

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

PRIMEFLIGHT AVIATION SERVICES, INC.,
Respondent,

and

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

**Case Nos. 29-CA-177992
29-CA-179767
29-CA-184505**

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

Brady Francisco-FitzMaurice
Counsel for the General Counsel
National Labor Relations Board, Region 29
Two MetroTech Center, Fifth Floor
Brooklyn, New York 11201

TABLE OF AUTHORITIES

Cases

<i>Air Serv Corp.</i> , 39 NMB 450 (2012).....	34
<i>Airway Cleaners</i> , 41 NMB 262 (2014).....	33
<i>Allied Aviation Service Co.</i> , 362 NLRB No. 173 (2015)	<i>passim</i>
<i>Alstate Maintenance, Inc.</i> , 2016 WL 3743257 (NLRB July 12, 2016)	34
<i>Bags, Inc.</i> , 40 NMB 165 (2013).....	33, 35, 38
<i>Bills Electric, Inc.</i> , 350 NLRB 292 (2007)	29, 31
<i>Bronx Health Plan</i> , 326 NLRB 810 (1998)	17
<i>D.R. Horton</i> , 357 NLRB No. 184 (2012)	27, 28, 29, 30
<i>Delta Carbonate, Inc.</i> , 307 NLRB 118 (1992)	43
<i>Dickerson-Chapman, Inc.</i> , 313 NLRB 907 (1994)	26
<i>Disneyland Park</i> , 350 NLRB 1256 (2007)	23, 24
<i>Fall River Dyeing & Finishing Corp. v. NLRB</i> , 482 U.S. 27 (1987).....	17, 18, 19, 44
<i>First National Maintenance v. NLRB</i> , 452 U.S. 666 (1981)	27
<i>Flambeau Airmold Corp.</i> , 334 NLRB 165 (2001)	25, 26
<i>Good N' Fresh Foods</i> , 287 NLRB 1231 (1988)	21
<i>Holly Farms Corp. v. NLRB</i> , 517 U.S. 392 (1996).....	33
<i>Hospital San Francisco</i> , 293 NLRB 171 (1989)	19, 43, 44

<i>Illiana Transit Warehouse Corp.</i> , 323 NLRB 111 (1997)	26, 27
<i>Irwin Industries</i> , 304 NLRB 78	21
<i>Local 660, United Workers of America (Alstate Maintenance, Inc.)</i> 2016 WL 2732017 (ALJ Green May 9, 2016)	34, 37, 39, 41
<i>Litton Systems</i> , 300 NLRB 324 (1990)	24
<i>Meat Cutters Local 189 v. Jewel Tea Co.</i> , 381 U.S. 676 (1965)	27
<i>Menzies Aviation, Inc.</i> , 42 NMB 1 (2014)	33, 37, 39
<i>Mid-America Door & Hardware, Inc.</i> , 1993 WL 735836 (GC Advice Memo June 30, 1993)	19, 45
<i>Mi Pueblo Foods</i> , 360 NLRB No. 116 (2014)	27
<i>Millwrights, Conveyors and Machinery Erectors Local Union No. 1031</i> , 321 NLRB 30 (1996)	26
<i>Murphy Oil USA</i> , 361 NLRB No. 72 (2014)	28, 30
<i>Myers Custom Products</i> , 278 NLRB 636 (1986)	44
<i>NLRB v. Acme Indus. Co.</i> , 385 U.S. 432 (1967)	23
<i>NLRB v. Burns Intern. Sec. Services, Inc.</i> , 406 U.S. 272 (1972)	<i>passim</i>
<i>NLRB v. Jeffries Lithograph Co.</i> , 752 F.2d 459 (9th Cir. 1985)	19, 44
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962)	24, 26
<i>NLRB v. Ky. River Community Care, Inc.</i> , 532 U.S. 706 (2011)	32
<i>NLRB v. Truitt Mfg. Co.</i> , 351 U.S. 149 (1956)	23
<i>Palm Beach Metro Transp., LLC</i> , 357 NLRB 180 (2011)	26
<i>Pioneer Hotel And Gambling Hall, Inc.</i> , 276 NLRB 694 (1985)	31

<i>Pressroom Cleaners,</i> 361 NLRB No. 57 (2014)	31
<i>Primeflight Aviation Services, Inc.,</i> 2015 WL 3814049 (NLRB June 18, 2015).....	34
<i>Ready Mix USA, Inc.,</i> 340 NLRB 946 (2003)	16, 22
<i>Spartan Aviation Indus., Inc.,</i> 337 NLRB 708 (2002)	33
<i>Spruce Up Corp.,</i> 209 NLRB 194 (1974)	21
<i>TD Barton Foods, LLC dba C-Town Supermarket,</i> 358 NLRB No. 56 (2012)	26
<i>Trane,</i> 339 NLRB 866 (2003)	20
<i>Tree-Free Fiber Co.,</i> 328 NLRB 389 (1999)	17
<i>Xidex Corp.,</i> 297 NLRB 110 (1989)	24

Statutes

29 U.S.C. 152(2)	32
29 U.S.C. 159(a)	24

TABLE OF CONTENTS

I. STATEMENT OF THE CASE.....	1
II. PROCEDURAL HISTORY.....	2
III. FACTUAL OVERVIEW.....	2
IV. ARGUMENT.....	14
(A) Division Vice President Matthew Barry’s testimony lacked credibility.	14
(B) Since May 23, 2016, Respondent, a <i>Burns</i> successor, has refused to recognize and bargain with the Union, in violation of Sections 8(a)(1) and (5) of the Act.	16
(1) Since May 23, 2016, Respondent failed to provide information that is necessary and relevant to collective bargaining.....	23
(2) Since about August 26, 2016, Respondent unilaterally changed employees’ terms and conditions of employment, without providing to the Union notice and an opportunity to bargain, by deducting pay from employees’ paychecks to account for unpaid break time.....	24
(3) Since about September 12, 2016, Respondent unilaterally changed employees’ terms and conditions of employment, without providing to the Union notice and an opportunity to bargain, by changing employee work schedules.....	26
(C) At all material times, Respondent has required its employees to sign, as a condition of employment, an unlawful arbitration agreement, in violation of Section 8(a)(1) of the Act.	27
(D) In or about June 2016, Respondent’s Supervisor Erick Brazao-Martinez threatened employees with discharge because they engaged in activities in support of the Union, in violation of Section 8(a)(1) of the Act.....	31
(E) Respondent’s Defenses.....	32
(1) Respondent failed to meet its burden of proving that it is not within the jurisdiction of the NLRB.....	32
(2) A substantial and representative complement of employees existed from May 9, 2016 through May 23, 2016, even if Respondent had nebulous plans to hire additional employees.	42
V. CONCLUSION.....	46

I. STATEMENT OF THE CASE

PrimeFlight Aviation Services, Inc. (“Respondent”) has repeatedly violated the National Labor Relations Act after taking over a contract with JetBlue Airways, Inc., to provide the terminal services in JFK Airport’s Terminal Five. Specifically,

- (A) **Since May 23, 2016, Respondent, a *Burns* successor, has refused to recognize and bargain with the Union, in violation of Sections 8(a)(1) and (5) of the Act. As a result of Respondent’s refusal to recognize and bargain with the Union, it has further violated Sections 8(a)(1) and (5) of the Act by:**
 - (1) **Since May 23, 2016, failing to provide information that is necessary and relevant to bargaining;**
 - (2) **Since about August 26, 2016, unilaterally changing employees’ terms and conditions of employment, without providing to the Union notice and an opportunity to bargain, by deducting pay from employees’ paychecks to account for unpaid break time;**
 - (3) **Since about September 12, 2016, unilaterally changing employees’ terms and conditions of employment, without providing to the Union notice and an opportunity to bargain, changing employee work schedules, including changing employees’ scheduled work days and reducing employees’ hours;**
- (B) **At all material times, Respondent has required its employees to sign, as a condition of employment, an unlawful arbitration agreement, in violation of Section 8(a)(1) of the Act;**
- (C) **In or about June 2016, Respondent’s Supervisor Erick Brazao-Martinez threatened employees with discharge because they engaged in activities in support of the Union, in violation of Section 8(a)(1) of the Act.**

This brief will first set forth a factual overview of the case, and then specifically discuss each of the above violations.

II. PROCEDURAL HISTORY OF THE CASE

On June 8, 2016 the Union filed an unfair labor practice charge against Respondent in Case No. 29-CA-177992. GC 1(A). On July 11, 2016, the Union filed a second charge against Respondent in Case No. 29-CA-179767. GC 1(E). On August 5, 2016, the Regional Director issued a Complaint and Notice of Hearing in Case 29-CA-177992. GC 1(I). On September 19, 2016, the Union filed a third charge against Respondent in Case No. 29-CA-184505. GC 1(L). On October 3, 2016, the Regional Director issued an Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing, in Case Nos. 29-CA-177992, 29-CA-179767, and 29-CA-184505. GC 1(R). On October 18, 19 and 20, the case was litigated before Administrative Law Judge Mindy Landow.

Contemporaneously with the administrative proceedings, on September 26, 2016, the Regional Director filed a Petition for Temporary Injunctive Relief Under Section 10(j) of the Act with the Eastern District of New York. On October 24, 2016, the District Court granted in part the Regional Director's Petition and ordered that Respondent recognize the Union, bargain in good faith with the Union, and provide to the Union information that is relevant to and necessary for collective bargaining. However, the District Court imposed a condition on the parties' bargaining, which is the subject of ongoing litigation in the federal courts. Civil Docket No. 16-CV-5338.

III. FACTUAL OVERVIEW

Background

Respondent provides services to various airlines at airports across the country. Tr. 27. At JFK Airport, pursuant to a contract with airline JetBlue Airways Corp. ("JetBlue"),

Respondent provides terminal services in Terminal Five. Tr. 216-17; Jt. 2. Respondent provides four types of terminal services: skycap curbside services, baggage handling services, line queue¹ services, and wheelchair services. Tr. 218. Descriptions of these services can be found below.

