is an employer subject to the Railway Labor Act.

2. Whether substantial evidence supports the Board's finding that the Company did not carry its burden of proving that its Fueling Supervisors/Dispatchers/Operations Supervisors, Maintenance Supervisors, and Tank Farm Supervisors are statutory supervisors excluded from the Act's protections.

3. Whether a properly constituted Board panel revisited the issues that were before the recess Board, thus mooted any claim that an improper recess Board played an unreviewed role in this case.

### **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 Fueling Supervisors/Dispatchers/Operations Supervisors, Maintenance Supervisors, and Tank Farm Supervisors at Newark Liberty 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 1401.)

The Company does not dispute its refusal to bargain. 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.<sup>2</sup> (A 1400.) The Company also maintains that all of the employees in the petitioned-for unit are statutory supervisors not covered by the Act. Finally, the Company asserts that the Board lacked a quorum when it ruled on a request for review of a Regional Director's decision in the representation stage of this case. (A 1400.) The Board's findings in the representation and unfair labor practice proceedings, as well as the Decision and Order under review, are summarized below.

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. The Company's Fueling Business at the Airport, Department Structure, and Machinist-Represented Employees**

The Company provides fueling services for commercial aviation throughout the United States, including at the Airport through a contract with the Port Authority (the owner of the Airport). (A 1060, 1062; 26, 42, 56.) The Company operates 24 hours per day, 7 days per week, to serve the 50 airlines operating 40 different kinds of aircraft out of 5 terminals. Under its contract, it must maintain on-time performance. (A 1063; 40, 43, 234, 802.) The Company maintains offices

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

at terminals A and C and runs its operation out of an onsite building with offices, a garage, and fuel storage facilities. (A 1063; 42, 46, 270.)

The Company dispenses between 2 and 3 million gallons of fuel per day by its fuelers (in the Fueling Department) fueling aircraft at the gates or in the ramp area near the gates. (A 1062-63; 49, 509.) The fuel travels either by tanker trucks driven by its fuelers or through a pipeline system, which terminates in about 500 hydrants. An incoming pipeline leads from a fuel supplier to the Company's tank farm, which consists of storage tanks capable of storing 15 million gallons of fuel, loading racks for filling the tanker trucks, pump pads, and a fuel selection area. The Tank Farm Department is responsible for maintaining and monitoring the tank farm and is also responsible for maintaining a wastewater facility and a gas station for fueling the Company's vehicles. (A 1063; 42, 46, 501-02, 509, 559.) The mechanics and utility employees in the Maintenance Department repair and perform preventive maintenance on vehicles and equipment, including maintenance on the hoses and filters used in the fueling operation. It is also responsible for cutting grass, painting, and cleaning the Company's facility. (1063; 44-45, 395-96.)

The Company employs fuelers, mechanics, utility employees, and tank farm employees, none of whom are the subject of the petition at issue in this case. Those employees have been represented by a local of the International Association

of Machinists for 30 years. (A 1063; 61.) The Supervisors in the petitioned-for unit do not perform the production work that those employees perform, such as fueling planes or repairing and maintaining the Company's vehicles, equipment, facilities, grounds, fuel storage facilities or pipeline system. (A 1064; 117, 372, 542.) Machinist-represented lead employees in the Fueling, Maintenance, and Tank Farm Departments distribute work to other Machinist-represented employees. (A 1063-64; 67, 397, 415, 464, 518, 556, 598, 721.)

**B. Department Manager Functions and Duties**

A manager runs each department and is either onsite or available by phone at all times. In the Fueling Department, Duty Managers interact with the airlines, Federal Aviation Administration ("FAA"), and Port Authority, meet with the Port Authority and others to answer questions about fuel spills, collaborate with the Maintenance Department to make sure that sufficient equipment is available for fueling, and schedule employees as well as make all decisions about time off. (A 1064; 39, 74, 95-96, 332, 338, 1013.) At least one Duty Manager is at the Airport for every shift. (A 1064; 48, 130, 788.) The Tank Farm Manager handles employee schedules, lays out the daily workload, and deals with development projects. (A 1064; 512, 728, 798.) The Maintenance Manager evaluates what work needs to be done on a daily basis, sets shop priorities, schedules employees

and grants time off, and responds to fuel spills. (A 1064; 96, 396, 644, 1027, 1047.)

### **C. Fueling Supervisor Functions and Duties**

Airlines put out a daily schedule of their departure times, gates, and fuel requests. The Fueling Supervisors transpose that information to a form or ticket, which contains the location and amount of fuel needed, and provide the ticket to the fueler. The inside Fueling Supervisors, or Dispatchers, assign fuelers to one of the five terminals and, operating off a list provided by the Duty Manager, distribute vehicles, equipment, and workload for the day. The outside Fueling Supervisor's job is to move the fuelers between airlines, gates, and aircraft depending on the needs of the airlines at any given moment. As the shift proceeds, Fueling Supervisors communicate with the airlines and each other to gather and share information about fueling needs, gate changes, and delays. (A 1065; 49-53, 94, 277, 313, 355-58, 593-96, 987-88, 1014-16.)

Each airline and type of aircraft has its own fueling procedure. Therefore, fuelers can only work for those airlines and aircraft for which they are certified. The Company keeps a log of the fuelers' certifications, which the Fueling Supervisors consult regularly to distribute work based on certification and availability. (A 1065-66; 140, 314, 378, 597, 608, 828.) The Fueling Supervisors working outside ensure that fuelers are fueling the proper aircraft and flight and

following appropriate procedure. They perform daily evaluations of these tasks by completing a checklist on safety and procedures. The evaluations can lead to additional training but Fueling Supervisors do not impose penalties or discipline. (A 1066; 277, 284, 289, 291, 354, 357, 384, 886.) At the end of each shift, Fueling Supervisors call each airline to see if there was any delay in fueling any of their aircraft. Whenever fueling is delayed, even by a few minutes, the Fueling Supervisors write a “delay report.” (A 1068; 105, 280.)

#### **D. Tank Farm Supervisor Functions and Duties**

The Tank Farm Supervisors maintain fuel inventory, keep track of fuel inflow and outflow, monitor storage and supply facilities for leaks and other problems, and maintain the Airport’s fuel pipeline system. (A 1066; 55, 207, 509, 517.) When only one Tank Farm Supervisor is working, he must stay inside the control room to monitor the inflow and outflow. He also maintains daily contact with the Company’s fuel supplier. (A 1066; 509-10, 560.) When more than one Tank Farm Supervisor is on shift, the outside Supervisor inspects all areas of the Department’s responsibility, on a daily basis, including checking lines, tanks, and equipment for problems. The Tank Farm Supervisors distribute work through a lead employee on each shift. This work includes checking fuel tanks, removing water from storage facilities, and checking gauges at the wastewater facility. (A

1066-67; 517-18, 721.) In the event of a severe problem, company protocol directs Tank Farm Supervisors to contact their Manager. (A 1066-67; 730, 788.)

#### **E. Maintenance Supervisor Functions and Duties**

The Maintenance Department is responsible for keeping the Company's tankers operating, maintaining the hydrants, and handling fuel spills. The Maintenance Supervisors keep track of the number of vehicles that are out of service as well as those that are scheduled for monthly preventive maintenance. (A 1067; 54, 643, 660.) Maintenance Supervisors give daily work orders, taken from their Manager's workload sheet, to Machinist-represented leads who distribute the work. (A 1067; 397, 415, 644, 1028-29.) Some mechanics work in the Maintenance shop, while at least three mechanics are stationed on the ramp where the fuelers are working to deal with breakdowns and flat tires in the field. Maintenance Supervisors can temporarily move mechanics from the shop to the field. (A 1067; 397, 425, 645-46, 660, 1028.)

