

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 12**

AIRCRAFT SERVICE INTERNATIONAL, INC.,

Employer

and

Case 12-RC-187676

COMMUNICATIONS WORKERS OF AMERICA,

Petitioner

and

LOCAL 74, UNITED SERVICE WORKERS  
UNION, INTERNATIONAL UNION OF  
JOURNEYMEN AND ALLIED TRADES,

Intervenor

**DECISION AND DIRECTION OF ELECTION**

Aircraft Service International, Inc.<sup>1</sup> (the Employer) provides a variety of services to commercial airlines at more than fifty (50) airports throughout the United States of America, including the Orlando International Airport (Orlando Airport). On November 4, 2016, Communications Workers of America (the Petitioner),<sup>2</sup> filed a petition with the National Labor Relations Board (NLRB or the Board) under Section 9(c) of the National Labor Relations Act (NLRA or the Act) seeking to represent all full time and regular part-time encoder operators employed by the Employer at the Orlando Airport located in Orlando, Florida; excluding all

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<sup>1</sup> The petition identifies the Employer as Aircraft Service International Group (ASIG). At the hearing, the parties agreed to amend the petition and other formal papers to reflect that the correct name of the Employer is Aircraft Service International, Inc. It appears from the record that ASIG is a parent company or other related company to the Employer and/or a trade name owned by the Employer that refers to all aspects of the Employer's operations, which include aircraft fueling, inter-lane fueling, fleet services, and passenger services.

<sup>2</sup> The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

other employees, confidential employees, guards, and supervisors as defined in the Act.<sup>3</sup> Encoder operators are employees who perform baggage handling service and are responsible for scanning and re-introducing bags into the baggage handling system. The unit sought by the Petitioner includes approximately 112 employees. Since 2012, the unit employees have been represented by Local 74, United Service Workers Union, International Union of Journeymen and Allied Trades (the Intervenor), for the purposes of collective bargaining with the Employer.<sup>4</sup>

A hearing was held in this matter on November 16, 2016. The Employer and the Intervenor each contend that there are two reasons not to process the instant petition. First, they take the position that the National Labor Relations Board (NLRB or the Board) does not have jurisdiction over the Employer, and that instead the Employer is subject to the jurisdiction of the National Mediation Board (NMB) pursuant to the Railway Labor Act (RLA), and for that reason the petition should be dismissed. In the alternative, the Employer and the Intervenor urge that this case be referred to the NMB for a jurisdictional advisory opinion. Second, they argue that the petition should be dismissed because there is a contract bar to an election. The Petitioner, on the other hand, takes the position that the NLRB has jurisdiction over the Employer and that there is no contract bar. Accordingly, the Petitioner requests that an election be conducted in the petitioned-for unit.

The first issue to be decided is whether the Employer, which is not directly or indirectly owned by an airline carrier, is an employer within the meaning of Section 2(2) of the National Labor Relations Act (NLRA), subject to the jurisdiction of the Board, and whether its employees in the petitioned-for unit are employees within the meaning of Section 2(3) of the NLRA, or is

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<sup>3</sup> The parties stipulated, and I find, that the petitioned-for unit is appropriate for the purposes of collective bargaining.

<sup>4</sup> The parties stipulated, and I find, that the Intervenor is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

the Employer subject to the RLA, in which case neither the Employer nor its employees meet the statutory definitions of employer and employee, respectively, under the NLRA?

(2) Is there a contract bar that precludes the existence of a question concerning representation of the petitioned-for unit of employees?

I have carefully reviewed and considered the evidence and arguments presented by the parties on the issues before me.<sup>5</sup> For the reasons discussed below, I find that the Employer's operations involved in this case are not subject to the RLA, and that the Employer is subject to the NLRB's jurisdiction under the NLRA in this matter. I also find that there is no contract bar and that the Petition was timely filed. Accordingly, I have directed an election in the petitioned-for unit.

### **I. The Jurisdictional Standard**

Pursuant to the RLA, the NMB has jurisdiction over common carriers by rail and air that are engaged in interstate or foreign commerce. Section 2(2) of the NLRA defines "employer" to exclude from the NLRA's coverage "any person subject to the Railway Labor Act." Section 2(3) of the NLRA provides that the term "employee" shall not include "any individual employed by an employer subject to the Railway Labor Act."

When an employer is not a rail or air carrier engaged in transportation of freight or passengers, the NMB applies a two-part test in determining whether the employer is subject to the RLA. First, the NMB determines whether the nature of the work is the type traditionally performed by employees of rail or air carriers. Second, the NMB determines whether the employer is directly or indirectly owned or controlled by, or under common control with, a carrier or carriers. Both parts of the test must be satisfied for the NMB to assert jurisdiction. *Air Serv. Corp.*, 39 NMB 450 (2012), *reconsideration denied* 39 NMB 477 (2012); *Talgo, Inc.*, 37

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<sup>5</sup> The parties filed briefs, which have been reviewed and carefully considered.