- “Wheelchair services” means helping disabled JetBlue customers into and out of wheelchairs, and pushing the wheelchairs through the terminal, e.g. to the ticket counter, to the gate of departure, onto the airplane, off the airplane, to a connecting flight, to baggage claim, to the parking facility, to the curbside area, etc. Tr. 219.
- “Line queue services” means directing customers to different points of entry at the security checkpoint (e.g. TSA pre-check, “even more speed,” etc.) and monitoring the size and number of carry-ons that passengers take to the security checkpoint. Tr. 220.
- “Baggage handling” services means assisting customers in moving their baggage at the ticket counters and baggage carousel areas, transporting bags behind the scenes to be inspected by TSA before being loaded on departing flights, etc. Tr. 221.
- “Skycap services” means assisting customers with baggage at a curbside location, as well as checking customers’ identification, issuing baggage tags and boarding passes, etc. Tr. 222.

As recently as February 2015, before Respondent provided the above-described services in Terminal Five, its predecessor Air Serv Corp. (“Air Serv”) provided all four types of services in the terminal. Tr. 57, 162-64, 217. However, during the period immediately preceding Respondent’s contract with JetBlue, which commenced on May 9, 2016, Air Serv provided only skycap, baggage handling, and line queue services, and PAX Assist provided the wheelchair services. Tr. 218.

¹ Also known as line monitor services or checkpoint services.

The Union's Bargaining Relationship with Predecessor Air Serv

Immediately before Respondent took over the terminal services in Terminal Five, Air Serv performed the bulk of the terminal services. Tr. 218. On March 25, 2015, Air Serv and the Union entered into a recognition agreement. GC 3. The recognition agreement states that, based on a card check performed by Arbitrator Gary Kendellen, the Union “has demonstrated majority support among the full-time and regular part-time employees [excluding statutory exclusions] employed by Air Serv at client [sic] at Newark Liberty, John F. Kennedy International and LaGuardia Airports (the ‘Bargaining Unit’).” The agreement does not specify any job titles. GC 3.

Respondent Wins the JetBlue Contract, and Takes Over the Terminal Services Operation at Terminal Five

In March 2016, Respondent successfully bid on a contract with JetBlue, under which it agreed to provide all four types of terminal services in Terminal Five commencing on May 9, 2016.² Tr. 216, 218, 229. Respondent and JetBlue memorialized their relationship by executing a “general terms agreement,” and a “statement of work.” Jt. 2 at 1, 23.

Respondent has not expanded its operation at JFK Airport beyond the wheelchair, line queue, baggage handling and skycap services that it agreed to begin providing, pursuant to the general terms agreement and statement of work, on May 9. Tr. 30. There is no evidence showing that Respondent expanded its operation by agreeing to provide additional services, or provide services in additional areas of the airport, or in any other way. Tr. 30.

² Henceforth, all dates refer to the year 2016, unless otherwise noted.

In April and Early May 2016, Respondent Hires its Employees, 52% of Whom Worked for Predecessor Air Serv

In the weeks leading up to May 9, while Respondent hired its workforce, Respondent and Air Serv worked together to encourage Air Serv employees to apply for employment with Respondent, excluding those who did not work in Terminal Five. Tr. 279, 281. For example, on April 6, Respondent's Northeast Mid-Atlantic Division Vice President Matthew Barry sent to Air Serv Manager Lamont Samuels an e-mail in which Barry provided a list of Air Serv employees who were "transitioning" to work for Respondent. GC 5. Barry asked Samuels to confirm that Barry had succeeded in removing from the hiring process all employees who had not previously worked for Air Serv on the JetBlue account in Terminal Five. GC 5.

Between April 5 and May 7, Respondent hired all 367 employees³ that it would employ on its first day of operation, May 9. GC 8. Respondent conducted its hiring without any input from JetBlue. Tr. 19. Between May 7 and June 6, roughly its first month of operations, Respondent did not hire any additional employees, and the workforce remained static. Tr. 271.

Throughout the entire first month of operations, until hiring resumed on June 6, a majority of Respondent's employees, 52%, had worked for predecessor Air Serv. In order to assess the bargaining unit, from the 367 employees hired in total, there can be no dispute that 16 are excluded from the unit because they are statutory supervisors. GC 8. These 16 employees include:

³ This number, 367 employees, includes all employees hired on or before May 7, as shown in the attachment to GC 8, which is a list of hires provided by Respondent during the administrative investigation. The group of 367 includes both bargaining unit employees and supervisory employees. The only names from GC8 that are excluded are five duplicate names (in the order shown): Debra Gray (p. 1), Taylor Champagne (p. 1), Kemal Bacchus (p. 3), Troy Bowry (p. 5), and Mandica Telfer (p. 5).

- All seven employees in the Wheelchair Services Supervisor classification (presented in the order shown in GC 8): Sherwin Arice, Mark A. Felix⁴, Erick R. Brazao-Martinez,⁵ Nancy L. Joshua, Keisha P. Newsome, Carlos A. Galarza, Josue E. Joachim, Krystelle Gaeton;
- Taylor Champagne, the only employee in the Wheelchair Services Manager classification;
- Mandica Telfer, the only employee in the Supervisor classification;
- Kemal Bacchus and Troy Bowry, both employees in the Duty Manager classification;
- Debra Gray,⁶ the only employee in the General Manager classification; and
- All three employees in the Office Hourly Support classification: Flordeliz Cabrera, Gloria Beatriz Curotto and Annakaye Louise Barnes.⁷

Throughout the entire first month of operations, up until Respondent began to hire additional employees on June 6, the bargaining unit consisted of 351 employees in the non-supervisory job categories: baggage handling staff, skycap services staff, line queue staff, wheelchair services staff, and wheelchair services dispatcher. GC 8. Of those 351 bargaining

⁴ Additionally, Mark A. Felix must be excluded because he only appears in Respondent's payroll records during the weeks beginning July 14 and July 21. Thus, it appears that he was not hired until well after the Union's May 23 bargaining demand. GC 4.

⁵ In Paragraph 4(b) of its Answer, Respondent admits that Wheelchair Services Supervisor Erick Brazao is a supervisor within the meaning of Section 2(11) of the Act, and an agent within the meaning of Section 2(13).

⁶ Additionally, Debra Gray must be excluded because she was terminated on May 19, before the Union's May 23 bargaining demand.

⁷ Employee Omar Duhaney testified that "Annakaye" interviewed him before Respondent hired him, and she and "Gloria" participated in the hiring process. Tr. 169. Duhaney also testified that "Flo" conducted part of the training, and he viewed her as a "Manager." Tr. 172. Furthermore, Respondent's payroll records show that Office Hourly Support employees receive a meaningfully higher rate of pay, \$14 to 16 per hour, as compared to unit employees, \$8.35 (plus tips) to 12 per hour. GC 4.

unit employees, GC 8, 183 had previously worked for Air Serv, Jt. 1. Thus, throughout the first month of operations, 52% of Respondent's unit employees had worked for predecessor Air Serv.

The Basis For the Majority Calculation: Comparing The List of Hires Produced During the Investigation, GC 8, With The List of Hires Prepared For the Instant Litigation, R 4

GC 8 is the list of hires that Respondent provided during the administrative investigation. During the hearing, Respondent introduced another list of hires, R 4, which was admitted over objection. Upon close inspection, R 4 is substantially similar to GC 8, except it distorts the composition of the workforce in subtle ways in order to dilute the Union's majority support. R 4 adds three indisputably supervisory employees who never worked for predecessor Air Serv: General Manager Joshua David Heady, Duty Manager Jeannette Bourdier, Office Manager Esme Linda Subaxon. Additionally, R 4 misclassifies employees whose job titles changed, from unit positions to supervisory positions (and vice versa) after the first month of operations, and most pertinently, after the Union's bargaining demand on May 23.⁸ Unit employees who are misclassified in supervisory positions are Wheelchair Services Staff Pedro Soto Jr. (not a predecessor employee) and four predecessor employees: Line Queue Staff Ruth N. Springer, Wheelchair Services Staff Roland O. Pencile, Line Queue Staff Mona L. Singh, and Wheelchair Dispatcher Johanna E. Martinez. Additionally, R 4 incorrectly lists two supervisory employees, Wheelchair Services Manager Taylor Champagne and Wheelchair Services Supervisor Mark Felix, with bargaining unit titles (Wheelchair Services Staff). Neither Champagne nor Felix worked for predecessor Air Serv. Finally, and inexplicably, R 4 completely omits Baggage Handler and predecessor employee Shiquita Dickey, who appears in GC 8 and all of

⁸ Respondent's set of payroll records, GC 4, shows individual employees' job titles on a weekly basis.

Respondent's payroll records beginning in the week of May 9. Although GC 8 and R 4 look very similar, Respondent's exhibit was quite obviously doctored to serve Respondent's litigious purpose of diluting the Union's majority support, and should therefore be disregarded.

Throughout the Hiring Process, Respondent Requires Employees to Sign A Mandatory Arbitration Agreement

When Respondent hired its workforce, it required all employees to agree to a mandatory arbitration agreement.⁹ The arbitration agreement in its entirety can be found in the record as GC 7. In pertinent part, it states:

Both you and the Company agree to resolve any and all claims, disputes or controversies arising out of or relating to your application for employment, your employment with the Company, and/or the termination of your employment exclusively by arbitration to be administered by a neutral dispute resolution agency agreed upon by the parties at the time of the dispute. [...] **the Arbitrator shall not have the authority to consolidate the claims of other employees into a single proceeding, to fashion a proceeding as a class, collective action, or representative action, or to award relief to a class or group of employees.** [...] By acknowledging and accepting employment with the Company if it is offered, you agree to be bound to this Dispute Resolution Agreement, as does the Company. You understand that, as more fully set forth above, you must arbitrate any and all employment-related claims against the Company and that **you may not file a lawsuit in court** in regard to any claims or disputes covered by this Agreement. GC 7 (emphasis added).