#### **F. Training Department Functions and Duties**

The Training Department consists of a Training Manager and three Training Supervisors who are trained by the individual airlines and who, in turn, are responsible for the initial training of recruits to fuel aircraft, certification of employees to work on additional airlines and aircraft, and annual recertification of the Company's fuelers. (A 1063; 811, 817, 837, 1163.) The Training Manager

oversees training and training records and is the liaison regarding training issues to the airlines, FAA, and Port Authority. (A 1064; 38, 801.) Training is performed on live aircraft; there is no practice ground. Training Supervisors take three or four weeks to train a new employee to fuel the different types of aircraft for one airline; to certify a fueler for all airlines takes about 400 hours. (A 1068; 803, 806, 1209.) Training Supervisors, who conduct all of the hands-on training and observation of trainees, evaluate the trainees and report to the Training Manager whether an employee is ready to fuel aircraft, needs additional training, or if the trainee is not working out. (A 1305; 806, 812-13, 854, 1209, 1230, 1238.) The Training Manager relies solely on the Training Supervisors' observations and information as to the trainee's progress in fueling because he is never on the field with trainees. (A 1305, 1312; 812, 1166, 1168, 1175.)

#### **G. The Company's Irregularity Report System**

All Supervisors write "irregularity reports," which are factual recitations of events covering any non-standard occurrence. They address inappropriate employee conduct (such as overfueling a plane or speeding in a truck), to broken equipment (such as a phone), or damage on a truck from an unknown cause. (A 1068-69; 288, 297, 520, 553, 750-51, 986.) The reports are given to a Duty Manager or to the Company's Hearing Officer, Jorge Quintero. (A 1068; 306, 572, 653, 758, 862, 1027.) Quintero then conducts an investigation and calls the

Machinist-represented employee whose conduct is at issue to a hearing with his shop steward. (A 1068; 90, 863, 962.) In rare cases, the Supervisor who wrote the irregularity report may attend the hearing, but only as a fact witness, or Quintero may contact the Supervisor with technical questions or questions regarding the incident. (A 1069; 529, 863, 912, 1011.) The Supervisors are not consulted about, or informed of, any next steps that Quintero takes with respect to discipline. (A 1069; 549, 658, 911, 986, 1027.) In one instance where a Supervisor spoke to the Hearing Officer to recommend that an employee not be disciplined, his Manager admonished him for not following the chain of command. (A 1069; 1026-27.) Supervisors can and do speak with Machinist-represented employees regarding errors or other incidents without writing irregularity reports. (A 1069; 402, 649, 893.) Supervisors receive notices, warnings, and write-ups for their own performance. (A 1069; 89, 232, 650, 990, 1002.)

#### **H. Additional Terms and Conditions of Employment for All Company Employees**

Supervisors and managers are paid a salary, receive the same benefit package, fill out the same application forms when they apply for positions, receive the same Code of Conduct, and wear the same blue shirts (although managers may also wear business attire). (A 1070-71; 72, 75, 79, 101, 258, 263, 265, 964, 999.) Supervisors do not attend management meetings. (A 1071; 89, 323, 727.) All terms and conditions of employment for Machinist-represented employees are

determined by their collective-bargaining agreement including pay, benefits, Code of Conduct, parking and locker facilities, uniforms (blue), and overtime allocation. (A 1070-71; 79, 97, 263, 265, 535, 636, 800.)

## **II. THE BOARD PROCEEDINGS**

### **A. The Representation Proceeding**

On March 20, 2012, the Union filed a petition with the Board seeking an election among the Fueling Supervisors/Dispatchers/Operations Supervisors, Maintenance Supervisors (including Parts Supervisors and Parts Persons), Tank Farm Supervisors, and Training Supervisors at the Airport. (A 192.) The Company disputed the appropriateness of the petitioned-for unit contending that all of the petitioned-for employees are supervisors within the meaning of Section 2(11) of the Act (29 U.S.C. § 152(11)).

Following a hearing to adduce evidence as to the supervisory status of the petitioned-for employees, the Board's Regional Director for Region 22 issued a Decision and Direction of Election finding that the petitioned-for employees are not supervisors, and directing that an election be conducted. (A 1059-89.) The Company requested review of the Regional Director's decision arguing that the Regional Director misapplied the facts and erred in finding that the petitioned-for employees were not statutory supervisors. (A 1090-1125.) The Company further sought to disqualify certain Board members, including Members Griffin and

Block, from ruling in the proceeding arguing that their recess appointments to the Board by the President were not proper. (A 1124.)

On June 5, 2012, the Board (Chairman Pearce and Members Griffin and Block) issued an order finding that the Company raised a substantial issue with regard to the Regional Director's finding that the Training Supervisors are not supervisors under the Act. (A 1141.) The Board amended the Regional Director's decision to permit the Training Supervisors to vote by challenged ballot and denied the request for review in all other respects.<sup>3</sup> (A 1141.) The Board also rejected the Company's recess appointment argument. (A 1141 n.1.)

The Regional Director held a secret-ballot election on June 7, 2012. The tally of ballots showed a vote of 21-20 in favor of union representation. (A 1301.) Because the three challenged ballots of the three Training Supervisors were sufficient in number to affect the results of the election, a hearing on the challenged ballots was held before an administrative law judge. During the hearing, the Company asserted that the challenged ballots should be counted; it argued that all of the employees in the unit (who all have the title of Supervisor) had the same responsibilities and authority, and that the Training Supervisors are not statutory supervisors if, as the Regional Director determined, its other

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<sup>3</sup> The Board also denied a motion by the International Association of Machinists and Aerospace Workers to reopen the record and intervene in the case. (A 1141.) That ruling is not at issue before this Court.

Supervisors are not. (A 1146-50.) The Company did not concede, however, that the Regional Director's initial unit determination was correct. The Union took the position that the Training Supervisors are Section 2(11) supervisors. Thereafter, the administrative law judge issued a Recommended Decision on Challenged Ballots, in which she concluded that the Union met its burden of showing that the three Training Supervisors who voted under challenge are supervisors under Section 2(11) of the Act.<sup>4</sup> (A 1315.) Therefore, she recommended that the challenged ballots be sustained and the Union be certified as the employees' collective-bargaining representative.

The Company filed exceptions with the Board, in which it continued to oppose the Board's 2012 Order denying review of the Regional Director's finding that all of the unit employees are not Section 2(11) supervisors excluded from the Act's protection. (A 1339 & n.6.) The Company further argued (A 1321) that if, as the judge found in her recommended decision, its Training Supervisors are statutory supervisors, then all of the Supervisors in the unit are also statutory supervisors, and the election should be set aside. On December 3, 2013, a Board panel consisting of three Senate-confirmed members (Members Miscimarra, Hirozawa, and Johnson) issued a Decision and Certification of Representative, adopting the judge's recommendation that the challenge to the Training

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<sup>4</sup> The Union filed objections to the election but the objections were withdrawn before the hearing and were thus not addressed by the judge. (A 1295-96.)

Supervisors' ballots be sustained and certifying the Union as the collective-bargaining representative of the petitioned-for unit excluding the Training Supervisors. (A 1358-60.)

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

On April 1, 2014, the Union requested that the Company recognize and bargain with it as the representative of the unit employees. On April 11, the Company refused. (A 1401.) Based on a charge filed by the Union, the Board's General Counsel issued an unfair labor practice complaint alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act. (A 1362-66.) In its answer, the Company admitted its refusal to bargain but denied that the refusal was unlawful, contending that the certified bargaining unit was inappropriate because all those in the unit were statutory supervisors. The Company also argued that the Board panel denying its request for review in 2012 was improperly constituted because of the recess appointments of Members Griffin and Block, and therefore the Board lacked the authority to render a decision in the underlying representation case. (A 1367-74.)