NMB 253 (2010); *Bradley Pacific Aviation, Inc.*, 34 NMB 119 (2007); *Gate Gourmet*, 34 NMB 97 (2007). The NMB applies this test on a case-by-case basis, at particular locations where the jurisdictional issue arises. *Menzies Aviation*, 42 NMB 1, 6 (2014).

In most cases involving employers who provide ground services under contract to air carriers, there is little dispute about whether contracted services are services traditionally performed by employers in the airline industry. The real question that must be resolved in those cases is the degree of direct or indirect ownership or control exercised, not simply contracted for, by the carriers over the employer's operations.

To determine whether there is carrier control over a non-carrier employer, the NMB looks for evidence of whether a sufficient degree of control exists between the carrier and the subject employer for the latter to be itself deemed a carrier. The factors the NMB considers 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.

*Bags, Inc.*, 40 NMB 165, 169 (2013), citing *Bradley Pacific Aviation, Inc.*, supra; *Gate Gourmet*, supra; *Signature Flight Support/Aircraft Serv. Intl., Inc.*, 32 NMB 30 (2004); *Ogden Ground Services*, 30 NMB 405 (2003). The NMB has found that where the extent of carrier control over the manner in which a non-carrier conducts its business is no greater than that found in a typical subcontractor relationship, there is not the exercise of "meaningful control over personnel decisions" necessary to establish RLA jurisdiction. *Airway Cleaners, LLC*, 41 NMB 262, 268-269 (2014); *Menzies Aviation, Inc.*, 42 NMB 1, 7 (2014). Isolated instances of employers

acquiescing to air carrier requests that they take particular actions are not sufficient to establish "jurisdictionally significant control." See *Airway Cleaners, LLC*, 41 NMB at 268.

With respect to determinations of whether to assert jurisdiction over an employer potentially covered by the RLA, "[t]here is no statutory requirement that the NLRB first submit a case to the NMB for opinion prior to determining whether to assert jurisdiction." *Spartan Aviation Industries*, 337 NLRB 708, 708 (2002) (citing *United Parcel Service*, 318 NLRB 778, 780 (1995)). It has been the Board's practice to refer the issue of jurisdiction to the NMB in cases where the issue is doubtful. *Federal Express Corp.*, 317 NLRB 1115 (1995). The NLRB gives "substantial deference" to NMB decisions in making jurisdictional determinations. *DHL Worldwide Express*, 340 NLRB 1034 (2003). However, if it is clear that the NLRB has jurisdiction over an employer's operations, it will proceed with the case. See NLRB Casehandling Manual, Section 11711.1; see also *United Parcel Service*, 318 NLRB 778 (1995).

## **II. Facts Concerning Jurisdiction**

### **A. Overview of the Employer's operations at Orlando International Airport and the Employer's relations with the Greater Orlando Aviation Authority**

The Employer is a Delaware corporation with an office and place of business located at Orlando International Airport, Orlando, Florida (Orlando Airport), and at other airports throughout the United States. The parties stipulated, and I find, that during the past twelve (12) months, a representative period of time, the Employer, in the course and conduct of its business operations, purchased and received at its Orlando, Florida facility, goods and materials valued in excess of \$50,000 directly from entities located outside the State of Florida. The Employer's services include aircraft fueling, ramp services, aircraft cabin cleaning, customer service, aircraft de-icing, fuel facility maintenance, maintenance of ground service equipment, and baggage system maintenance.

At Orlando Airport, the only location involved in this case, the Employer has, since 2012, provided baggage handling services pursuant to a contract between the Employer and the Greater Orlando Aviation Authority (the Aviation Authority or GOAA), a governmental body, created under the laws of the State of Florida.<sup>6</sup> The Aviation Authority is not an air carrier. It is the entity responsible for the management of Orlando Airport, including the operation of the baggage handling system on behalf of all airlines operating at the Orlando Airport.<sup>7</sup>

The contract between the Employer and the Aviation Authority requires that the Employer provide labor, supervision, management, administrative oversight, training, materials and all other items necessary or proper for, or incidental to: 1) performing baggage handling, which includes: baggage queue management, manual baggage movement (loading and unloading of conveyors), baggage alignment, and the clearing of bag jams on the conveyor systems, manual bag recoding/sorting functions, collecting/distributing, the cleaning of the stations, and other customer service functions as deemed necessary; 2) performing staffing support services which include: manual baggage movement including loading bags onto conveyors/EDS machines (baggage screening devices), provide various non-security roles in support of the Transportation Security Administration (TSA) staff and any other related customer service functions as directed by the Aviation Authority in accordance with the contract. The Employer does not provide curbside baggage handling services at Orlando Airport. There is testimony that approximately

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<sup>6</sup> The main testimony regarding the jurisdiction issue was provided by the Employer's manager in charge of all of its operations at Orlando Airport, including baggage handling, and also fueling, maintenance and trucking services that are not involved in this matter.