On May 9, Respondent Takes Over Operations at Terminal Five and Seamlessly Continues Air Serv's Operation

On May 9, Respondent commenced operations in Terminal Five, and began providing all four types of terminal services, including the three that Air Serv had provided through May 8 (line queue, baggage and skycap). Tr. 216-18, 229. Paragraph 7(b) of the Complaint alleges,

⁹ According to Division Vice President Matthew Barry, "all PrimeFlight employees" are required to sign the arbitration agreement. Tr. 291. According to Senior Vice President of Human Resources William Stejskal, all employees, except "those hired before January 1, 2012," were required to sign the arbitration agreement. Tr. 310-11. In any event, the arbitration agreement is a standard, nationwide requirement, which is not limited to Respondent's employees at JFK Airport.

and Respondent admits in its Answer, that “since about May 9, 2016, Respondent has continued to operate the portion of Air Serv’s business at JFK Airport in **basically unchanged form.**”

Employees from the line queue, baggage and wheelchair classifications testified that their jobs did not change in any material way. Tr. 84; 96; 106; 108; 110; 114; 117-22; 125-27; 132-33.

The evidence establishes that the only changes to their jobs pertained to minor, superficial changes such as using a different kind of time clock and wearing a uniform that displays the company name “PrimeFlight” instead of “Air Serv.” *Id.*

In addition to the line queue, baggage and skycap services, Respondent began providing wheelchair services on May 9. At that time, up until June 6, the number of employees hired into the wheelchair services classification constituted a minority of Respondent’s entire workforce (174 of 367, or 47%), and a minority of the bargaining unit (174 of 351, or 49.5%). GC 8. The remaining employees constituting 53% of Respondent’s workforce and just over half of the bargaining unit, performed work that had previously been performed by Air Serv: line queue, baggage and skycap services. GC 8.

Since beginning operations on May 9, Respondent has utilized its workforce interchangeably among job classifications, requiring employees to frequently perform work in job classifications other than the one they were hired into. Baggage employee Denzyl Prince testified that since Respondent has taken over, he has performed the wheelchair duties upon request and he has observed wheelchair employees doing baggage work. Tr. 122-24. Wheelchair employee Omar Duhaney testified that, in addition to his wheelchair duties, he performs baggage duties “five times a week.” Tr. 186. Additionally, over the course of two months, Duhaney observed baggage employees performing wheelchair work on a daily basis and observed line queue employees performing wheelchair work about twice per week. Tr. 187.

On May 23, The Union Requests Recognition, Bargaining and Information; Respondent Fails to Meet its Bargaining Obligation

By letter dated May 23, to Respondent's General Counsel, the Union's Deputy General Counsel Brent Garren demanded that Respondent recognize the Union as the representative of "Respondent's employees at JFK Airport, the majority of whom were formerly Air Serv employees represented by Local 32BJ." Jt. 3. The letter continued, "these are employees working at Terminal Five on the Jet Blue account, providing baggage handling, skycap and check point services. As we understand it, the appropriate bargaining unit also includes employees providing wheelchair assistance. We request recognition for a unit of all full-time and regular part-time employees at Terminal Five on the Jet Blue account, excluding supervisors, office clericals, and guards as defined in the NLRA."¹⁰ Jt. 3. In addition, the Union requested certain information from Respondent:

1. A roster of all bargaining unit employees, including their names, addresses, telephone numbers, e-mail addresses, wages, shifts, classifications and start dates,
2. A copy of any employee handbook applicable to any bargaining unit employee,
3. A copy of the summary plan description for any health insurance or other employee benefit plan applicable to any bargaining unit employee.

By letter dated May 25, 2016, Respondent's Senior Vice President of Human Resources William Stejskal III replied to Garren, requesting evidence that establishes the basis for the Union's claim that it represents the employees at issue, including Board certifications and collective bargaining agreements. Jt. 3.

¹⁰ The letter also described a second unit: "Respondent's employees at Newark Liberty Airport providing baggage handling, skycap and check point services at Terminal A for Jet Blue, a majority of whom are former Air Serv employees represented by Local 32BJ. We request recognition for a unit of all full-time and regular part-time employees at Terminal A on the Jet Blue account, excluding supervisors, office clericals, and guards as defined in the NLRA." This unit is not at issue in the instant case.

By letter dated June 2, 2016, Garren replied to Stejskal, and enclosed a copy of the March 26, 2015 recognition agreement between Air Serv and the Union (GC 3). Jt. 3. Since May 7, before it commenced operations, through June 7, Respondent had not hired any employees, and continued to employ, as a majority of its employees, individuals who had been employed by predecessor Air Serv. GC 8.

By letter dated June 10, 2016, Stejskal asked Garren to provide any additional agreement between the parties, “that preceded the Recognition Agreement and stipulated the card check procedure referenced in the Recognition Agreement,” should one exist. Jt. 3. Additionally, Stejskal asked Garren whether a Collective Bargaining Agreement exists for any of the employees at issue, and explained that its requests are relevant to the Union’s May 23 recognition demand. Jt. 3.

By letter dated June 15, 2016, Garren replied to Stejskal by stating, “We have supplied you with sufficient documentation to demonstrate that we represent the employees in the bargaining units at JFK and Newark airport in which the former Air Serv employees constitute a majority of Respondent's non-supervisory workforce. After you acknowledge that the Union is the exclusive bargaining agent, we will be happy to provide any additional information which is necessary and relevant to collective bargaining. Please provide the authority that supports your claim that a collective bargaining agreement or documents preceding the recognition agreement are necessary to determine our representative status.” Jt. 3.

After the Union’s June 15 letter, there was no further correspondence between the Union and Respondent. Respondent did not recognize the Union until it did so on an interim basis, as ordered to by the Eastern District of New York on October 24 (in the related 10(j) proceeding).

After the Bargaining Demand, Respondent Resumes Hiring Wheelchair Staff

Respondent did not hire any employees between its first day of operation, May 9, and June 6, two weeks after the Union's May 23 bargaining demand. Tr. 271. Two weeks after the Union's bargaining demand, from June 6 through July 6, Respondent began hiring almost exclusively Wheelchair Services employees. GC 8. During this period, Respondent hired 139 employees into the Wheelchair classification (including two Wheelchair Dispatchers), and only five into the Baggage Handling classification, three into the Line Queue classification, and zero employees into the Skycap classification. GC 8 at 5-7.

As a result of the post-bargaining demand hiring spree, the composition of Respondent's workforce changed. Whereas more than half of its employees had been former Air Serv employees when the Union requested recognition on May 23, by July 6, the percentage had fallen below half. Jt. 1. Additionally, whereas less than half of the bargaining unit consisted of Wheelchair Services employees when the Union requested recognition on May 23, by July 7, Respondent had hired 313 in the Wheelchair Services classification, out of approximately 507 employees in total (62%). GC 8.

In June 2016, Respondent's Supervisor Threatens Employees With Discharge

In the midst of Respondent's post-bargaining demand hiring spree, in June, Wheelchair Services Employee Omar Duhaney learned from Union Organizer Mike Cassaday that the Union was organizing a march in Terminal Five. Tr. 187. Duhaney agreed to attend the march, but ultimately did not attend because of a threatening statement that his supervisor made. Tr. 189.

About a week after learning about the Union march, Duhaney arrived at work and reported to the dispatch office, as usual. Tr. 189-90. There were some other employees present,

including wheelchair agent Joan (last name unknown) and dispatcher Jessica (last name unknown). At about 2:55 AM, shortly before Duhaney's 3:00 AM shift was to begin, his supervisor, Erick Brazao-Martinez, made an announcement. Tr. 189. Duhaney's uncontradicted testimony establishes that Brazao-Martinez said, "don't join the Union. We've only been with PrimeFlight for a couple of months. Be smart, guys. If you join the Union, you will get fired." Tr. 189. Dispatcher Jessica replied, "that's why I'm not joining no Union." Tr. 191. At that point, Duhaney punched the clock and began his shift. Tr. 191.

In Late August and September, Respondent Unilaterally Implements Changes to Employees' Terms and Conditions of Employment

Paragraph 17 of the Complaint alleges, and Respondent admits, that since about August 26, Respondent has been deducting pay from employees' paychecks to account for unpaid break time. Employee Allison Halley testified that on or about September 13, Flo¹¹ asked Halley to sign a form. Tr. 101. The form states that thirty minutes per day will be deducted from employees' pay to account for break time. GC 2. Halley testified that before Flo asked Halley to sign the form, Halley had never seen the form before, and Respondent had never before deducted break time from her pay. Tr. 101-02.

Paragraph 18 of the Complaint alleges, and Respondent admits, that since about September 12, Respondent has changed employees' scheduled work days and reduced employees' hours. Paragraph 20 of the Complaint alleges, and Respondent admits, that Respondent engaged in the conduct described in paragraphs 17 and 18 without prior notice to the

¹¹ Presumably "Office Support" employee, Flordeliz Cabrera.

Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct.

IV. ARGUMENT

(A) District Vice President Matthew Barry's Testimony Lacked Credibility

Respondent's main witness was Matthew Barry, Northeast Mid-Atlantic Division Vice President. Barry's testimony lacked credibility in that he made speculative statements, which are completely unsupported by any other record evidence, and he gave evasive answers to straightforward questions. Furthermore, it was evident that Barry's testimony was clearly crafted in an unsuccessful attempt to substantiate Respondent's defenses that it did not employ a representative complement of employees when the Union demanded recognition, and that the Board lacks jurisdiction.