The General Counsel then filed a motion for summary judgment with the Board. The Board issued an order transferring the case to itself and directed the Company to show cause why the motion should not be granted. (A 1375.) The Company filed a response reasserting its prior affirmative defenses. (A 1376-99.)

In addition, the Company argued for the first time that the Board lacked jurisdiction because the Company is subject to the RLA. (A 1387-91.)

On June 26, 2014, while the unfair labor practice case was pending before the Board, the Supreme Court issued a decision finding that the President's January 2012 recess appointments, including those of Members Griffin and Block, were invalid. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2574, 2578 (2014).

### **III. THE BOARD'S DECISION AND ORDER**

The Board (Members Miscimarra, Hirozawa, and Johnson) granted the General Counsel's motion for summary judgment in the unfair labor practice proceeding. The Board found that "issues raised by [the Company] regarding supervisory status and the appropriateness of the bargaining unit...were or could have been litigated in the prior representation proceeding." (A 1401.) 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 decisions made in the representation proceeding." (A 1401.) The Board also rejected the Company's arguments that this case raises a quorum issue and that the Company is an employer subject to the RLA. (A 1400-01 & n.1.) Accordingly, the Board 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 1401.)

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 1402.) Affirmatively, the Board's Order requires the Company, upon request, to bargain with the Union and to post a remedial notice. (A 1402.)

### **SUMMARY OF ARGUMENT**

The Company's Supervisors chose union representation and their representative sought to bargain with the Company on their behalf. The Company denied that request relying on jurisdictional or statutory arguments. The Board reasonably found that the Company's assertions are without merit and thus did not excuse its failure to bargain. Therefore, the Board's Order should be enforced.

First, the Board reasonably found that it has jurisdiction over the Company as an employer within the meaning of the Act. The Company asserted for the first time after its refusal to bargain that the Board lacks jurisdiction over this matter because the Company is subject to the RLA. The Board rejected the Company's contention by applying, to the record before it, the National Mediation Board's ("NMB") test for carrier control over a non-air carrier. The Board found that the

record lacks sufficient evidence to show, and the Company failed to even argue, that the airlines exercise meaningful control over its personnel decisions. To the extent that the Company asserts that the Board misapplied the NMB's test, the Company has waived that argument by not presenting it to the Board in the first instance, and its additional citations to the record fail to establish dispositive carrier control under NMB precedent.

The Board also reasonably found that the Company failed to meet its heavy burden of showing that the unit Supervisors are statutory supervisors excluded from the Act's protections. Initially, the Company has waived its argument that its Supervisors can adjust grievances or make hiring and termination recommendations by citing no record evidence and presenting no argument to this Court in support of its contention. In any event, the Board reasonably found that the record lacks any evidence to support those indicia of supervisory status.

Furthermore, the Company failed to meet its burden of showing that the Supervisors discipline, or effectively recommend discipline of, the Machinist-represented employees. The Board reasonably rejected the Company's reliance on the Supervisors' writing of irregularity and delay reports as evidence of discipline, because the reports do not constitute discipline, do not contain any recommendations as to discipline, and are always reviewed and investigated by the Hearing Officer before he acts in his own discretion to discipline employees.

Furthermore, the Company did not show that the Supervisors assign or responsibly direct the Machinist-represented employees using independent judgment. Substantial evidence in the record demonstrates that Supervisors make task assignments only and do so based on an employee meeting the required qualification and being available at the time, without giving consideration to the skill and experience of employees. In other instances, Supervisors give the shift's work assignments to the lead employee who then distributes the work to his colleagues. As to responsible direction of work, the Company did not present required evidence to show that the Supervisors are held accountable for Machinist-represented employees' work. Indeed, the Company presented only letters of warning, with no additional penalties attached, issued to Supervisors for issues related to the performance of their own duties. Thus, given the Company's failure to show that the unit Supervisors are statutory supervisors, the Board properly certified the Union as their representative, and the Board appropriately directed the Company to bargain with the Union.

Finally, the Board properly rejected the Company's claim that the Board lacked authority to issue a decision in the representation case. The Company's argument that the Board panel denying its request for review of the Regional Director's decision (finding that the Supervisors are employees within the meaning of the Act) was not properly constituted was mooted by the subsequent decision,

issued by a properly constituted Board panel, certifying the Union as the Supervisors' representative. The Board panel that issued the certification, which came after the election and a post-election hearing on challenged ballots, was properly constituted from a confirmed five-member Board. That Board panel had before it, in the Company's exceptions to the judge's decision on challenged ballots, the Company's argument regarding the appropriateness of the petitioned-for unit that it had presented to the Board in its earlier request for review. Thus, the Board panel that issued the certification revisited the same issues addressed by the invalid Board panel and mooted any claim based on the denial of the Company's request for review.

### **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"). Therefore, this Court will reverse a decision of the Board "only if it is contrary to law, inadequately reasoned, or unsupported by substantial evidence." *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 276 (D.C. Cir. 2001) (internal citation omitted).

The Board's findings of fact are "conclusive" when supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a

conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). A reviewing court may not displace the Board’s choice between two fairly conflicting views, even if the court “would justifiably have made a different choice had the matter been before it *de novo*.” *Id.* at 488; *accord UFCW, Local 204 v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007). Rather, the Board’s decision ““may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view.”” *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 771 (D.C. Cir. 2012) (quoting *Robinson v. Nat’l Transp. Safety Bd.*, 28 F.3d 210, 215 (D.C. Cir. 1994)). “Indeed, the Board is to be reversed only when the record is so compelling that no reasonable fact finder could fail to find to the contrary.” *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011).

## ARGUMENT

### **THE BOARD PROPERLY FOUND THAT 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)).<sup>5</sup> The Company does not dispute (Br. 16) that it has refused to bargain with the Union but, rather, raises jurisdictional and statutory challenges to the Board’s Order. First, the Company contends that it is subject to the RLA and thus not subject to the Act. Second, the Company argues that the unit employees are supervisors under the Act. Finally, the Company asserts that the Board panel denying its request for review of the Regional Director’s decision was improperly constituted and, therefore, the Board lacked the authority to render a determination in the representation proceeding. It is undisputed, however, that the Board is entitled to enforcement of its Order if, as set forth below and as the Board found, the Company’s challenges fail. *See Pearson Educ., Inc. v. NLRB*, 373 F.3d 127, 130 (D.C. Cir. 2004).

**A. The Board Properly Found that the Evidence is Insufficient to Show that the Company is an Employer Subject to the RLA**

**1. 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

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<sup>5</sup> 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).

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.” 29 U.S.C. § 152(3). In cases discussing the statutory definition of “employee,” the Supreme Court has made clear that Congress tasked the Board with construing the Act’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 [Act] was designed to reach.” *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996).

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 United States 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.<sup>6</sup> *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. *United Parcel Serv.*, 92 F.3d at 1225; *see also Spartan Aviation Sys.*, 337 NLRB 708, 708 (2002) (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”). Furthermore, 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 test for whether an employer is controlled by, or under the common control of, a carrier or carriers.

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

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<sup>6</sup> The Company never requested that the Board refer this case to the NMB.

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).

In assessing carrier controls, the overall question is whether the carrier or carriers exercise “meaningful control” rather than simply the type of control found in any contract for services.<sup>7</sup> *Bags, Inc.*, 40 NMB 165, 170 (2013); *Aero Port Servs., Inc.*, 40 NMB 139, 143 (2013). 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;

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<sup>7</sup> To determine whether there is carrier control over an employer under the second prong of the test, the NMB has identified 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 NMB at 456.

*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.