<sup>7</sup> I take administrative notice of the following information on the Airport Authority's website at <https://www.orlandoairports.net/about-us/>:

Orlando International Airport is managed by the Greater Orlando Aviation Authority, which is governed by a seven-member board; the mayor of the City of Orlando, the Mayor of Orange County, and five other members who are appointed by the Governor of the State of Florida, subject to confirmation of the senate.

The airport is operated by the Executive Director, who is appointed by the Authority, and his staff of nearly 650 full-time employees.

180 commercial airlines operate at Orlando Airport, but the record does not reflect how many of them are passenger airlines or use the baggage handling service provided by the Employer and its employees.

The Employer is paid directly by the Aviation Authority. The contract with the Aviation Authority sets the hours of service the Employer is to provide and specifies anticipated staffing requirements. Pursuant to its contract with the Aviation Authority, at Orlando Airport the Employer operates from 3:00 a.m. to 11:30 p.m., seven days per week, and 365 days per year. The Aviation Authority may also require the Employer to provide additional staffing for its baggage handling or staffing support services, but it is the Employer's responsibility to ensure that a sufficient number of staff is available at all times during the operation or when the Aviation Authority requires additional personnel. There is some evidence that flight schedule changes or delays may result in a change in the hours of work and/or numbers of baggage handling employees the Employer must use at a given time, but there is no evidence as to how often such changes occur, and the record is clear that such changes are determined by the Employer and possibly by GOAA, and it appears that there is no communication between air carriers and the Employer regarding such staffing needs.

The Employer maintains an administrative office space in Orlando Airport that is provided by the Aviation Authority pursuant to the parties' contract. The Employer's baggage handling manager reports to the Employer's general manager for all of its operations at Orlando Airport.<sup>8</sup> The Employer has seven baggage handling supervisors who report to the baggage handling manager and are responsible for supervising the 112 encoder operators, or baggage handling employees. The Employer employs approximately 112 encoder operator employees at the Baggage Handling System (BHS) operation or department at the Airport, who comprise the

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<sup>8</sup> As noted above, the general fueling, maintenance and trucking services are not involved in this matter.

petitioned-for unit. The BHS department is comprised of five areas called “pods” (pods A, B, C, D, and E) and has about 30 miles of conveyor belts. Each pod has x-ray machines where the bags are scanned. Before sorting the passengers’ bags to be sent to the appropriate airline carrier, the bags are scanned throughout the BHS with “photo eyes.” When the bags are piled on top of each other, encoder operators will, through a set of procedures, notify the airport, remove the bags from the BHS, and then scan the bags and reintroduce them into the BHS. The employees are also responsible for scanning bags that, for any reason, were not correctly scanned through the BHS when they were initially introduced.

**B. The Employer’s encoder operators (baggage handling employees) perform work traditionally done by employees of air carriers**

The parties stipulated, and I find that the work performed by the encoder operators is work traditionally performed by employees of air carriers. The Employer has no contract with any airline carrier to perform baggage handling services at Orlando Airport. Airline carriers do not provide any equipment for the encoder operators at Orlando Airport.

**C. The extent of carriers’ control over the Employer’s business at Orlando Airport**

At the hearing the Employer’s counsel stated that the Employer did not intend to present any evidence regarding carrier control of the employees in the petitioned-for unit. The Employer relies solely on NMB decisions finding that the Employer’s operations at certain locations other than Orlando Airport are subject to RLA jurisdiction.

Degree of Supervision Exercised

There is no evidence that airline carriers have access to the Employer’s office at Orlando Airport. The airline carriers do not have access to the Employer’s business records. Airline carrier representatives have access and frequent the BHS area, but those representatives do not supervise the Employer’s employees. The Aviation Authority, however, is authorized to provide

direction and instruction to the Employer's staff and reserves the right to assign or locate the employees differently than the original assignment at its sole discretion, provided that it notifies the Employer in advance. The record does not reflect whether or how often the Aviation Authority has exercised this right.

#### Personnel Decisions

Airline carriers at Orlando Airport have no role in the Employer's personnel decisions, such as screening of applicants for hire, hiring, promoting, firing, disciplining, and discharging employees. Airline carriers do not determine the wages or benefits for encoder operators, do not set staffing levels, and do not give work assignments to the Employer's employees, or direct their work, or transfer them. Rather, the Employer is responsible for all of these functions. The Aviation Authority requires only that the Employer conduct an employee background check on each person proposed for employment.