Barry misrepresented facts and tailored his testimony in an attempt to support Respondent's defense that the Board lacks jurisdiction. Despite his admission that JetBlue has never asked Respondent to remove an employee from working at JFK Airport, Barry claimed that Respondent would be required to do so if JetBlue made such a request. Tr. 264. To support his hypothetical assertion (admitted over objection), Barry claimed that a "specific term" in the General Terms Agreement, Jt. 2, imposes such a requirement. Tr. 265. However, during cross-examination, Barry was flummoxed when asked to identify that "specific term." Tr. 285. After poring over the entire document, while the Court patiently waited for several minutes, Barry failed to identify the "specific term" that he claimed existed and, instead, admitted that he could rely only on Section 7.6. Tr. 287. That Section states:

Business Partner [Respondent] shall enforce (and, if applicable, cause its subcontractors to enforce) strict discipline and good order among its employees, to maintain and observe sound and harmonious labor practices, and to take all reasonable steps to avoid labor disputes (including but not limited to jurisdictional and other site-specific labor disputes) and work stoppages. If, at any time, any of the workers performing the Services shall be unable to work in harmony or shall interfere with any labor employed by JetBlue or any tenant of the area in which the Services are performed, Business Partner shall take such reasonable steps as shall be necessary to resolve such dispute including but not limited to the removal and replacement of employees or agents. Jt. 2 at 6.

Section 7.6 does not set forth any right that JetBlue has to require Respondent to take any action with regard to any employee. On the contrary, it states that “Business Partner,” meaning Respondent, is responsible for maintaining order and resolving labor disputes. Barry’s tortured reading of Section 7.6 shows his willingness to twist the truth in order to suit Respondent’s position.

Barry demonstrated his willingness to evade answering forthrightly to try to avoid providing testimony that he thought might hurt Respondent’s defenses. In that regard, when asked straightforward questions about JetBlue’s unambiguously documented preference that Respondent’s employees wear uniforms that look unique, and not be associated with Jet Blue, Barry responded evasively. In that regard, Counsel for the General Counsel asked, “PrimeFlight agreed to uniforms that are unique from JetBlue uniforms, isn’t that right?” Barry responded, “I don’t know if you would classify them as unique.” When pressed to respond directly, Barry dug in his heels by stating, “PrimeFlight agreed to the proposed uniform that we had proposed that JetBlue accepted.” Tr. 283. Counsel for the General Counsel gave Barry another opportunity to admit the truth by asking, “isn’t it true that JetBlue prefers PrimeFlight employees to look unique and not like JetBlue?” Tr. 283. Barry kept obfuscating: “I believe the terminology that they used was that they wanted them not to stand out.” Tr. 283.

The truth of the matter is straightforward. An e-mail from JetBlue’s senior manager Don Uselmann, who served as Barry’s primary contact with regard to designing Respondent’s uniforms, informed Barry that the JetBlue branding department “would prefer you to look unique (not JetBlue), and not to stand out.” GC 6. Barry clearly remember the e-mail, however, he went to great lengths to avoid admitting that JetBlue wanted Respondent’s employees to be held out to the public as unmistakably PrimeFlight, not JetBlue, employees. Admitting this would have undermined Respondent’s claim that it is not an employer within the meaning of the Act, which Barry was not willing to do.

For the foregoing reasons, Northeast Mid-Atlantic Division Vice President Matthew Barry lacked credibility, and his testimony should not be relied upon.

(B) Since May 23, 2016, Respondent, a *Burns* successor, has refused to recognize and bargain with the Union, in violation of Sections 8(a)(1) and (5) of the Act.

Under *NLRB v. Burns Intern. Sec. Services, Inc.* and its progeny, an employer that acquires a predecessor’s operations succeeds to the predecessor’s collective-bargaining obligation if: (i) there is a “substantial continuity” between the predecessor’s enterprise and that of the successor, (ii) a majority of the successor’s employees at the facility it acquired from the predecessor were former predecessor employees, and (iii) the unit remains appropriate for collective bargaining under the successor’s operations. 406 U.S. 272, 280-81 (1972); *see e.g., Ready Mix USA, Inc.*, 340 NLRB 946, 946-48 (2003). In this case, the record evidence satisfies all three elements.

The Evidence Establishes that Respondent Substantially Continued Predecessor Air Serv’s Business.

The substantial continuity test examines the totality of the circumstances, including: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987). The test focuses on the retained employees' perspective as to whether their jobs are essentially unaltered. *Fall River Dyeing*, 482 U.S. at 43.

Here, Respondent admits that it continued to operate Air Serv's business in basically unchanged form. This is not surprising, given the fact that Air Serv and Respondent are both in the business of providing terminal services to airlines. Because the continuity test focuses on whether the "employees who have been retained [the Air Serv employees] will understandably view their job situations as essentially unaltered," the analysis properly ends here. *See id.*

Beyond Respondent's admission, the evidence clearly demonstrates that there is substantial continuity between Air Serv and Respondent. The transition between the two enterprises was seamless, with Air Serv concluding its operations on May 8 and Respondent beginning its operations on May 9. The retained employees are doing the same work they were doing under Air Serv, in the same locations, with substantially the same supervision, and with no interruption in service. Respondent's changes to employees' working conditions, such as rebranding uniforms, are minor. That Respondent also operates the wheelchair assistance work, whereas Air Serv did not, has not caused any significant change to the former Air Serv employees' work. *See, e.g., Tree-Free Fiber Co.*, 328 NLRB 389 (1999) (continuity satisfied where retained employees performed the same work, despite a difference with respect to the

scope of the successor's business); *Bronx Health Plan*, 326 NLRB 810 (1998) (continuity satisfied where there were no material changes in job situations from the perspective of the employees, even though successor was "designed to engage in a completely separate business activity"), *enfd.* 203 F.3d 51 (D.C. Cir. 1999). The addition of the wheelchair work does not change the nature of the predecessor employees' work, or the business as a whole. Rather, the addition of wheelchair work merely adds a service that has long been considered a part of the terminal services operation, and which many predecessor employees have performed at some point. For all these reasons, there is substantial continuity between Air Serv and Respondent.

The Evidence Shows that A Majority of Respondent's Employees Are Former Air Serv Employees

Once the substantial continuity test is satisfied, a successor's bargaining obligation requires that a majority of the employees of the successor, in an appropriate unit, were formerly employed by the predecessor. Here, the undisputed evidence shows that on day one of Respondent's operations, and as of the Union's May 23 bargaining demand, 52% of Respondent's bargaining unit employees had been previously employed by Air Serv. GC 8.

May 23 is the appropriate date on which to examine the snapshot of Respondent's workforce because a bargaining demand triggers a successor's bargaining obligation as long as a "substantial and representative complement" exists at that time. *Fall River Dyeing*, 482 U.S. at 47. When "fixing the moment when the determination as to the composition of the successor's work force is to be made," the Board examines: whether the employer has substantially filled the unit job classifications designated for the operation, whether the operation was in substantially normal production, the size of the complement on the date of normal production, the time

expected to elapse before a substantially larger complement would be at work, and the relative certainty of the expected expansion. *Id.* at 49.

Here, as of May 23, just like the employer in *Fall River Dyeing Corp.*, Respondent “had hired employees in virtually all job classifications, had hired at least fifty percent of those it would ultimately employ in the majority of those classifications, and it employed a majority of the employees it would eventually employ when it reached full complement.” *See* 482 U.S. at 52. To wit, as of May 23, Respondent had hired employees in all four job classifications that it would employ: baggage handling, skycap, line queue and wheelchair assistance. In each of the first three classifications, an overwhelming majority – between 94% and 100% – of positions had been filled. GC 8. Well over half, or 56%, of the wheelchair employees had been hired.¹² *Compare Mid-America Door & Hardware, Inc.* 1993 WL 735836 at *5 n.22 (June 30, 1993 GC Advice Memo) (Case No. 17-CA-16512) (finding substantial and representative complement where employer had hired “significantly less than 50% of the employees the employer would ultimately employ in” modular casework classification, which composed 65-75% of operation as a whole). Finally, 73% of Respondent’s “full complement” of employees had been hired.¹³ *Compare NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459 (9th Cir. 1985) (finding representative complement where employer had hired less than half (29 of 65) of full complement) (cited with approval in *Fall River*, 482 U.S. at 33); *Hospital San Francisco*, 293 NLRB 171, 172 (1989) (finding representative complement where employer had hired only 62% of its planned full complement (25 of 40)).

¹² 174 of 313 wheelchair employees. GC 8.

¹³ 367 of 507 employees. GC 8.

Perhaps most significantly, beginning at midnight on May 9, Respondent began providing *all* of the terminal services in Terminal Five, and thus was in “substantially normal production.” Although Respondent later hired additional wheelchair employees, there is no evidence that it began providing new services, began operating in new areas, or otherwise expanded its operation in any way after day one of operations, May 9. Tr. 30. Thus, under the *Fall River Dyeing* standard, a substantial and representative complement of employees existed when the Union made its bargaining demand on May 23. As of that date, because 52% of Respondent’s employees had worked for predecessor Air Serv, the Union’s majority status is satisfied.

The Evidence Establishes that The Unit Remains Appropriate for Collective Bargaining

Once majority status is found, a successor’s bargaining obligation requires that the unit remains appropriate for collective bargaining under the successor’s operations. The Board has long held that a single-facility unit is presumptively appropriate and that the party opposing it has a heavy burden to rebut its presumptive appropriateness. *See Trane*, 339 NLRB 866, 867 (2003) (to determine whether “heavy burden” of rebutting presumption is met, examine community of interest factors, including (1) central control over daily operations and labor relations, including the extent of local autonomy; (2) similarity of employee skills, functions, and working conditions; (3) the degree of employee interchange; (4) the distance between the locations; and (5) bargaining history, if any exists).

Here, the unit is presumptively appropriate because it is a single-facility, wall-to-wall unit of the Employer’s employees in Terminal Five of the JFK Airport. The evidence shows that Respondent’s employees are all supervised and managed by Respondent’s supervisors.

Bargaining unit employees undergo common training and frequently perform job duties outside of their classification on an as-needed basis. The unit employees all work in a single airport terminal, Terminal Five. Finally, although there is no evidence of a collective bargaining agreement, Respondent's employees have been represented by the Union since March 2015. Significantly, the recognition agreement defines the bargaining unit without regard to job classification: "full-time and regular part-time employees." GC 3. All of these factors weigh in favor of the presumptively appropriate, single-facility wall-to-wall unit.