**2. 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 the Airlines**

The Board found (A 1400) that it has jurisdiction over the Company as an employer because the record does not establish that the Company is controlled by any RLA carrier. At the outset, the Board notes that the issue of RLA jurisdiction was not litigated in the underlying representation proceeding, which focused on the question of whether any of the employees in the petitioned-for unit are statutory supervisors excluded from the Act’s protections. On the first day of the representation hearing, the Board’s hearing officer asked the Company’s acting general manager/operations manager whether the Company was owned or controlled by an RLA carrier. He replied, “Not that I know of. I would have to look into that.” (A 141.) The issue was not raised again until the Company’s response to the General Counsel’s motion for summary judgment in this case. (A 1387-89.) Nonetheless, the Board relied, as it is required to do, on the evidence in the record before it.

The Board found (A 1400) that the record does not support the Company's argument that the unit employees are "indirectly controlled by or under common control with a carrier or carriers to an extent sufficient to invoke the jurisdiction" of the NMB.<sup>8</sup> As the Board found (A 1401), the Company did not argue that the airlines "exercise 'meaningful control over personnel decisions,' and the record contains no such evidence." *See Airway Cleaners*, 41 NMB at 268 ("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"); *Menzies*, 42 NMB at 7 (no RLA jurisdiction where carrier "does not exercise meaningful control over personnel decisions"); *Bags*, 40 NMB at 170 (carrier control "not the type of meaningful control over personnel decisions to warrant RLA jurisdiction"). The Board noted (A 1400) that, in finding a lack of meaningful control over personnel decisions, the NMB recently has "emphasized in particular the absence of control over hiring, firing, and/or discipline." *See Menzies*, 42 NMB at 7 (airline "does not hire, fire, or routinely discipline" employer's employees); *Airway Cleaners*, 41 NMB at 269 (airline "does not have sufficient control over the hiring, firing and discipline of employees to establish

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<sup>8</sup> The Board did not make a specific finding as to whether the nature of the unit employees' work is work traditionally performed by airline employees. Because, as the Company also notes (Br. 24), both parts of the carrier control test must be satisfied for the NMB to have jurisdiction, the Board did not need to address that question. *See Menzies*, 42 NMB at 4-5; *Airway Cleaners*, 41 NMB at 267.

RLA jurisdiction”); *Bags*, 40 NMB at 170 (airlines “do not have significant control over the hiring, firing and discipline employees”).

The Board concluded that the “elements of control identified by the [Company] are ‘no greater than that found in a typical subcontractor relationship.’” (A 1401 (quoting *Menzies*, 42 NMB at 7).) As the Board indicated (A 1401), the NMB has “made clear” that such control is “insufficient for assertion of its jurisdiction.” *See id.* (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*, 40 NMB at 170 (finding type of control no different from that “found in almost any contract between a service provider and a customer”). As the NMB has stated, “[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.” *Aero Port*, 40 NMB at 143. Thus, RLA jurisdiction requires “significant control over labor relations.” *Id.* (finding no RLA jurisdiction where employer provided no evidence of such control). On the record as a whole, the Board reasonably rejected (A 1400) the Company’s assertion that it is under the meaningful control of the airlines and therefore subject to the RLA. As such, the Company is an employer within the meaning of the Act.

### 3. The Company's Arguments are Without Merit

The Company erroneously states (Br. 26) that the Board “mistakenly contends” that the NMB has adopted a “new heightened standard” for carrier control and the Board exercised misplaced reliance on that “purported” standard. To the extent that the Company challenges the Board’s representation of the NMB’s test, the Company has waived that argument by not first presenting it to the Board. 29 U.S.C. §160(e) (“no objection that has not been urged before the Board...shall be considered by the Court” absent extraordinary circumstances). As this Court has recognized, where “a petitioner objects to a finding on an issue first raised in the decision of the Board...the petitioner must file a petition for reconsideration with the Board to permit it to correct the error (if there was one).” *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 185-86 (D.C. Cir. 2006); accord *Nova Southeastern Univ. v. NLRB*, 807 F.3d 308, 316 (D.C. Cir. 2015). By failing to file a motion for reconsideration, the Company has deprived this Court of jurisdiction to consider its claim that the Board’s recitation of the NMB’s standard was flawed. See *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (Section 10(e) of the Act precludes court of appeals from reviewing claim not raised to the Board).

In any event, and contrary to the Company’s contention, the Board applied NMB precedent, looking specifically at the carriers’ role in personnel decisions, a

factor the Company identifies (Br. 26) as relevant. Moreover, the Board specifically relied on the NMB's reasoning in a series of recent cases involving airport contractors where the Board referred the case to the NMB because an employer alleged RLA jurisdiction and the NMB declined to assert it. *See, e.g., Menzies*, 42 NMB at 1, 7; *Airway Cleaners*, 41 NMB at 262, 268; *Bags*, 40 NMB at 165, 170.

The Company also lists (Br. 27-28) facts that it avers should change the Board's analysis but none of them are dispositive of carrier control, even to the extent that the record supports the Company's assertions. For example, the Company states (Br. 27) that the record shows carrier review of staffing levels and compensation. However, the review discussed in the record is in the context of an annual budget meeting with the Airport's fuel committee. (A 36, 71-72, 261.) The Company indicated that if the budget is "not approved then we have to modify it or try to sell it the best we can." (A 72.) The NMB has not found such carrier control, which it has noted is typical of a contract for services, rises to the level necessary to confer RLA jurisdiction. *See Menzies*, 42 NMB at 2-6 (finding airline conducting monthly audit of employer performance, compliance, and budget, approving staffing levels, and preparing report cards to determine incentive payments to be typical of any contract for services). As the Board reasonably

determined (A 1401), the factors that the Company argued established carrier control were “insufficient” under the NMB’s test.

The Company further relies (Br. 8, 27) on the airlines’ ability to audit the work of unit employees. However, 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. Likewise, 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. The Company relies on evidence of audits by contracting authorities but has not shown that the Company is required to take specific personnel actions against employees based on those audits. Several employees who testified at the hearing indicated that they have little to no involvement in audits and none testified to any consequences that they incurred due to an audit or inspection result. (A 410, 534, 599, 660, 752-53.)

Similarly, the Company’s reliance (Br. 27-28) on airline audits of training records, as well as the airlines’ additional role in training the trainers who teach the fuelers how to do their jobs, is not dispositive under the NMB’s precedent. The record shows that only the Training Supervisors, and no airline representatives,

train fuelers in the field and evaluate their competency. (A 1305, 1312; 806, 854, 1209, 1230.) *See Airway Cleaners*, 41 NMB at 265, 268 (insufficient evidence of control where airline trained contractor employees to train other contractor employees); *Bags*, 40 NMB at 169 (same). The Company's related assertion (Br. 28) that Training Supervisors are held out as airlines' designated trainers to the Port Authority and FAA does not constitute sufficient evidence, nor does the record contain evidence that the Training Supervisors are held out to the public as airline employees. *See, e.g., Air Serv*, 39 NMB at 456 (factor is "whether employees are held out to the public as carrier employees").

Additionally, the Company's reliance (Br. 28-29) on the Board's findings, relevant to supervisory status, as to the Fueling Supervisors' "constant interaction" with airline employees does not indicate carrier control dictating RLA jurisdiction. Rather, those interactions, primarily updates from airlines regarding gate and aircraft changes as well as updates both to and from the airlines regarding delays, are typical of what would be expected in a contract for services that operate on a 24/7 basis. (A 1065.) *See Aero Port*, 40 NMB at 143 (finding provision of services in accord with carrier instructions including airlines instructing employees on baggage delivery did not indicate carrier control where no evidence of "meaningful control over labor relations that is necessary for RLA jurisdiction").