Airline carriers at the Orlando Airport have representatives throughout the BHS, but those representatives do not supervise the Employer's employees. The Aviation Authority, however, can provide direction and instruction to the Employer's staff and reserves the right to assign or locate the employees differently than the original assignment at its sole discretion, provided that it notifies the Employer in advance.

#### Training

The contract between the Employer and the Aviation Authority requires that the Employer provides employees, prior to being assigned to work in a BHS area, with a complete training program. The Employer is responsible for providing and conducting the training program in coordination with the Aviation Authority's staff. Airline carriers do not control the training provided to the Employer's employees.

### Whether the Employees are Held out to the Public as Carrier Employees

The Employer's encoder operators providing baggage handling services wear the Employer's uniform, and thus are not presented to the public as employees of any of the airline carriers. They do not wear anything that identifies them as employees of carriers. Pursuant to the Employer's contract with the Aviation Authority, the Employer must provide and maintain uniforms for its employees so that they can be easily identified. The Employer's encoder operators are required to wear t-shirts that identify them as employees of the Employer.

### **III. Analysis of the Jurisdiction Issue**

As stated above, the NMB uses a two-part test to determine whether a non-carrier employer falls within its jurisdiction. The first prong, whether the subject work has traditionally been performed by carriers, is not in dispute in this case because the parties stipulated that the Employer satisfied the first prong of the test. The work performed by encoder operators has traditionally been performed by carrier employees.

The second prong of the test seeks to ascertain whether an employer is directly or indirectly controlled by a carrier. The Employer concedes, and the evidence in this case demonstrates, that the carriers at the Orlando Airport do not exercise direct or indirect control of the Employer's baggage handling operation. Rather, the Employer's baggage handling services are provided pursuant to its contract with the Aviation Authority, and there is no contractual relationship between the Employer and the carriers. Therefore, there is no basis for the carriers to exercise control over the Employer's operations.

As noted above, it is undisputed that the air carriers have no access to records or the personnel files of the Employer's employees who work at Orlando Airport and no ability to enter

the Employer's offices at Orlando Airport. In addition, although the carriers' representatives have access to the BHS areas, there is no evidence that they communicate or interact with the Employer or its employees. To the contrary, the record shows that the carriers do not participate in the Employer's personnel decisions concerning its baggage handling employees, or encoder operators, including decisions regarding hiring, firing, promoting, and/or disciplining employees, assigning work to employees or directing their work. In addition, the carriers do not train the Employer's encoder operators, and those employees are identified to the public as employees of only the Employer, and not as employees of any air carrier.

Based on the record as a whole, the second prong of the NMB's two-part test for establishing RLA jurisdiction has not been met in this case. As in *Menzies Aviation*, 42 NMB 1 (2014) and *Airway Cleaners*, 41 NMB 262 (2014), and cases cited therein, there is insufficient evidence of direct or indirect control over the operations and employees of the Employer by a carrier. Rather, there is a total absence of control by air carriers, and there is not even evidence of communications from air carriers to the Employer, with respect to the Employer's baggage handling operations at Orlando Airport.

The Employer and Intervenor rely on past NMB decisions finding that certain aspects of the Employer's operations at locations other than Orlando Airport are subject to the RLA based on the exercise of a sufficient degree of control over the Employer's employees by airline carriers. However, they cite no prior NMB decisions involving the Employer's operations at Orlando Airport, and as noted above, the NMB applies the two-part test for determining jurisdiction with respect to non-carriers by considering the specific location and operations involved on a case-by-case basis. In addition, the NMB cases involving the Employer upon which it and the Intervenor base their position that the Orlando baggage handling operations are

subject to the RLA involved situations in which the Employer had contracts with air carriers, unlike this case.

Thus, in *Aircraft Service International Group, Inc.* 31 NMB 361 (2004), involving fuelers and mechanics employed at Detroit Metropolitan Airport, the NLRB requested the NMB's opinion regarding its jurisdiction over fueling operations at that airport that were performed by the Employer pursuant to its contract with Northwest Airlines. The NMB concluded that Northwest exercised sufficient control over ASIG's employees to support a finding of RLA jurisdiction. See also, *Aircraft Service International Group, Inc.*, 342 NLRB 977 (2004), relying on 31 NMB 361. Similarly, in *Signature Flight Support/Aircraft Service Int'l, Inc.*, 32 NMB 30 (2004), the NMB determined that the Employer's ground handling operations, including baggage handling and ground service equipment maintenance, at LaGuardia Airport, Flushing, New York were subject to the RLA. Applying the two-part test, the NMB concluded that carrier American Trans Air exercised sufficient control over the Employer's employees at LaGuardia Airport to support a finding of jurisdiction based on the RLA.<sup>9</sup>