The Bargaining Unit Appropriately Includes Wheelchair Employees

While the unit includes the wheelchair assistants, who were unrepresented at the time that Respondent took over operations from the predecessor, this does not destroy the bargaining obligation. In analyzing a successor's duty to bargain, the Board has found units that include previously unrepresented employees to be appropriate, as long as the formerly represented portion constitutes a majority of the unit. *See Good N' Fresh Foods*, 287 NLRB 1231, 1231 n.1, 1236-37 (1988) (successor was obligated to bargain with union for unit comprised of formerly unrepresented maintenance employees and represented production employees); *Spruce Up Corp.*, 209 NLRB 194, 196 (1974) (where successor took over 19 represented barbershops, the addition of employees from eight unrepresented shops "did not destroy the appropriateness of the certified unit and constituted only 'an expansion of the bargaining unit'"), *enf'd* 529 F.2d 516 (4th Cir. 1975). *See also, Irwin Industries*, 304 NLRB 78, 80 (1991) (a unit consisting of approximately 337 formerly represented employees and 228 previously unrepresented employees was an appropriate unit, but denying successorship obligation on other grounds), *enf. denied Int'l Union of Petroleum & Indus. Workers v. NLRB*, 980 F.2d 774, 780 (D.C. Cir. 1992)

(agreeing with the Board that new unit was appropriate and finding that there was a successorship obligation under Board law).

Here, on the date of the bargaining demand, more than half of the bargaining unit employees had previously worked for the predecessor and continued to perform the baggage, skycap, and line queue work that had been performed by predecessor Air Serv. Moreover, the manner in which Respondent operates the wheelchair work enhances the community of interest in the bargaining unit. Specifically, Respondent requires former Air Serv baggage handlers and line queue employees to perform wheelchair work on an as-needed basis. Conversely, wheelchair employees are also required to perform baggage handling work. Thus, the Employer, through its own actions, has proven that the wheelchair work is an integral part of the unit work.

Finally, the appropriateness of including the wheelchair work in the unit is demonstrated by the fact that the wheelchair work was originally included in the wall-to-wall unit recognized by the predecessor, at a time when the predecessor performed wheelchair work. Additionally, Respondent hired some of the predecessor's employees as wheelchair assistants even though they had been performing baggage handling, skycap services, or line queue services for the predecessor. For example, Omar Duhaney performed baggage work for Air Serv, but Respondent hired him to do wheelchair work. Tr. 163, 170. For all these reasons, the bargaining unit described in the Union's May 23 bargaining demand – all of Respondent's employees in Terminal Five, including employees performing baggage handling, line queue, skycap, and wheelchair services – is an appropriate bargaining unit.

Respondent is a *Burns* Successor, and is Obligated to Recognize and Bargain with the Union

Because (i) there is “substantial continuity” between Air Serv’s enterprise and Respondent’s, (ii) a majority of Respondent’s employees at JFK Airport were former Air Serv employees, and (iii) the unit remains appropriate for collective bargaining under the Respondent’s operations, Respondent is obligated to bargain with the Union under *Burns*. See 406 U.S. 272, 280-81 (1972); see e.g., *Ready Mix USA, Inc.*, 340 NLRB 946, 946-48 (2003). Thus, since the Union’s May 23 bargaining demand, the evidence conclusively establishes that Respondent violated Sections 8(a)(1) and (5) by failing and refusing to recognize and bargain in good faith with the Union.

Respondent’s Unlawful Refusal to Recognize the Union Caused it To Commit Additional Violations of Section 8(a)(5)

As a result of Respondent’s unlawful refusal to recognize the Union, it has further violated Sections 8(a)(1) and (5) by (1) failing to provide information that is necessary and relevant to collective bargaining, (2) unilaterally changing employees’ terms and conditions of employment, without providing to the Union notice and an opportunity to bargain, by deducting pay from employees’ paychecks to account for unpaid break time, and (3) unilaterally changing employees’ terms and conditions of employment, without providing to the Union notice and an opportunity to bargain, by changing employees’ work schedules. Each of these three unfair labor practices.

(1) It is undisputed that since May 23, 2016, Respondent failed to provide information that is necessary and relevant to bargaining, in violation of Sections 8(a)(1) and (5) of the Act.

Under Section 8(a)(5) of the Act, an employer is required to provide a union with relevant information necessary to perform its duties as the employees’ bargaining representative.

NLRB v. Acme Indus. Co., 385 U.S. 432, 435 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). When the union's request for information pertains to employees within the bargaining unit, the information is presumptively relevant and the employer must provide the information. *Disneyland Park*, 350 NLRB 1256, 1257 (2007).

Here, all three information requests that the Union made in its May 23 letter pertain directly to bargaining unit employees: (1) roster of bargaining unit employees; (2) employee handbook applicable to any bargaining unit employee; (3) summary plan description for any health insurance or other employee benefit plan applicable to any bargaining unit employee. The information requests are therefore presumptively relevant. *See Disneyland Park*, 350 NLRB at 1257. Thus, Respondent was required to provide the requested information, as long as the bargaining obligation attached, under *Burns*. The evidence and well-settled Board law clearly establishes that Respondent is a *Burns* successor, and Respondent does not dispute that it did not provide the requested information to the Union. By failing and refusing to do so, it must be found that Respondent violated Section 8(a)(5).

(2) It is undisputed that since about August 26, 2016, Respondent unilaterally changed employees' terms and conditions of employment, without providing to the Union notice and an opportunity to bargain, by deducting pay from employees' paychecks to account for unpaid break time, in violation of Sections 8(a)(1) and (5) of the Act.

Section 8(a)(5) prohibits an employer from unilaterally changing, without providing to the union notice and an opportunity to bargain, mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736, 747 (1962). A change to employees' paid break time implicates a mandatory subject of bargaining because it involves "rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. 159(a); *See, e.g., Litton Systems*, 300 NLRB 324 (1990)

(employer violated 8(a)(5) by eliminating extra paid half hour for lunch the day before Christmas); *Xidex Corp.*, 297 NLRB 110 (1989) (employer violated 8(a)(5) by replacing 30 minutes unpaid break with 15 minute paid break). As the evidence establishes that Respondent is a *Burns* successor and its bargaining obligation attached as of May 23, Respondent was required to provide the Union with notice and an opportunity to bargain over the unilaterally implemented change to employees' paid break time.

Respondent admits that since August 26, it has deducted pay from employees' paychecks to account for unpaid break time, and that it did so without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct. Answer ¶¶18, 20. Because Respondent is a *Burns* successor, it was not privileged to make this change unilaterally, and Respondent violated Section 8(a)(5) by doing so.

Respondent might argue that its policy, of deducting pay to account for unpaid break time, is memorialized in its employee handbook, CP 1, and therefore existed as a term and condition of employment when all employees were hired. This argument is belied by employee Allison Halley's unrebutted testimony, that on or about September 13, Flo¹⁴ asked Halley to sign a form that states that thirty minutes per day will be deducted from employees' pay to account for break time. GC 2. Halley testified that before Flo asked Halley to sign the form, Halley had never seen it before, and had never before deducted break time from her pay. Tr. 101-02. There is no record evidence contradicting Halley's testimony. Thus, employees had no way to know of Respondent's supposedly preexisting policy.

¹⁴ Presumably "Office Support" employee, Flordeliz Cabrera.

Moreover, even if the policy had always been written in the Employee Handbook, and acknowledged by employees, that fact does not relieve Respondent of its duty to bargain in good faith with the Union because the evidence shows that Respondent did not enforce the policy. *See Flambeau Airmold Corp.*, 334 NLRB 165 (2001) (enforcement of previously unenforced rule written in handbook, which required employees to punch in or out no more than six minutes prior to or after a shift, constituted unilateral change in violation of Section 8(a)(5), even though shift in enforcement explained by installation of a new time clock). No matter when the policy was written, Respondent's unilaterally implemented change to Respondent's enforcement of the break policy violates its bargaining obligation. *See id.*

For all these reasons, Respondent violated Section 8(a)(1) and (5) when it unilaterally changed employees' terms and conditions of employment, without providing to the Union notice and an opportunity to bargain, by deducting pay from employees' paychecks to account for unpaid break time.

(3) It is undisputed that since about September 12, 2016, Respondent unilaterally changed employees' terms and conditions of employment, without providing to the Union notice and an opportunity to bargain, by changing employees' scheduled work days and reducing employees' hours, in violation of Sections 8(a)(1) and (5) of the Act.

Section 8(a)(5) prohibits an employer from unilaterally changing mandatory subjects of bargaining without providing to the union notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. at 747. Board law is clear that employee schedules and work hours are a mandatory subjects of bargaining, which an employer may not unilaterally change. *TD Barton Foods, LLC dba C-Town Supermarket*, 358 NLRB No. 56 (2012) (recess appointment) (employer violated 8(a)(5) by reducing unit employees' hours by five to ten hours per week due to declining sales);

Palm Beach Metro Transp., LLC, 357 NLRB 180 (2011) (employer violated 8(a)(5) by reducing hours in response to fluctuations in available work); *Illiana Transit Warehouse Corp.*, 323 NLRB 111 (1997) (employer violated 8(a)(5) by reducing hours); *Dickerson-Chapman, Inc.*, 313 NLRB 907 (1994) (employer violated 8(a)(5) by reducing hours). “Similarly, the ‘particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of ‘wages, hours, and other terms and conditions of employment’ about which employers and unions must bargain.” *Millwrights, Conveyors and Machinery Erectors Local Union No. 1031*, 321 NLRB 30, 31 (1996) (quoting *Meat Cutters Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965)); see also *Illiana Transit Warehouse Corp.*, 323 NLRB 111 (1997) (employer violated 8(a)(5) by changing employees’ shift start and end times and reducing hours).