The Company's reliance (Br. 29) on several cases where the NMB found that it had jurisdiction over what the Company deems "similar employers" does not require a different result on the record in this case. For example, in *Aircraft Services International Group*, the NMB found evidence that the employer's operations manager modified start times, number of hours, and furloughs based on airline needs, the employer disciplined and transferred employees pursuant to airline demand, and the carriers had direct control over labor and benefit costs, staffing, and equipment. 33 NMB 200, 208-09 (2006). In this case, the record contains no evidence indicating that the Company staffs employees pursuant to airline needs (it is only known that the Company operates around the clock), has ever disciplined or transferred an employee because of an airline's demand, or any evidence to indicate any direct control over the Company. There is no evidence as to how the Company's labor costs are paid by the carriers (only that there is an annual budget review) or that the carriers provide any of the Company's equipment.<sup>9</sup> Furthermore, the NMB had repeatedly found Aircraft Services' comparable operations at other airports to be subject to the RLA, whereas here there is no evidence that the NMB has asserted jurisdiction over any of the

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<sup>9</sup> The Company cites (Br. 25, 29) a Board decision dismissing a representation petition in which the Board applied the above-cited NMB decision. *Aircraft Servs. Int'l, Inc.*, 352 NLRB 137 (2008). The two-member Board that rendered that decision did not have the authority to issue decisions when there were no other sitting Board members. *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

Company's fueling operations at other airports. *Id.* at 213; *see also Aircraft Servs. Int'l Group*, 347 NLRB 1417 (2006) (dismissing petition where NMB found employer's similar operations at Albuquerque airport were subject to RLA); *Aircraft Servs. Int'l Group*, 342 NLRB 977 (2004) (same for employer's Detroit airport operations).

The Company's further citations (Br. 29) are equally not dispositive of the carrier control question here. In *Empire Aero Center, Inc.*, carriers determined the time and manpower allowable to complete aircraft repairs and had the right of refusal for contractor employees. Also, the contractor reassigned project managers and technicians on request and provided carrier representatives with offices because they remained onsite to oversee the entire repair process. 33 NMB 3, 10 (2005). Here, there is no comparable evidence showing that carriers determine allowable hours, assign employees, or otherwise exert control over the Company's employees. Additionally, the Company's reliance on *Mercury Refueling, Inc.*, is misplaced. In that case, the NMB found an employer was not subject to the RLA because its employees did not perform work traditionally performed by airline employees nor was the employer subject to carrier control as it had been under a different contract for services that gave carriers the right to control its employees. 9 NMB 451, 455 (1982). Here, as in *Mercury Refueling*, the record does not show

that the airlines or Port Authority have the requisite level of control over the Company's employment policies and practices.

The Company further contends (Br. 28, 30) that if its Training Supervisors and Fueling Supervisors are under the indirect control of the airlines, that satisfies the jurisdictional question without regard to the Maintenance and Tank Farm Supervisors or other employees. The Board, however, did not find that the carriers exercised the requisite control over any subset of employees or the Company as an employer to satisfy the NMB's test. In the only case the Company cites (Br. 30) for its view that carrier control over only some employees suffices for RLA jurisdiction, the NMB found evidence of more than merely indirect control over a subset of training and fueling employees. The NMB found control over discipline and reassignment for all employees as well as control factors relating to tank farm, mechanical, and cleaning operations. *See Aircraft Servs.*, 33 NMB at 207-09. As the Board found (A 1401), the record here, which was developed to address a different question as to the petitioned-for unit, was insufficient to show the degree of meaningful control necessary to establish RLA jurisdiction. *Cf. Beverly Enters.-Mass., 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, Chem. & Atomic Workers Int'l Union v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971)).

**B. Substantial Evidence Supports the Board’s Finding that the Company Did Not Carry Its Burden of Proving that Its Fueling Supervisors/Dispatchers/Operations Supervisors, Maintenance Supervisors, and Tank Farm Supervisors are Statutory Supervisors Excluded from the Act’s Protections**

**1. Applicable Principles of Statutory Supervisory Status**

Section 7 of the Act (29 U.S.C. § 157) guarantees collective-bargaining rights to all workers who meet the Act’s definition of “employee.” 29 U.S.C. § 152(3). The term “employee” in the Act excludes “any individual employed as a supervisor.” 29 U.S.C. § 152(3). In turn, Section 2(11) of the Act provides, in pertinent part, that a “supervisor” is “any individual having authority, in the interest of the employer, to hire, transfer,...discharge, assign,...discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action,” provided that “the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C. § 152(11).

Thus, the Act dictates that individuals are not statutory supervisors, even if the employer refers to that employee by such a title, unless (1) they have the authority to engage in at least one of the listed supervisory functions, and (2) their exercise of that authority requires the use of independent judgment. *See NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 712 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *accord Avista Corp. v. NLRB*, 496 F. App’x 92,

93 (D.C. Cir. 2013) (noting that *Oakwood* “undisputedly reflects sound law”). To exercise independent judgment, “an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood*, 348 NLRB at 693.

Judgment is not independent “if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement.” *Id.* at 693.

*See also Kentucky River*, 532 U.S. at 713 (“Many nominally supervisory functions may be performed without the exercis[e of] such a degree of...judgment or discretion...as would warrant a finding of supervisory status under the Act”) (citation omitted).

The Court has cautioned that “the Board must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers of their organizational rights.” *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999). Thus, in interpreting Section 2(11), the Board is mindful of Congress’ intended statutory goal of distinguishing truly supervisory personnel—who are vested with “genuine management prerogatives”—from employees such as “straw bosses, leadmen, and set-up men” who enjoy the Act’s protections even though they perform “minor supervisory duties.” *Oakwood*, 348 NLRB at 688

(quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974) and Sen. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)).

The burden of demonstrating Section 2(11) supervisory status is on the party asserting it. *Kentucky River*, 532 U.S. at 711-12; *see also Croft Metals, Inc.*, 348 NLRB 717, 721 (2006) (party seeking to prove supervisory status must establish it by preponderance of evidence). To meet this burden, the party seeking to prove supervisory status must support its claim with specific examples, based on record evidence. *See Oil, Chem. & Atomic Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971). Conclusory or generalized testimony does not suffice. *See, e.g., Beverly Enters.-Mass.*, 165 F.3d at 963; *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 731 (2006). Nor can a party meet its burden with “inconclusive or conflicting evidence.” *New York Univ. Med. Ctr.*, 324 NLRB 887, 908 (1997), *enforced in relevant part*, 156 F.3d 405 (2d Cir. 1998). Further, it is settled that designations of theoretical or “paper power”—as in a job description—are insufficient to prove supervisory status. *Beverly Enters.-Mass.*, 165 F.3d at 962-63; *Oil Workers*, 445 F.2d at 243. Any lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 535 n.8 (1999).

Given the Board’s expertise in evaluating the “infinite variations and gradations of authority” that may exist in the workplace, the Board’s findings with

regard to supervisory status are “entitled to great weight.” *Oil Workers*, 445 F.2d at 241 (quoting *NLRB v. Metro. Life Ins. Co.*, 405 F.2d 1169, 1172 (2d Cir. 1968)). As discussed above (pp. 21-22), those findings must be upheld as long as they are supported by substantial evidence. 29 U.S.C. § 160(e).

**2. The Board reasonably found that the Company failed to carry its burden of proving that the unit employees are statutory supervisors**

At the pre-election hearing, the Company made no claim and adduced no evidence to show that the Supervisors have authority to permanently transfer, lay off, recall, or promote or reward employees, or to effectively recommend those actions. (A 1062.) Accordingly, those indicia of supervisory status are not at issue here. Rather, the Company asserts (Br. 36-37) that its Supervisors have the “ability to discipline, adjust grievances, directly assign and reassign, and make hiring and termination recommendations” as to the fuelers, mechanics, utility employees, and tank farm employees, and are thus supervisors under the Act. As shown below, the Board correctly rejected the Company’s contentions because the Company failed to carry its evidentiary burden and the record evidence does not support its argument that the Supervisors have that authority or that they exercise such authority with independent judgment as required by the statute.