Other NMB decisions relied on by the Employer concern the appropriate system (scope of the unit) for the purposes of collective bargaining (i.e. nationwide or local). *Aircraft Service Int'l Group*, 40 NMB 43 (2012) (involving fleet service employees at Los Angeles International Airport); *Aircraft Service International Group*, 31 NMB 508 (2004) (involving fleet services employees, and mechanics and related employees, at Tampa Airport). In those cases the NMB dismissed unions' applications to represent employees of ASIG in single location units at Los

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<sup>9</sup> See also *Aircraft Service Int'l Group*, 33 NMB 258 (2006) (involving Ramp Servicemen, Fuelers, GSE Mechanics, and A&P Mechanics at Albuquerque International Airport); *Aircraft Services International Group, Inc.*, 347 NLRB 1417 (2006), based on 33 NMB 258; and *Aircraft Service Int'l Group*, 33 NMB 200 (2006) (involving fueling services at Pittsburgh International Airport).

Angeles and Tampa, respectively. Rather, in both cases the NMB concluded that the proper system for representation under the RLA included all of ASIG's facilities nationwide for fleet services employees, and, in the case involving employees in Tampa, the NMB concluded that the proper system for representation under the RLA included all of ASIG's facilities nationwide for a separate unit of mechanics and related employees.

The Employer asserts that in those cases the NMB found ASIG to be a nationwide carrier, and therefore in the instant case the two-part test for jurisdiction is inapplicable and RLA jurisdiction is established merely because the Employer's operations at issue herein involve "the aviation function."<sup>10</sup> However, this argument does not withstand scrutiny because "the NMB considers jurisdiction on a case-by-case basis at different locations, where companies contract with different carriers who exercise various degrees of control." *Menzies Aviation*, 42 NMB at 6. Also, in *Aircraft Service Int'l Group*, 40 NMB 43 (2012), and *Aircraft Service International Group*, 31 NMB 508 (2004), the cases involving ASIG's Los Angeles and Tampa employees, respectively, no parties contested the NMB's jurisdiction, and that issue was not litigated. Finally, notwithstanding the NMB's 2004 determination that ASIG's employees in Tampa belonged in a nationwide system, in later cases involving other airport operations of ASIG, the NMB made determinations regarding RLA jurisdiction based on the two-part test applicable to non-carriers.<sup>11</sup> For these reasons, I find that the NMB's two-part test for determining whether a non-carrier is directly or indirectly controlled by a carrier, applies here notwithstanding the NMB's past decisions involving ASIG.

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<sup>10</sup> In making the nationwide system finding, the NMB relied on the fact that ASIG had certain centralized management services (human resources, labor relations, legal, finance and accounting, and sales and marketing) and employee benefits. The NMB made this finding even though ASIG had voluntarily recognized unions as representatives of its employees in separate units at a number of individual facilities.

<sup>11</sup> These cases are the above-cited *Signature Flight Support/Aircraft Service Int'l, Inc.*, 32 NMB 30 (2004); *Aircraft Service Int'l Group*, 33 NMB 258 (2006); and *Aircraft Service Int'l Group*, 33 NMB 200 (2006).

Because it is clear under NMB precedent that the second requirement necessary to establish that the Employer is subject to the RLA has not been met, I shall not refer this case to the NMB. *Spartan Aviation Industries*, 337 NLRB 708. I find that the Employer's Orlando Airport baggage handling operations are not subject to the RLA. Therefore, based on the record as a whole, the Employer is an employer engaged in interstate commerce within the meaning of Section 2(2), (6) and (7) of the NLRA with respect to its Orlando Airport baggage operations, and the petitioned-for unit of encoder operators employed by the Employer at Orlando Airport are employees within the meaning of Section 2(3) of the Act.

#### **IV. Facts Concerning the Contract Bar Issue**

In 2012, the Employer replaced a company known as "DVI" as the baggage handling service provider to the Greater Orlando Aviation Authority, and the Employer voluntarily recognized Local 74 as the collective-bargaining representative of its encoder operators employed at Orlando Airport. Shortly thereafter, the parties bargained and executed their first collective-bargaining agreement. That document indicates that it was signed by the Employer's Director of HR – Labor Relations and the Intervenor's President on February 13, 2013. The cover page reads:

LABOR AGREEMENT  
Between  
AIRCRAFT SERVICE INTERNATIONAL, INC.  
-and-  
UNITED SERVICE WORKERS UNION  
LOCAL NO. 74  
-at-  
ORLANDO INTERNATIONAL AIRPORT  
ORANGE COUNTY, FLORIDA  
Effective: November 28, 2012  
Expires: November 27, 2015  
Encoder Group page 1

Various dates appear in the body of the agreement. The preamble states that it was entered into on November 28, 2012. However, Article XXIII – Duration of Agreement, which appears immediately above the parties’ signatures, states: “Agreement shall be effective as of the 28th day of December, 2012 and shall remain in full force and effect for three (3) years from that date.” Thus, based on the duration clause of the 2012 to 2015 agreement, it is effective from December 28, 2012 to December 27, 2015, rather than November 28, 2012 to November 27, 2015.<sup>12</sup>