Respondent admits that since about September 12, it has changed employee work schedules, including changing employees' scheduled work days and reducing employees' hours. Respondent also admits that it made these changes to employees’ schedules without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the conduct and the effects of the conduct. Answer ¶¶18, 20. Because Respondent is a *Burns* successor, it could not make these changes unilaterally, and violated Section 8(a)(5) by doing so.¹⁵

¹⁵ In the event that Respondent argues that these types of changes fall within its entrepreneurial purview, under *First National Maintenance v. NLRB*, this argument must be rejected. 452 U.S. 666, 678-79 (1981) (“Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business”). The changes at issue, i.e. changes to employee schedules and work hours, are more akin to those in *Mi Pueblo Foods*, where the employer violated 8(a)(5) when it unilaterally decided to change employees’ schedules, reduce hours, lay off employees, and subcontract a relatively small part of its operations. 360 NLRB No. 116 (2014).

(C) **The evidence establishes that Respondent has required its employees to sign, as a condition of employment, an unlawful arbitration agreement, in violation of Section 8(a)(1) of the Act.**

The Board has held in *D.R. Horton*, and reaffirmed in *Murphy Oil USA*, that an employer violates Section 8(a)(1) of the Act by requiring employees “as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial.” *D.R. Horton*, 357 NLRB No. 184 at 1 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013); *Murphy Oil USA*, 361 NLRB No. 72 at 1-2 (2014), enf. denied in relevant part — F.3d —, 204 L.R.R.M. 3489 (5th Cir. 2015).

Here, there is no dispute that Respondent requires all of its employees, nationwide, to agree to the arbitration agreement as a condition of hire. The mandatory arbitration agreement states:

Both you and the Company agree to resolve any and all claims, disputes or controversies arising out of or relating to your application for employment, your employment with the Company, and/or the termination of your employment exclusively by arbitration to be administered by a neutral dispute resolution agency agreed upon by the parties at the time of the dispute. [...] **the Arbitrator shall not have the authority to consolidate the claims of other employees into a single proceeding, to fashion a proceeding as a class, collective action, or representative action, or to award relief to a class or group of employees.** [...] By acknowledging and accepting employment with the Company if it is offered, you agree to be bound to this Dispute Resolution Agreement, as does the Company. You understand that, as more fully set forth above, you must arbitrate any and all employment-related claims against the Company and that **you may not file a lawsuit in court** in regard to any claims or disputes covered by this Agreement.

Thus, the plain language of the agreement precludes employees “from filing joint, class, or collective claims addressing their wages, hours, or other working conditions” in all forums, both arbitral and judicial. This is precisely the type of agreement that violates Section 8(a)(1). *D.R. Horton*, 357 NLRB No. 184 at p. 1 (agreement violated 8(a)(1) where it required arbitration

of all employment-related disputes, stated that arbitrator “will not have the authority to consolidate the claims of other employees,” and “does not have authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding,” and waived employee’s right to file a lawsuit).

Additionally, where a mandatory arbitration agreement contains provisions whereby “nonlawyer employees would reasonably conclude they are barred or restricted from filing NLRB charges,” the agreement violates Section 8(a)(1) of the Act. *D.R. Horton*, 357 NLRB No. 184 at 24. An agreement can reasonably be construed as restricting employees from filing Board charges even where it expressly states that employees retain the right to file Board charges. For example, where a mandatory arbitration agreement stated that “this shall not be a waiver of any requirement for the Employee to timely file any charge with the NLRB, EEOC, or any State Agency,” the Board found that the agreement as a whole was ambiguous because it also required the employee to agree that the grievance and arbitration procedure would be the “exclusive method of resolution of all disputes.” *Id.* (quoting *Bills Electric, Inc.*, 350 NLRB 292, 296 (2007)). Where the language is ambiguous, “it is well settled, as a general precept, ambiguous policies or rules that reasonably could be interpreted as violative of employee rights will be construed against the maker of the policy or rule and, even if not followed, will be found to violate the Act.” *Id.*

Here, the arbitration agreement violates Section 8(a)(1) because employees reasonably would believe that it bars or restricts them from filing charges with the Board and/or restricts their access to the Board's processes. This is true even though the agreement states:

This Agreement does not affect or limit Employee's right to file an administrative charge with a state or federal agency such as the National Labor Relations Board or the Equal

Employment Opportunity Commission, and it does not cover claims relating to whistleblowers and/or unlawful retaliation arising under the Sarbanes-Oxley Act.

This portion of the agreement is buried at the end of a long and dense paragraph, which begins with the statement that “any and all” employment-related claims will be resolved “exclusively by arbitration.” Just like in *Bills Electric, Inc.*, 350 NLRB at 296, where the Board found an ambiguous agreement to violate Section 8(a)(1), these two sentences are at odds with one another, and a nonlawyer employee is far more likely to read the prohibitive sentence in the beginning of the paragraph, rather than the sentence at the end that purports to clarify employees’ right to file Board charges. Furthermore, the sentence purporting to clarify the right to file Board charges is followed by a sentence that would be opaque, and perhaps threatening, to a nonlawyer: “You and the Company agree that this Agreement shall be enforceable pursuant to and interpreted in accordance with the provision of the Federal Arbitration Act.” Thus, employees’ right to file Board charges under the arbitration agreement is ambiguous, at best. That ambiguity must be construed against Respondent. *See D.R. Horton*, 357 NLRB No. 184 at 24. For all these reasons, the agreement can reasonably be construed as restricting employees from filing Board charges, and therefore violates Section 8(a)(1).

Respondent has no defense to either theory of an 8(a)(1) violation, except to argue that, despite clear Board law prohibiting agreements such as the one it requires employees to agree to, Respondent hopes to prevail in an enforcement proceeding before a federal court. In opening argument, counsel for Respondent admitted, “with respect to the arbitration agreement, we recognize of course that there are NLRB precedents that Your Honor may not have the discretion to ignore.” Tr. 55.

Any defense asserted by Respondent that is based on Respondent not having fired or disciplined any employee for filing a class or collective action is of no moment. Tr. 309. “The vice of maintaining [a facially unlawful arbitration] rule is that it reasonably tends to chill employees in the exercise of their statutory rights. As a result, the rule may be unlawful even if there is no showing that a covered employee ever engaged in the protected concerted activity prohibited by the rule, precisely because the rule itself discourages employees from doing so.” *Murphy Oil USA*, 361 NLRB No. 72 at 18.

The arbitration agreement is facially unlawful because it (a) precludes employees from filing class or collective claims in arbitral and judicial forums, and (b) can reasonably be construed as restricting employees from filing Board charges. For these reasons, the arbitration agreement violates Section 8(a)(1).

(D) In or about June 2016, Respondent’s Supervisor Erick Brazao-Martinez threatened employees with discharge because they engaged in activities in support of the Union, in violation of Section 8(a)(1) of the Act.

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 Section 7" of the Act. Threatening employees with discharge if they engage in Union activity is a classic violation of Section 8(a)(1). *Pressroom Cleaners*, 361 NLRB No. 57 (2014) (supervisor’s statement, that employees would get fired if they continue to talk to union representative, was a “classic and blatant” violation of 8(a)(1)); *Pioneer Hotel And Gambling Hall, Inc.*, 276 NLRB 694, 698 (1985) (supervisor’s statement, that anyone signing a union card would be fired, violated 8(a)(1)).

Here, the uncontroverted testimony of employee Omar Duhaney is that in June, Supervisor Erick Brazao-Martinez¹⁶ said to Duhaney and other employees, “Don’t join the Union. We’ve only been with PrimeFlight for a couple of months. Be smart, guys. If you join the Union, you will get fired.” Tr. 189. This statement is a “classic” violation of Section 8(a)(1). *See Pioneer Hotel*, 276 NLRB at 698. Moreover, in this instance, the statement actually caused Duhaney to decide not to participate in a Union march, thereby unlawfully restraining him from engaging in protected activities in support of the Union.

Duhaney’s testimony was specific, coherent and clear. Most significantly, Respondent presented no witness to deny that Brazao-Martinez made the statement. Therefore, Duhaney’s testimony is not in dispute. For all these reasons, the evidence shows that Respondent violated Section 8(a)(1) by threatening employees with discharge because they support the Union.

(E) Respondent’s Defenses

Counsel for the General Counsel anticipates that Respondent will assert two primary defenses. First, Respondent will argue that it is a “derivative carrier” under the Railway Labor Act (“RLA”) and therefore not an “employer” within the meaning of Section 2(2) of the National Labor Relations Act. In other words, Respondent will argue that it falls under the jurisdiction of the National Mediation Board (the agency that enforces the RLA, “NMB”), rather than the Board’s. Second, Respondent will attempt to argue that on May 23, when the Union made its bargaining demand, Respondent did not employ a substantial and representative complement of employees. Both arguments fail.

¹⁶ In paragraph 4(b) of its Answer, Respondent admits that at all material times, Brazao-Martinez held the position of “Supervisor” and was a 2(11) supervisor and 2(13) agent of Respondent.

(1) Respondent Failed To Meet Its Burden of Proving That It Is Not Within The Jurisdiction of the NLRB

Respondent will attempt to argue that it is not an “employer” within the meaning of the Act because it falls under the jurisdiction of the Railway Labor Act. *See* 29 U.S.C. 152(2) (defining “employer” to exclude “any person subject to the RLA”); 29.U.S.C. 152(3) (defining “employee” to exclude “any individual employed by an employer subject to the RLA”). Because Respondent is attempting to claim the benefit of an exclusion from the Act, Respondent bears the burden of proving that it is subject to the RLA. *See NLRB v. Ky. River Community Care, Inc.*, 532 U.S. 706, 711 (2011) (in determining burden of proof for exemption from the Act’s definition of “employee,” apply “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”); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) (Board “must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach”). Respondent failed to meet its burden of proof, especially in light of recent Board law holding that the Board has jurisdiction over typical airline contractors.

Current Relevant Case Law from the NLRB and the NMB Holds That The NLRB Has Jurisdiction Over Typical Airline Contractors

Both the Board and the NMB agree that typical airline contractors, like Respondent, fall under the Board’s jurisdiction. While the Board has in the past referred some cases of arguable RLA jurisdiction to the NMB, it does not do so if it is clear that the Board has jurisdiction over the employer. *See* Sections 11711.1, 11711.2 of the NLRB Casehandling Manual. Notably, the

Board "will not refer a case that presents a jurisdictional claim in a factual situation similar to one in which the NMB has previously declined jurisdiction." *Spartan Aviation Indus., Inc.*, 337 NLRB 708, 708 (2002).