**a. The Company has waived its argument that the Supervisors can adjust grievances or make hiring or termination recommendations**

The Company asserts (Br. 19, 36) that its Supervisors can adjust grievances as well as make hiring and termination recommendations. But the Company cites no record evidence and makes no argument in its brief to this Court in support of its position. As such, the Company has waived those arguments. *New York Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (“It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel’s work.”) (quoting *Schneider v. Kissinger*, 412 F.3d 190, 200 n. 1 (D.C. Cir. 2005)). In any event, the Board properly found that the record contained no evidence that anyone other than the Hearing Officer can resolve employee grievances. (A 1076.) The Board further found (A 1076) that the Company presented “only vague, conclusionary testimony and provided no specific examples” to support its claim that the Supervisors effectively recommend hiring for Machinist-represented employees. Indeed, the Company’s General Manager testified that he is solely responsible for hiring at the Airport. (A 100, 219, 246.) Finally, with respect to employee terminations, the Company argued to the Board only that the Training Supervisors, who the Board found to be statutory

supervisors and thus are not unit employees, effectively recommended discharge of fuelers during the fuelers' probationary period.<sup>10</sup> (A 1076.)

**b. The Supervisors do not discipline the Machinist-represented employees or effectively recommend discipline**

The Board reasonably found (A 1075) that the Company failed to show that the Supervisors discipline or effectively recommend discipline. The Board concluded (A 1073) that the delay reports and irregularity reports written by Supervisors "do not always lead to discipline" and, furthermore, the reports "do

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<sup>10</sup> The Company erroneously contends (Br. 41) that the Board is being "internally inconsistent" by concluding that its Training Supervisors are statutory supervisors. To the contrary, the Board relied on substantial evidence in the record to determine that the Training Supervisors effectively recommend whether to retain probationary employees who the Training Supervisors alone train in the field, observe, and evaluate. (A 1301, 1311-12, 1358-59.) The Company misleadingly (Br. 40) states that the judge ignored evidence from the post-election hearing on challenged ballots in making her recommendation to the Board that the Training Supervisors are statutory supervisors. The judge devoted 5 pages of a 16-page decision to setting forth the testimony that the Company adduced at the post-election hearing before analyzing that testimony, in conjunction with the prior testimony of the Company's Training Manager (who oversees the Training Supervisors), and evaluating each of the Company's arguments based on the entirety of the record evidence. Thus, based on substantial evidence in the record as whole, the Board reasonably concluded (A 1359) that the Training Supervisors should be excluded from the bargaining unit. To the extent that the Company believes (Br. 40) that its Training Supervisors have been "improperly disenfranchised" by being excluded from the unit, if the Training Supervisors choose a collective-bargaining representative, the Company can voluntarily agree to bargain with the representative of a unit of supervisors. *See* 29 U.S.C. § 164(a); *NLRB v. News Syndicate Co.*, 365 U.S. 695, 699 (1961); *E.G. & H. Inc. v. NLRB*, 949 F.2d 276, 279-80 (9th Cir. 1991).

not contain recommendations regarding discipline.” Indeed, as the Board found, Supervisors compose “factual recitations of events of everything from flight delays and employee errors to mechanical failures.” (A 1073; 288, 297, 520, 553, 750-51, 986.) Thus, the Board’s conclusion is consistent with well-established case law holding that simple reporting of factual information is insufficient to demonstrate supervisory status under the Act. *See, e.g., Loparex LLC v. NLRB*, 591 F.3d 540, 550 (7th Cir. 2009); *NLRB v. St. Clair Die Casting, LLC*, 423 F.3d 843, 850 (8th Cir. 2005); *Hosp. Gen. Menonita v. NLRB*, 393 F.3d 263, 268 (1st Cir. 2004); *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 265-66 (2d Cir. 2000); *Veolia Transp. Servs., Inc.*, 363 NLRB No. 98, slip op. at 8 n.31 (2016)(citing *Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007)).

Under established Board law, effective recommendation of discipline requires a showing that supervisors submit actual recommendations that are regularly followed “without independent investigation or review by others.” *Waverly-Cedar Falls Health Care Ctr., Inc. v. NLRB*, 933 F.2d 626, 630 (8th Cir. 1991) (citing *Passavant Health Ctr.*, 284 NLRB 887, 890 (1987)); *see also Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 309 (6th Cir. 2012). Here, the Board noted that, among hundreds of such reports contained in the record, not one even contained a disciplinary recommendation. (A 1073.) Once the reports are filed, the Supervisor’s involvement ends without ever learning the consequences of

the report. At most, a Supervisor may serve as a fact witness for the Hearing Officer if he has questions about the nature of the incident or a technical issue. (A 1073; 529, 549, 658, 863, 911-12, 986, 1011, 1027.) Simply put, the Board reasonably found (A 1074) that the “purpose of the forms is to report incidents, not impose discipline” and that does not give the Supervisors the authority required to be supervisors under the Act.

Discipline does not result from any report without an independent review by the Hearing Officer who conducts an investigation before exercising his discretion as to what form of discipline, if any, to issue. (A 1073; 863, 902.) However, to confer supervisory authority through exercise of disciplinary authority, a report must lead to some personnel action without the independent investigation or review of other management officials, something that never happens with the Supervisors’ delay or irregularity reports. (A 1073.) *See Franklin Home Health Agency*, 337 NLRB 826, 830 (2002). Because the Hearing Officer decides what, if any, discipline is warranted when Supervisors report Machinist-represented employee irregularities, the Supervisors do not have the authority to take any meaningful corrective action in order to ensure that employees comply with their directions. *See, e.g., 735 Putnam Pike Operations, LLC v. NLRB*, 474 F. App’x 782, 783 (D.C. Cir. 2012) (“write-ups” not final and authoritative disciplinary actions because no effect on employees’ job status or pay); *Frenchtown*, 683 F.3d

at 309 (reports that “at best...create[] a possibility of discipline” are “not sufficient to show supervisory authority”) (citing *Jochims*, 480 F.3d at 1170); *Loparex*, 591 F.3d at 550 (shift leaders could not take corrective action, because “the shift leader’s only option [was] to submit a factual reporting detailing the issue to her team manager for consideration”).

The Board acknowledged (A 1074) that the Company elicited some testimony that Supervisors can prevent individuals from working who are intoxicated, violent, driving recklessly, or flat out refusing to work. However, as the Board has consistently held, such authority to take action in the limited circumstances of flagrant violations is insufficient to establish supervisory status. *See Frenchtown*, 683 F.3d at 309 (“Sending employees home for egregious misconduct does not require independent judgment.”); *Vencor Hosp.-L.A.*, 328 NLRB 1136, 1139 (1999) (sending employee home did not show supervisory status when authority was “limited to situations involving egregious misconduct”). Furthermore, as the Board found, even in emergencies involving egregious conduct, a Supervisor more often than not will send the employee to the always-present Duty Manager rather than taking action on his own. (A 1075; 293, 361, 546, 604.) One of the few examples in the record of a Supervisor sending someone home was a Maintenance Supervisor sending an employee home for sleeping in his truck during an ice storm when the employee was supposed to be de-icing the

roads. Even in that situation, the Supervisor informed the Duty Manager who was on shift before the employee was sent home. (A 406.)