In or around September 2015, representatives of the Employer and the Intervenor met to negotiate a successor collective-bargaining agreement. According to both the Employer’s Director of Human Resources and Employee Relations<sup>13</sup> and the Intervenor’s Business Representative they met at that time because the Greater Orlando Aviation Authority had mandated that the encoder operators employed by the Employer must receive a wage increase that had to be implemented by October 2, 2015. The Employer’s Director of HR, general manager,<sup>14</sup> and attorney met with representatives of the Intervenor, including its President, its Business Representative and approximately four employees members of the Intervenor’s bargaining committee, at least some of whom were also shop stewards. It appears that the parties met on one or two occasions, for about an hour to 90 minutes.

As a result of this meeting or meetings, the Employer’s Director of HR and the Intervenor’s President executed a memorandum of agreement on September 29, 2015. The

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<sup>12</sup> The 2012 to 2015 agreement contains various other dates. It states that personal paid hours (Article X), health dental, life and vision insurance (Article XVI), and a wage increase (Appendix A), were not to take effect until July 1, 2013, and provided for Employer and employee insurance premium increases (Article XVI) effective January 1, 2014, and January 1, 2015. Appendix A repeats the effective and expiration dates as written on the cover page, but those dates are not tied to any wage increase or otherwise explained.

<sup>13</sup> The Employer’s Director of Human Resources and Employee Relations is the same person as the Director of HR-Labor Relations who signed the various agreements with the Intervenor that are discussed herein. It appears that these job titles refer to the same position. She shall hereafter be referred to as the Employer’s Director of HR.

<sup>14</sup> The general manager who attended negotiations with the Union is the same individual who testified regarding the jurisdiction issue. He was not questioned and did not testify about the contract bar issue.

memorandum of agreement stated that the modifications to the 2012 to 2015 collective-bargaining agreement would be effective "October 2, 2015-November 27, 2016;" that the modifications were "[s]ubject to the ratification of the membership;" and that the Intervenor's negotiating committee had "unanimously agreed to recommend the above changes to the membership at the ratification meeting." The memorandum of agreement made a further reference to the ratification requirement in Appendix A, pertaining to "rovers," as follows:

Rover Premium: All employees currently designated as "rovers" will continue to receive a differential of fifty cent (\$.50) per hour; however, those employees will no longer be utilized as "rovers" upon ratification of this agreement. Current designated "rovers" will be assigned an encoding position. As current "rovers" leave the position, the Company will not replace "rover" positions.

The Intervenor's Business Representative and a shop steward who had been a member of the Union's negotiating committee, and who was called as a witness by the Petitioner, were the only witnesses who testified regarding the ratification process conducted by the Intervenor. The Business Representative testified that he went to the BHS areas of Orlando Airport on October 19, 2015, with a bucket, "a sheet with a yes or no ballot on it" (presumably indicating agreement or opposition to the terms of the tentative new collective-bargaining agreement), and "a handful" of copies of the memorandum of agreement. No ratification meeting announcement, copies of marked or unmarked ballot sheets, ratification vote tally, notice of ratification from the Intervenor to the Employer, or other documents regarding ratification were offered in evidence.

There is no evidence that the Intervenor gave employees or its members advance notice about the date of ratification. The shop steward testified that he did not know when the ratification process would occur until he found out that the Business Representative was in the Orlando Airport BHS area and had started obtaining employees' votes individually. The

Business Representative traveled from pod to pod within the BHS area, talking to employees about ratification, and it does not appear that there was a mass meeting for the purpose of holding a ratification vote.

There is no evidence as to how long the Intervenor's Business Representative took to conduct the ratification process. The Intervenor's Business Representative testified that all unit employees who were working when he visited the BHS area on October 19, 2015, were present, but it is unclear as to how he knew that in view of the fact that he was traveling through the pods of the Orlando Airport baggage handling system, and there is no evidence that he gathered all of the potential voters at the same time. He further testified that all employees present had the opportunity to review the memorandum of agreement, "some" employees actually "looked at" the memorandum of agreement, and that there were some employees who did not vote. The shop steward who testified received a copy of the memorandum of agreement, although it is not clear whether this occurred on the date of the ratification process or at an earlier meeting. When asked how many employees he spoke to during the ratification process, the Business Representative testified vaguely that he spoke to "quite a few and provided a verbal synopsis of the memorandum of agreement." There is no evidence that his verbal synopsis included the effective dates of the parties' agreement.<sup>15</sup>

There is no evidence that ratification votes were counted, or about the outcome of the ratification vote. The shop steward testified that he did not see any ratification count.