In nearly identical factual situations applying to airline contractors similar to Respondent, the NMB has repeatedly declined jurisdiction. *Menzies Aviation, Inc.*, 42 NMB 1, 7 (2014) (declining jurisdiction over contractor that provided ramp, baggage, and airport handling services to airline); *Airway Cleaners*, 41 NMB 262, 267-269 (2014) (declining jurisdiction over contractor that provided cleaning and maintenance to airlines); *Bags, Inc.*, 40 NMB 165, 169 (2013) (declining jurisdiction over contractor that provided skycap, wheelchair and unaccompanied minor services to airlines); *Air Serv Corp.*, 39 NMB 450, 459 (2012) (declining jurisdiction over contractor that provided shuttle bus transportation services between airport parking areas and terminal buildings). In a case involving the same Respondent as the instant case, the Board recognized the NMB's "shift" since 2013, which has ceded to the Board jurisdiction over airline contractors. *Primeflight Aviation Services, Inc.*, Case 12-RC-113687, 2015 WL 3814049, slip op. at 1 n.1 (June 18, 2015) (unanimous Board decision denying Respondent's request for review of Regional Director's conclusion that Board has jurisdiction) (Member Johnson "acknowledges that these cases represent a shift by the NMB from earlier opinions in which it had asserted jurisdiction on similar grounds, and that this view is currently extant NMB law").

Having recognized that the NMB declines jurisdiction over airline contractors, the Board now affirmatively asserts jurisdiction in such cases, absent evidence that an airline exercises greater control over the contractor than is present in "a typical subcontractor relationship." *Allied Aviation Service Co.*, 362 NLRB No. 173, 2015 WL 4984885, slip op. at 2 (August 19,

2015) (asserting jurisdiction over contractor that provided fueling services to airlines, and granting summary judgment where contractor refused to recognize and bargain with union, in violation of 8(a)(5)); *see also Alstate Maintenance, Inc.*, 2016 WL 3743257 (July 12, 2016) (asserting jurisdiction over contractor that provided baggage handling, skycap, and wheelchair services to airlines at JFK Airport).

Respondent is a Typical Airline Contractor; JetBlue Does Not Exercise Substantial Control Over Respondent

Here, the evidence shows that Respondent is a “typical” airline contractor, as described by the Board in *Allied Aviation Service Co.*, because JetBlue exercises insufficient control over Respondent to establish RLA jurisdiction under the NMB’s “substantial control” test. *See* 362 NLRB No. 173. In order for a non-carrier, such as Respondent, to qualify for RLA jurisdiction under the substantial control test, the NMB requires that “a material degree of control exists between the carrier and the employer in question.” *Bags, Inc.*, 40 NMB at 169. Historically, the factors to be considered include: the extent of the carrier's control over the manner in which the company conducts its business, access to the company's operations and records, the carrier's role in personnel decisions, the degree of supervision exercised by the carrier, the carrier's control over training and whether the employees in question are held out to the public as carrier employees. *Id.*

In recent years, the Board and the NMB have developed the substantial control test to focus primarily on control over “personnel decisions [...] emphasiz[ing] in particular [...] control over hiring, firing, and/or discipline.” *Allied Aviation Serv. Co.*, 2015 WL 4984885 at *1 (analyzing post-2012 NMB decisions applying the substantial control test, and finding that the

NMB emphasizes control over hiring, firing and discipline). With regard to this most important factor, personnel decisions, the evidence is clear that JetBlue exercises almost no control over Respondent.

Respondent Exercises Nearly Exclusive Control Over Personnel Decisions

The evidence shows that Respondent exercises nearly exclusive control over critical personnel decisions such as hiring, firing, and/or disciplining employees. First, with regard to hiring employees, Respondent stipulated that it has exclusive control over hiring employees at JFK. Tr. 19. With regard to promotions and demotions, Respondent stipulated that JetBlue does not provide commendations for Respondent's employees, Tr. 21, and Division Vice President Matthew Barry admitted that JetBlue has not requested that he promote or demote any employee, Tr. 295. Thus, the evidence shows that Respondent exercises exclusive control over which employees get hired, and which job title each employee holds.

With regard to disciplining and firing employees, there is no evidence that JetBlue can exercise any control at all. Respondent cannot point to any example of any employee who it disciplined or terminated at JetBlue's request. Tr. 288. Furthermore, Respondent cannot point to any provision in either of its contracts with JetBlue – the general terms agreement or the statement of work – that gives JetBlue this type of control. Jt. 2. Rather, Respondent alone controls its discipline and termination policies, as embodied in Respondent's employee handbook, which lists rules of conduct and procedures for determining discipline. Jt. 2, §§ 701-722. All of these facts weigh heavily in favor of finding that JetBlue exercises insufficient control to establish RLA jurisdiction.

At most, Respondent has an extremely limited right to request that Respondent move an employee from one job classification to another. JetBlue can request that Respondent remove a skycap found to be “collecting revenue outside of the system,” but in no other scenario. Jt. 2 at 24, SkyCap Services, ¶ 5. Even then, Respondent is only required to remove the employee from performing baggage services work. *Id.* Significantly, Respondent need not remove the employee from the JetBlue account altogether, or terminate him or her. *Id.* Counsel for the General Counsel asked Matthew Barry, “how many times has PrimeFlight removed an employee at JFK at JetBlue’s request?” Barry replied, “zero.” Tr. 287.

Respondent will likely argue that, even though it has not happened yet, JetBlue retains the right to require Respondent to remove an employee from its account. This claim is completely unsubstantiated by the evidence. Instead, the general terms agreement states that Respondent is responsible for addressing disciplinary issues, with the limited exception of employees who are found to be “collecting revenue outside of the system.”

This limited right pales in comparison to the right, which other airline contractors frequently give to airlines, to request that a particular employee be removed from that airline’s account altogether. For example, in *Local 660, United Workers of America (Alstate Maintenance, Inc.)*, ALJ Green analyzed contractual language that gave an airline much more control than JetBlue has over Respondent. *See* 2016 WL 2732017, 29-CB-103994 (May 9, 2016). In that case, the parties’ agreement stated:

Alstate Maintenance shall upon request of TOGA [Terminal One Group Association; a consortium of airlines] remove from service and replace any Personnel who, in the sole opinion of TOGA, display improper conduct or are deemed not qualified to perform the duties assigned to them. *Id.*

This provision clearly gave the airlines the unilateral power to remove an employee from their account, and yet, Judge Green still found that the airlines exercised insufficient control over the contractor to exclude it from the Board's jurisdiction. There is no evidence that JetBlue possesses even this level of authority over Respondent. Even if it did, such authority would be insufficient to exclude Respondent from the Board's jurisdiction. *See also Menzies Aviation, Inc.*, 42 NMB at 2 (no RLA jurisdiction where airline had authority to require contractor to remove employee from account).

In sum, all the record evidence convincingly establishes that Respondent possesses nearly exclusive control over personnel decisions, the most important factor in the substantial control test. *See Allied Aviation Serv. Co.*, 2015 WL 4984885 at *1. This fact weighs heavily in favor of finding that JetBlue exercises insufficient control to establish RLA jurisdiction.

Less important factors also demonstrate Respondent's control: business operations, access to records, supervision, training, whether employees are held out to the public as airline employees

In addition to analyzing control over personnel decisions, the substantial control test examines less important factors, such as the extent of the airline's control over the manner in which the company conducts its business, access to the company's operations and records, the degree of supervision exercised by the airline, airline's control over training and whether the employees in question are held out to the public as airline employees. *Bags, Inc.*, 40 NMB at 169. The evidence shows that Respondent, and not JetBlue, has control over each of these factors.

Respondent conducts its business in the manner of a typical subcontractor. Matthew Barry testified that JetBlue compensates Respondent according to a per-flight flat rate, regardless

of Respondent's business expenses. Tr. 245. Indeed, Respondent's contract with JetBlue demonstrates that it is solely responsible for managing its own business, including all costs and expenses. The general terms agreement requires Respondent to, "at its sole cost and expense, furnish all labor, supervision, equipment, facilities, materials and supplies, and other requisites necessary for the proper performance of the Services at each Airport." Jt. Ex. 2 at 9, ¶ 9.1. Additionally, the agreement ensures that Respondent is responsible for purchasing and maintaining "all equipment, material, supplies, and any special equipment required to perform the Services, unless otherwise stated in a SOW," and the statement of work contains no such exceptions. *Id.* at ¶9.5. Although Matthew Barry claimed that JetBlue provides some equipment, despite the general terms agreement's clear contrary language, he also admitted that Respondent supplies its own wheelchairs, tablets, office equipment, and a software system called Centrak, which tracks wheelchair usage. Tr. 251-53. In terms of actually providing the contracted-for services, JetBlue provides broad specifications of work that must be performed, Jt. 2 at 23-30, but Respondent's Training Manual specifies in great detail how employees should get the job done. CP 2. Respondent's supervisors, and not JetBlue, oversee employees on a day-to-day basis. Tr. 288. All of these facts show that Respondent conducts its business in order to meet its obligations to JetBlue, but controls its own operations like a typical subcontractor under the Board's jurisdiction.

In addition to the manner in which Respondent conducts its business, the limited right of JetBlue to access Respondent's records demonstrates the lack of control that JetBlue has over Respondent. JetBlue may monitor how well Respondent performs its duties, and may access relevant records "at all reasonable times," and "during regular business hours [...] with at least ten business day's prior written notice." Jt. 2 at 13, ¶13.1-13.2. JetBlue has requested staffing

reports when Respondent's performance did not meet expectations, and Respondent has provided them. Tr. 239, 246. This level of access is typical of an airline contractor under the Board's jurisdiction. For example, in *Menzies Aviation, Inc.*, the contract allowed the airline to audit the contractor's records "with reasonable notice," and the airline conducted a monthly audit of "operational performance, execution, compliance, quality, training, communication, budget, key performance indicators (KPIs) and administrative record keeping." 42 NMB No. 1 at 3 (control insufficient to establish RLA jurisdiction). Likewise, in *Local 660*, the airline consortium held a contractual right to audit the contractor's records to ensure the contractor was billing appropriately. 2016 WL 2732017 at n.5 (control insufficient to establish RLA jurisdiction). Thus, the limited right of JetBlue to access Respondent's records does not amount to the "substantial control" required to find RLA jurisdiction.