The Company errs (Br. 37-38) in relying on *GGNSC Springfield LLC v. NLRB*, 721 F.3d 403 (6th Cir. 2013), *Glenmark Assocs., Inc. v. NLRB*, 147 F.3d 333 (4th Cir. 1998), and *NLRB v. Attleboro Assocs., Ltd.*, 176 F.3d 154 (3d Cir. 1999). In those cases, unlike here, the courts found that charge nurses issued write-ups that corresponded to specific steps in a progressive disciplinary system. Thus, the court in *GGNSC* held that the nurse-prepared write-ups “[we]re discipline” because each one would “lead[] automatically to a written warning, which is a ‘step’ in the [employer’s] system of progressive discipline,” with the fourth warning triggering automatic suspension pending investigation. 721 F.3d at 409, 411. The *Glenmark* court likewise held that the write-ups there were disciplinary actions in themselves because they constituted the first step in the employer’s system of progressive discipline and placed the employee on a track that “automatically” called for certain defined disciplinary actions based on subsequent offenses, culminating in termination on the fourth offense. 147 F.3d at 337, 344. Along the same lines, the *Attleboro* court held that the write-ups there were at least effective recommendations of discipline, inasmuch as they played a definite role in a progressive disciplinary system similar to that in *Glenmark*, and included recommendations as to disciplinary action that were only “sometimes”

reviewed by higher-level officials. 176 F.3d at 158, 164-65. By contrast, the Company's progressive disciplinary system assigns no significance to irregularity and delay reports, and accordingly those reports cannot qualify as discipline under *GGNSC*, *Glenmark*, or *Attleboro*.

Similarly, the Company incorrectly relies (Br. 38) on *Lakeland Health Care Assoc., LLC v. NLRB*, 696 F.3d 1332 (11th Cir. 2012), where the court addressed supervisors' discretion whether to initiate the disciplinary process and ultimately to coach, verbally warn, or suspend an employee. *Id.* at 1337. The Company's Supervisors have no discretion to issue any discipline such as a letter of warning or suspension—all of those determinations are made by the Hearing Officer. Nor can the Supervisors effectively recommend such action. The Board acknowledged (A 1072) that the record evidence indicated the Supervisors can verbally counsel or even verbally reprimand Machinist-represented employees. However, the Company showed “no impact on the employees' job status or tenure, or their terms or conditions of employment due to counseling.” (A 1072.) The Board therefore found it “clear that these reprimands and counseling do not amount to discipline which would establish supervisory status.” (A 1072.) *See Washington Nursing Home, Inc.*, 321 NLRB 366, 371 (1996) (“mere authority to issue verbal reprimands...[and] mere factual reporting of oral reprimands and the issuing of written warnings that do not automatically affect job status or tenure do not

constitute supervisory authority”). The record fully supports the Board’s finding (A 1075) that, even assuming the Supervisor has a choice to counsel an employee or file an irregularity report, neither constitutes discipline or its effective recommendation.

**c. The Supervisors do not assign or responsibly direct the Machinist-represented employees**

The Board reasonably found that the Company failed to meet its burden of showing that the Supervisors assign or responsibly direct the fuelers, mechanics, utility and tank farm employees under the Board’s precedent. In reaching this conclusion, the Board applied (A 1077) its *Oakwood* trilogy, which clarified the circumstances in which the Board will find that individuals exercise sufficient “independent judgment” in performing the supervisory functions of “assigning” and “responsibly directing” work. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688-94 (2006); *Croft Metals, Inc.*, 348 NLRB 717, 720-22 (2006); *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 728-31 (2006).

In *Oakwood*, the Board construed the term “assign” as the “act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Id.* at 689. The Board further explained that “assign,” for purposes of Section 2(11), does not refer to “ad hoc instruction that the employee perform a discrete task.” *Id.* The Board went on

to describe “responsible direction” as occurring when a “person decides what job shall be undertaken next or who shall do it...provided that the direction is both ‘responsible’...and carried out with independent judgment.” *Id.* at 691.

Furthermore, an individual has the authority to responsibly direct other employees only if that individual is accountable for the performance of tasks by those employees. In other words, the individual must face the prospect of adverse consequences if the employees under his command fail to perform their tasks correctly. *Oakwood*, 348 NLRB at 692. The individual must also exercise independent judgment in assignment and responsible direction for a finding of supervisory status. *Id.* at 693.

**i. The Supervisors do not make assignments using independent judgment**

The Board reasonably found, based on substantial evidence in the record, that the Company failed to meet its burden of showing that the Supervisors assign employees through the exercise of independent judgment. The Supervisors play no role in shift scheduling and do not assign overtime to specific employees. The Supervisors do not assign overall duties to employees—the employees already have specific roles such as fuelers or mechanics that dictate what they do each shift. For example, as the Board noted (A 1079), “all fuelers simply fuel planes” such that Fueling Supervisors do not assign significant overall duties. *See Croft Metals*, 348 NLRB at 718 (individuals not supervisors who did not prepare posted

work schedules, appoint employees to departments, shifts, or overtime, or assign significant overall duties).

The Company made no showing that the Fueling Supervisors judge which fueler is more skilled or more likely to complete a task efficiently, even though timing is crucial to the Company's business. (A 1079.) As the Board indicated (A 1078-79), while Supervisors make task assignments, "no consideration is given as to how difficult the task is, and the skill and experience of the employees play no role" in the assignments. Instead, fueling assignments are made on the basis of training and certification status, which is found on a readily accessible list, and who is first available. As one Fueling Supervisor put it in his testimony, it is "the first guy I see." (A 1079; 1006, 1023-24.) The Board acknowledged that Fueling Supervisors frequently shuffle fuelers between gates and aircraft but they make those assignments in a routine manner. *See NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 14 (1st Cir. 2015) (finding dispatchers not supervisors where routing of field employees "nothing more than a routine task" not involving independent judgment). As the Board found, "[m]aking assignments based on a list of certifications and who is available at the time is merely common sense." (A 1079-80 (quotation omitted).) Thus, the Board further determined (A 1084) that Supervisors do not exercise independent judgment in making assignments because

they are “merely assign[ing] work to any available certified fueler...[to] merely ensur[e] an even distribution of work so it can be done safely and on time.”

Maintenance and Tank Farm Supervisors give all work assignments to Machinist-represented leads who then distribute the work to their colleagues as they see fit.<sup>11</sup> (A 1067; 396, 415, 644, 1027-28.) Thus, the Board found (A 1084-85) that Maintenance and Tank Farm Supervisors do not exercise independent judgment in making assignments. In any event, the record indicates that, similar to the fuelers who can do work based on their training qualifications, mechanics and tank farm employees are trained to handle assigned repairs. (A 1068.)

As to overtime, the Company failed to establish that any of the disputed Supervisors possess the authority to assign work by requiring involuntary

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<sup>11</sup> The Board acknowledged that the record contained contradictory evidence regarding whether Supervisors weigh mechanics’ skills and abilities in making assignments by intervening in the lead’s assignment decisions. However, 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 1068 n.14) on credibility resolutions but rather the weight of the evidence in making its factual findings. To that end, one Maintenance Supervisor, testifying for the Company, stated that he assigns repair and maintenance work to mechanics based on their experience and abilities. Two other Maintenance Supervisors stated that they simply give work to the leads, who then distribute work as they see fit. (A 1067; 397, 415, 647, 1028-29.) The Maintenance Supervisor who testified as a Union witness stated that he only intercedes in work assignments when he knows the project is going to take more time to finish than the mechanic’s schedule will allow, due to his days off, because the Manager wants the mechanic who started a project to finish it. (A 1067-68; 1029.)

overtime. The Board found (A 1080) that when Supervisors deem overtime is warranted, they merely request employees from a Machinist steward who works off a union list. *See Golden Crest*, 348 NLRB at 729 (affirming principle that supervisory authority means “ability to require” that action be taken rather than “merely to request” that action be taken). Furthermore, even in rare instances of mandatory overtime dictated by events such as weather conditions, Supervisors have no authority to choose which employees will perform overtime. As the Board reasonably found (A 1081), “[w]ithout the authority to choose an employee for overtime assignment, the Supervisor cannot be found to be exercising independent judgment.” *See G4S Government Sols., Inc.*, 363 NLRB No. 113, slip op. at 3 (2016).