On November 5, 2015, the Employer and Intervenor executed a new collective-bargaining agreement, replacing the memorandum of agreement and the 2012 to 2015

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<sup>15</sup> It is undisputed that some unit employees have difficulty reading and/or understanding English. The shop steward testified that most of the unit employees are "Spanish people." There is no evidence that a Spanish translation of the memorandum of agreement was prepared, and the shop steward testified that there was none. The Business Representative spoke to employees in Spanish during the ratification process.

agreement. The parties held no meetings between September 29, 2015, the date of execution of the memorandum of agreement, and November 5, 2015. In addition, there is no evidence that the Intervenor informed the Employer that the memorandum of agreement or the new contract had been ratified. The agreement signed on November 5, 2015, contains a single reference to ratification, in Appendix A, which is the same as the above-quoted language in Appendix A of the memorandum of agreement relating to “rovers.”

The cover page of the new agreement is identical to the cover page of the 2012 to 2015 agreement, except for the dates at the bottom, which state:

Effective: October 2, 2015  
Expires: November 27, 2016

The preamble of the new agreement states that it was entered into on September 29, 2015. The only sentence concerning the effective dates of the new agreement is contained in Article XXIII – Duration of Agreement – which appears just above the signatures of the Employer’s Director of HR and the Intervenor’s President reads:

This Agreement shall be effective as of the 2nd day of October, 2015 and shall remain in full force and effect for one (1) year from that date.<sup>16</sup>

Therefore, based on the duration clause, it appears Appendix A of the new agreement contains a correction of the effective date of the wage increase for employees whose base wage is less than \$10.44/hr. from October 2, 2016, as stated in the memorandum of agreement, to October 2, 2015.<sup>17</sup> The Employer’s Director of HR testified that the parties did not intend that the new contract would expire on October 2, 2016. She acknowledged that she read the agreement before

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<sup>16</sup> The parties’ agreements covering the unit of Orlando Airport encoder operators do not contain any automatic renewal provision.

<sup>17</sup> Appendix A of the new agreement repeats the effective and expiration dates as written on the cover page of the new agreement, but, as was the case with the 2012 to 2015 agreement, those dates are not tied to any wage increase or otherwise explained.

signing it on November 5, 2016, but did not catch the mistake, and that regarding the duration clause, she testified:

I believe that's an error. When this particular agreement was updated, I think that that was a clerical error. I think it's clear from both the cover page, as well as the memorandum of agreement which memorialized what we talked about at the table, that the contract was to expire on November 27, 2016.

The Intervenor's Business Representative testified that the duration clause was a "typo," but only in response to a leading question on direct examination. The record does not reflect who prepared the collective-bargaining agreement that was signed on November 5, 2015.

The Employer and the Intervenor witnesses testified that the duration clause of the new agreement does not reflect their intent that the agreement signed on November 5, 2015, was to expire on November 27, 2016, and that they were unaware of the "error" in the duration clause before the petition was filed in the instant case. There is no evidence that either the Employer or the Intervenor attempted to correct the error, or to explain the discrepancy between the cover page dates and the duration clause dates to the bargaining unit employees.

#### **V. Analysis of the Contract Bar Issue**

I find that the Employer and the Intervenor have failed to meet their burden of establishing a contract bar for two reasons. First, there is insufficient evidence to show that the purported contract terms, which were subject to ratification by the Intervenor's membership, were ratified. Second, even if ratification was not required, or the ratification requirement had been met, the petition filed on November 4, 2016, was timely filed after October 28, 2016, the date on which the contract asserted as a bar expired, based on the duration clause. To the extent that the memorandum of agreement and/or the cover page and Appendix A of the agreement signed on November 5, 2015, conflict with the duration clause in the November 5, 2015,

agreement, I find that the conflicting dates permit the Petitioner to rely on the dates in the duration clause in the November 5, 2015, agreement. Thus, the Petitioner is an outside party that could not know the unwritten “intent” of the Employer and Intervenor based on the documents themselves.

The Board has long held that parties asserting that a contract operates as a bar bear the burden of proof. See *Road & Rail Services, Inc.*, 344 NLRB 388, 389 (2005); *Roosevelt Memorial Park, Inc.*, 187 NLRB 517m 517-518 (1970); *Bo-Low Lamp Corp.*, 111 NLRB 505 (1955). In order to act as a bar, a collective-bargaining agreement must contain substantial terms and conditions of employment to which parties can look for guidance in resolving day-to-day problems. *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958).

When, as a condition precedent, a written agreement between an employer and union is made subject to ratification by a union’s membership, then the agreement is not a contract bar unless it is ratified before a representation petition is filed. *Appalachian Shale Products Co.*, 121 NLRB 1160, 1162-1163 (1958); *American Broadcasting Co.*, 114 NLRB 7, 7-8 (1956); *Westinghouse Electric Corporation, Small Motor Division*, 111 NLRB 497, 498-500 (1955); cf. *Aramark Sports & Entertainment Services*, 327 NLRB 47 (1998). Parol evidence on this issue is not relevant. *Gate City Optical Co.*, 175 NLRB 1059, 1061 (1969). In such circumstances, a report to the employer that the contract has been ratified is normally sufficient to bar a petition. *Swift & Co.*, 213 NLRB 49 (1974).