In addition to JetBlue's limited right to access Respondent's records, Respondent's exclusive responsibility to supervise its own employees demonstrates the lack of control that JetBlue has over Respondent. Matthew Barry conceded that "PrimeFlight is solely responsible for managing its employees." Tr. 288. His testimony demonstrates that Respondent meets its responsibility by way of a complete supervisory structure, including managers, supervisors and leads. Tr. 303. Barry's testimony comports with the contractual language. The general terms agreement is clear that Respondent shall "at its sole cost and expense, furnish all . . . supervision." Jt. Ex. 2 at 9, ¶ 9.1. The agreement goes on to state, "the employees of Business Partner engaged in performing Services hereunder will be considered employees of Business Partner for all purposes and will under no circumstances be deemed to be employees of JetBlue," and Respondent "shall be solely responsible for supervision of such employees . . ." *Id.*, ¶ 9.3. Unsurprisingly, employee Allison Halley testified that JetBlue does not direct employees' work,

and there is no contrary testimony. Tr. 95. Rather, Barry admitted that Respondent assigns employees to shifts, Tr. 288, days off, Tr. 295, authorizes employees to swap shifts, Tr. 296, and assigns overtime, Tr. 296-97. All of these facts show that Respondent, and not JetBlue, controls its own supervision of employees like a typical subcontractor under the Board's jurisdiction.

In addition to Respondent's exclusive control over supervision, Respondent's primary control over employee training demonstrates the lack of control that JetBlue has over Respondent. The general terms agreement makes clear that Respondent "shall provide its employees . . . with all necessary initial and recurrent training, including familiarization with JetBlue Policies." Jt. Ex. 2, at 11 ¶ 10.9. Employees Halley, Prince and Duhaney consistently testified that agents of Respondent, and not JetBlue, trained them. Tr. 89; 171; 178; 182.

Matthew Barry testified that Respondent's classroom training consists of three components, two of which are controlled exclusively by Respondent (the "internal company training module" and the "PrimeFlight technology application"). Tr. 262. The other component is "JetBlue policies, procedures, training," for which JetBlue trains Respondent's trainers, but does not directly train Respondent's employees. *Id.* In addition, Respondent conducts its own on-the-job training program. Tr. 303. All of these facts show that Respondent, and not JetBlue, exercises primary control over the training of employees, like a typical subcontractor under the Board's jurisdiction.

In addition to Respondent's primary control over employee training, the fact that Respondent's employees are held out to the public as employees of PrimeFlight, and not JetBlue, demonstrates the lack of control that JetBlue has over Respondent. Employees wear uniforms that show the PrimeFlight logo, not the JetBlue logo. Tr. 92; 175; 302. Employees also use identification badges that show the PrimeFlight name, not JetBlue. Tr. 87. Although JetBlue

reviewed Respondent's proposed uniforms, JetBlue approved Respondent's proposal with no changes. Tr. 283. Most pertinently, the parties agreed on uniforms that "look unique (not JetBlue)." GC 6. There can be no doubt that Respondent's employees are held out as PrimeFlight employees, which indisputably weighs in favor of finding insufficient airline control to exclude Respondent from the Board's jurisdiction.

Thus, in addition to Respondent's nearly exclusive control over personnel decisions, all of the lesser factors show that JetBlue exercises minimal control over Respondent, like a typical subcontractor under the Board's jurisdiction.

Conclusion: Respondent Fails to Meet Its Burden of Proving that JetBlue Exercises Sufficient Control Over Respondent

In sum, just like in *Allied Aviation*, Respondent does not argue that the airline at issue exercises meaningful control over Respondent's personnel decisions. *See* 362 NLRB No. 173. Because the record contains no such evidence, the only elements of control that Respondent can identify are generalized, broad constraints placed upon it by JetBlue, akin to standards of performance, and no greater than that found in "a typical subcontractor relationship." *See id.* Additionally, Respondent possesses control over all of the lesser elements control. For these reasons, Respondent fails to meet its burden of showing that JetBlue exercises sufficient control, such that it is properly excluded from the Act. Therefore, Respondent must fall under the Board's jurisdiction.

(2) A Substantial and Representative Complement of Employees Existed from May 9, 2016 through May 23, 2016, even if Respondent Had Nebulous Plans to Hire Additional Employees.

Respondent will attempt to argue that on May 23, when the Union made its bargaining demand, Respondent did not employ a substantial and representative complement of employees. Respondent will likely argue that its initial shortcomings, in its first few days of operation, to fully provide certain aspects of the terminal services prove that Respondent began planning, on day one, to hire significantly more employees. This is not the case. To the extent that there were any deficiencies in Respondent's services in those first days, Matthew Barry admitted that they were not the result of Respondent being understaffed, but for many reasons: on day one, Respondent did not understand which areas of the airport required security badges, how employee schedules should be optimized based on the flight schedule, or the peak times for wheelchair assistance. Tr. 231-232. Thus, the evidence establishes that any challenges that Respondent faced were the result of a learning curve at the very beginning of providing the services.

Additionally, Respondent's May 12 and May 13 e-mails with JetBlue, wherein Respondent's managers attempt to explain its shortcomings, prove that Respondent had failed to ensure that all of its employees had attained the requisite security credentials. R 1. During the first week of operations, of the 367 employees that Respondent employed, only 247 had security badges. R. 1 (as of May 12, only "261 ids cleared," including 4 on May 11 and 10 on May 12). Thus, although Respondent experienced some difficulty in meeting its obligations at first, this fact does not prove that Respondent had concrete plans to hire substantially more employees in the first two weeks of its operation.

Although Respondent did hire more employees after the Union's May 23 bargaining demand, this fact is not evidence that Respondent had any plans, before the Union's bargaining demand, to expand its operation. On the contrary, Barry admitted that the industry's "high

attrition rate” requires continued hiring in order to have “an appropriate level of folks in the pipeline.” Tr. 233. Thus, the evidence shows that Respondent hired more employees, at least in part, simply to maintain the same number of employees in its workforce. There is no evidence showing that Respondent resumed hiring in order to expand its operation in any way, such as to offer new terminal services, or to operate in new areas of the airport. *Compare Delta Carbonate, Inc.*, 307 NLRB 118, 118 (1992) (representative complement despite employer’s plan to expand operation by diversifying product line and expanding customer base); *Hospital San Francisco*, 293 NLRB at 172 (1989) (representative complement despite employer’s expanded operation, as evidenced by testimony that employer purchased new equipment, remodeled and expanded its space, and added numerous new medical services). Thus, Respondent cannot rely on its post-bargaining demand hiring as evidence that it had previously planned, with “relative certainty,” to expand its operation. *See Fall River Dyeing*, 482 U.S. at 47.

The simple fact is that there is no evidence supporting Respondent’s contention that it made concrete plans during the period before the Union’s May 23 bargaining demand to hire 500 people. To the contrary, Matthew Barry admitted that there is no document in evidence that refers to any hiring goal at all. Tr. 182; *compare Myers Custom Products*, 278 NLRB 636 (1986) (no representative complement but “relative certainty” of expansion not in issue because parties stipulated that employer planned, before commencing operations, to double its workforce).

Even if Respondent had planned to expand its workforce from about 367 to 507, which the evidence does not support, that kind of planned expansion would be insufficient to delay the majority status calculation. The remaining *Fall River Dyeing* factors demonstrate that Respondent employed a substantial and representative complement beginning on May 9, and

continuing through the Union's May 23 bargaining demand. Whereas Respondent had hired over 72% of its supposedly planned full complement on the date of the bargaining demand (367 of 507), in *Hospital San Francisco*, the employer had hired only 62% of its planned full complement (25 of 40). 293 NLRB at 175. The Board found a substantial and representative complement. *Id.*; see also *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459 (9th Cir. 1985) (finding representative complement where employer had hired 45% (29 of 65) of full complement) (cited with approval in *Fall River*, 482 U.S. at 33). Moreover, when the Union made its bargaining demand, Respondent had hired over 95% of its baggage, skycap and line queue employees, and over 56% of its wheelchair employees (174 of 309). GC 8. *Compare Mid-America Door & Hardware, Inc.* 1993 WL 735836 at *5 n.22 (June 30, 1993 GC Advice Memo) (Case No. 17-CA-16512) (finding substantial and representative complement where employer had hired "significantly less than 50% of the employees the employer would ultimately employ in" modular casework classification, which composed 65-75% of operation as a whole).

Most significantly, Respondent does not dispute that it was in full operation beginning on May 9, demonstrating that it employed a substantial and representative complement of employees sufficient to provide all of its contracted-for services. From its first day of operation, Respondent contracted with JetBlue to provide four types of terminal services in Terminal Five, and it did so for two full weeks before the Union demanded recognition on May 23. In a situation like this, with no gap in operation, and no evidence that Respondent planned to expand its operation in any way, Respondent employed a substantial and representative complement on day one of its operation, May 9, through the day of the Union's bargaining demand, May 23, when Respondent's bargaining obligation attached. For all of the above reasons, May 23 is the correct moment in time to determine the composition of Respondent's work force.

V. CONCLUSION

As discussed above, the facts and law demonstrate that Respondent violated Sections 8(a)(1) and (5) of the Act. The General Counsel requests that Your Honor find the appropriate violations.

Dated at Brooklyn, New York, December 19, 2016.

/s/ Brady Francisco-FitzMaurice
Brady Francisco-FitzMaurice
Counsel for the General Counsel
National Labor Relations Board, Region 29
Two MetroTech Center, Fifth Floor
Brooklyn, New York 11201