**ii. The Supervisors do not responsibly direct the Machinist-represented employees**

The Board reasonably found (A 1082) that the Company failed to show that the Supervisors are held accountable for the Machinist-represented employees’ work and, thus, failed to show that they responsibly direct the employees. As the Board indicated (A 1082), none of the letters of warning in the record that the Company issued to its Supervisors held them accountable for the respective Machinist employee’s action rather than their failure to perform their *own* duties. *Compare NSTAR Elec.*, 798 F.3d at 18 (disciplinary record did not establish requisite accountability where it appeared transmission supervisor was disciplined

for own failure to properly perform responsibilities prior to ordering employee to perform task rather than for the employee's execution of task) and *Frenchtown*, 683 F.3d at 314-15 (disciplinary records did not establish requisite accountability where not clear that nurse being disciplined for aide's conduct rather than own conduct and errors) *with Croft Metals*, 348 NLRB at 722 (lead persons received written warnings when their crews did not meet production goals). Additionally, while some Supervisors testified that they were held accountable for the employees working in their departments, the Company produced no documentary evidence to support the conclusionary statements it adduced. *See Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999).

The Board found (A 1083) that the Company did not show that Supervisors "faced even the prospect of adverse action due to the performance of employees for whom they had oversight." Indeed, one Supervisor testified that the Company itself, rather than the Supervisor, would be in trouble because of employee mistakes. (A 1083; 424.) When Supervisors did receive letters of warning, it was a result of performance problems with their own duties and those warnings did not result in any additional penalties. *Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 596 (7th Cir. 2012) ("proper inquiry...is whether the purported supervisor is at risk of suffering adverse consequences for the actual performance of others, not his own performance in overseeing others") (citations omitted). In

the absence of evidence showing Supervisors were disciplined for employee performance, the Company, despite its statements to the contrary (Br. 39), also did not produce any evidence indicating when a Supervisor could potentially be disciplined for an employee's irregularity or delay. The Company's failure to produce such evidence distinguishes this case from *Lakeland Health Care*, upon which the Company relies (Br. 39), because there, the court found that the employer provided testimony that the purported supervisors would be disciplined if subordinates failed to perform tasks properly. 696 F.3d at 1346. Thus, as the Board found (A 1084), a Supervisor "could not reasonably expect to face the prospect of accountability for the individuals he oversees."

### **3. The Company errs in relying on secondary indicia of supervisory status**

Finally, the Company incorrectly relies on so-called secondary indicia of supervisory status—ones that are "not included in the statutory definition of supervisor but that often accompany the status of supervisor." *Public Serv. Co. of Colorado v. NLRB*, 405 F.3d 1071, 1080 (10th Cir. 2005). It is settled that a secondary indicator of supervisory status cannot substitute for a showing of the primary indicia as explicitly delineated in the Act. *See, e.g., 735 Putnam Pike Operations, LLC v. NLRB*, 474 F. App'x 782, 784 (D.C. Cir. 2012); *Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 445 F.2d 237, 242 (D.C. Cir. 1971). While the Board recognized (A 1085) that the Company established several common

characteristics of supervisory status such as different pay (salary versus hourly), benefits, uniforms, lockers, and parking, none of those secondary indicia are sufficient to overcome a lack of statutory authority.

Finally, as the Board stated (A 1085), the Company's contention that it could not operate its business without the Supervisors is a red herring. The Company's burden was to show that the Supervisors are statutory supervisors under well-established precedent, not to simply show that they are integral to its operations. Indeed, all employees are presumably integral to an employer's operations or otherwise, they would be let go.

**C. A Properly Constituted Board Panel Revisited the Issues that Were Before the Recess Board, thus Mooting any Claim that an Improper Recess Board Played an Unreviewed Role in this Case**

The Board properly rejected (A 1400 n.1) the Company's claim that the Board lacked authority to issue a decision in the representation case because, prior to the election, an improperly constituted Board panel denied the Company's request for review. As the Board explained, the Company's argument is moot because a properly constituted Board panel issued the certification of representative after considering the arguments originally rejected by the invalid Board panel.

As described above (pp. 13-15), before the election, the Company filed a request for review arguing that all of the employees in the petitioned-for unit were

statutory supervisors, which a Board panel denied in June 2012. Because that Board panel had two recess-appointed members who were later determined in *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2574, 2578 (2014), to have been invalidly appointed, the order is invalid.<sup>12</sup>

However, subsequent events in this case demonstrate that, before certifying the Union, a properly constituted Board considered the issues addressed by the June 2012 panel. Not only was the issue of the supervisory status of all unit employees raised in the post-election hearing before the administrative law judge, but the Company, in its exceptions to the judge's decision (A 1320-21, 1338-39 & n.6), reiterated to the Board its argument, rejected in June 2012, that all of the petitioned-for employees were statutory supervisors. After reviewing those exceptions, a panel of the fully-confirmed Board issued a Decision and Certification of Representative on December 3, 2013. (A 1358-60). As the Board explained (A 1400 n.1), in certifying the Union, that panel "considered and rejected" the restated argument in the Company's exceptions that all employees in the petitioned-for unit were supervisors.

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<sup>12</sup> Contrary to the Company's assertion (Br. 32-33), the Board does not dispute the fact that the Supreme Court's holding in *Noel Canning* rendered the Board's June 2012 order invalid. However, as the Board noted (A 1400 n.1), the absence of a Board quorum did not impair the Regional Director's authority to process the representation petition, and the Company does not argue otherwise. See *UC Health v. NLRB*, 803 F.3d 669, 673-81 (D.C. Cir. 2015); *SSC Mystic Operating Co., LLC v. NLRB*, 801 F.3d 302, 308 (D.C. Cir. 2015), *petition for rehearing en banc denied* (Feb. 12, 2016).

In short, the Board's December 2013 Decision and Certification resolved the same issues addressed by the invalid Board panel in June 2012. Accordingly, as the Board correctly found (A 1400 n.1), the December 2013 Decision and Certification mooted any claim based on the Board's lack of quorum when it denied the Company's request for review in June 2012.<sup>13</sup>

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<sup>13</sup> The Company incorrectly (Br. 32) asserts that the Board relies on *Center for Social Change, Inc.*, 358 NLRB No. 24 (2012), as the basis for its rejection of the Company's quorum argument. In its 2012 order, the invalid Board had relied on this case for its rejection there of the Company's argument that the recess-appointed Board members should be disqualified from ruling in that proceeding. (A 1141 n.1.) The properly constituted Board here did not rely on that case in its 2015 Order, which rejected the Company's quorum argument as moot.

**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.

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National Labor Relations Board

March 2016

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

ALLIED AVIATION SERVICE COMPANY OF NEW JERSEY	:	
	:	
	:	
Petitioner/Cross-Respondent	:	Nos. 15-1321 &
	:	15-1360
v.	:	
	:	Board Case No.
NATIONAL LABOR RELATIONS BOARD	:	22-CA-127150
	:	
Respondent/Cross-Petitioner	:	
	:	
and	:	
	:	
LOCAL 553, INTERNATIONAL BROTHERHOOD OF TEAMSTERS	:	
	:	
	:	
Intervenor	:	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,503 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.2015 and is virus-free according to that program.

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Dated at Washington, DC  
this 14th day of March, 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 2(3)** (29 U.S.C. § 152(3)):

The term “employee” shall include any employee...but shall not include...any individual employed by an employer subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time....

### **Section 2(11)** (29 U.S.C. § 152(11)):

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

### **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....

**Section 14(a)** (29 U.S.C. § 164(a)):

Supervisors as union members

Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

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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	:	
and	:	
	:	
LOCAL 553, INTERNATIONAL BROTHERHOOD OF TEAMSTERS	:	
	:	
	:	
Intervenor	:	

**CERTIFICATE OF SERVICE**

I hereby certify that on March 14, 2016, I electronically filed the foregoing document 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 that 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  
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