The memorandum of agreement signed by the parties on September 19, 2015, and the collective-bargaining agreement signed by the parties on November 5, 2015, both preceded the filing of the petition herein. However, agreement concerning the terms of the memorandum of agreement that were then included in the agreement signed on November 5, 2015, were expressly

conditioned upon ratification by the Intervenor's membership, and there were no negotiations between the parties after the execution of the memorandum of agreement. Thus, the November 5, 2015, agreement was intended to merely incorporate the new terms in the memorandum of agreement into a full contract based on the 2012 to 2015 agreement. There is insufficient evidence to show that the membership of the Intervenor or the employees of the Employer in the contractual bargaining unit, i.e. the encoder operators, ratified the contract executed on November 5, 2015, and accordingly, that contract cannot operate to bar the processing of the instant petition.

As stated above, I further find that even if the ratification requirement was satisfied or no ratification was required, the petition herein was timely filed. The Board had held that contracts containing conflicting effective dates do not create a contract bar because this situation precludes a clear determination by a potential petitioner of the proper time for filing a new petition. *Cabrillo Lanes*, 202 NLRB 921 (1973). Similarly, when the contract distributed to employees shows different dates than the actual contract dates, a petition filed within the dates known to the petitioner is considered timely. *Bob's Big Boy Family Restaurant*, 235 NLRB 1227 (1978).

It is undisputed that there are conflicting effective dates as between the memorandum of agreement and the full agreement signed on November 5, 2015, and internally, within the agreement signed on November 5, 2015. To add to the confusion, there are conflicting wage increase effective dates between the memorandum of agreement signed on September 29, 2015, and the agreement signed on November 5, 2015. In these circumstances, it was reasonable for the Petitioner, an outside party, to rely on the duration clause of the November 5, 2015, agreement, the most recent agreement and complete agreement between the Employer and

Intervenor. That clause states that the agreement became effective on October 2, 2015, the same date as the corrected date of the contractual wage increase, and remained in effect for one year from that date, thus expiring on October 1, 2016. Based on the duration clause, the contract had expired by the time the Petitioner filed the instant petition on November 4, 2016, and there was no new contract in effect at that time. Moreover, the duration clause is the only contract provision that that explains the effective dates of the contract in a full, clearly worded sentence.

Based on the evidence on the record, I find that the conflicting expiration dates in the MOA, the successor CBA and the cover page of the CBA precluded the Petitioner from making a clear determination of the proper time for filing the instant petition. See *Cabrillo Lanes*, supra. I also find that by executing the successor CBA on November 5, 2015, the parties modified the duration of their agreement to expire on October 2, 2016. Thus, the Petition was filed timely, as it was filed on November 4, 2016, after the contract had expired. Consequently, I find there is no contract bar that precludes the processing of the instant Petition.

## **VI. Conclusion and Findings**

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization which claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time encoder operators employed by the Employer at Orlando International Airport, Orlando, Florida; excluding all other employees, confidential employees, guards and supervisors as defined in the Act.

## **VII. Direction of Election**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for the purposes of collective bargaining by Communications Workers of America; by Local 74, United Service Workers Union, International Union of Journeymen and Allied Trades; or by neither labor organization.

### **A. Election Details**

An order setting forth the election details will issue shortly.

### **B. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are

eligible to vote. Those in military service of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or have been discharged for cause since the designated payroll period; (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and (3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

**C. Employer to Submit List of Eligible Voters**

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional office an election eligibility list containing the full names and addresses of all eligible voters. *North Macon Health Care Facilities*, 315 NLRB 359 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the National Labor Relations Board, Region 12, 201 E. Kennedy Boulevard, Suite 530 Tampa, Florida 33602, on or before December 29, 2016. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever

proper objections are filed. Since the list will be made available to all parties to the election, please furnish two copies of the list.<sup>18</sup>

#### **D. Notice of Posting Obligations**

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

#### **VIII. Right to Request Review**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request

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<sup>18</sup> The list may be submitted electronically through the Agency's website at [www.nlr.gov](http://www.nlr.gov), or by facsimile transmission to (813) 228-2874, as well as by hard copy. To file the list electronically, go to the Agency's website at [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. Only one copy of the list should be submitted if it is filed electronically or by facsimile.

for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: December 27, 2016.



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Margaret J. Diaz, Regional Director  
National Labor Relations Board, Region 12  
201 E. Kennedy Boulevard, Suite 530  
Tampa, Florida 33602