UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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.

EMPLOYER'S REQUEST FOR REVIEW OF DECISION AND DIRECTION OF ELECTION ISSUED BY REGIONAL DIRECTOR OF REGION 12 AND BRIEF IN SUPPORT OF REQUEST FOR REVIEW

Dated: January 24, 2017

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On December 27, 2016, the Regional Director of Region 12 issued the Decision and Direction of Election in the above-captioned matter. Pursuant to Section 102.67(b) of the National Labor Relations Board's ("Board" or "NLRB") Rules and Regulations, as amended, the Employer, Aircraft Service International, Inc. ("ASIG" or the "Employer"),[1] by and through counsel, hereby submits its Request for Review of the Decision and Direction of Election.[2]

[1] At hearing, the Employer was referred to as "ASIG," which is a trademark that is owned and utilized by the Employer in the operation of its business. We shall do so herein as well.

[2] References to the hearing record shall be as follows: ASIG's exhibits shall be cited as "ER Exh. __"; Board Exhibits shall be cited as "Bd. Exh. __" references to the transcript shall be

I. STATEMENT OF POSITION

This matter arose out of a petition for representation filed by Petitioner Communications Workers of America ("CWA") on behalf of all regular full-time and part-time encoder operators employed by ASIG at the Orlando International Airport ("MCO"), excluding all other employees, guards, confidential employees, and supervisors as defined in the National Labor Relations Act ("NLRA"). Tr. 21:13-22:3.2. The petitioned-for employees are currently represented by Intervenor Local 74, United Service Workers Union, International Union of Journeymen and Allied Trades ("Local 74"), pursuant to voluntary recognition under the Railway Labor Act ("RLA"). Tr. 11:18-12:12; ER Exh. 1 at 2. On November 16, 2016, Hearing Officer Paul D'Aurora conducted a hearing to take evidence regarding CWA's petition.

ASIG raised three arguments in its Statement of Position, at the hearing, and in its post-hearing brief regarding both the propriety of CWA's petition and the Board's jurisdiction to decide this matter:

First, ASIG presented evidence that the petitioned-for employees were subject to a valid and unexpired collective bargaining agreement and CWA's petition was thus barred by the well-established contract-bar doctrine.

Second, ASIG argued that the Regional Director should dismiss the petition for lack of jurisdiction because the National Mediation Board ("NMB") has already determined that ASIG and the petitioned-for employees are subject to the RLA and not the NLRA.

Third, because a ruling on the jurisdictional issue would directly implicate previous NMB decisions relating to ASIG's status as a carrier under the RLA and the scope of its system for representation under that statute, ASIG requested that consistent with longstanding policy and

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cited as "Tr. [page number]:[line number]," and citation to the Decision and Direction of Election shall be cited as "D.D.E. __."

practice, if the Regional Director elected not to dismiss the petition for lack of jurisdiction, the Regional Director should refer the matter to the Board in Washington, D.C., so that the Board may seek an advisory opinion from the NMB.

In her Decision and Direction of Election, the Regional Director refused to apply the contract-bar doctrine to the parties' agreement and found that in spite of the NMB's prior rulings, ASIG was not subject to the RLA. And even though the Regional Director acknowledged that it has been the Board's longstanding practice to refer issues of RLA jurisdiction to the NMB, she declined to do so in this case. In reaching these conclusions, the Regional Director drew incorrect conclusions of law regarding the applicability of the contract-bar doctrine, misinterpreted the NMB's prior decisions finding that ASIG is covered by the RLA, and inappropriately refused to permit the NMB to render an advisory opinion regarding the affect of its prior decisions. As a result, ASIG respectfully requests review of the Regional Director's Decision and Direction of Election.

II. STATEMENT OF RELEVANT FACTS

ASIG, headquartered in Orlando, Florida, provides a variety of services to commercial airlines at more than 50 airports throughout the country. The services it provides include aircraft fueling, ramp services, aircraft cabin cleaning, customer service, de-icing, fuel facility maintenance, maintenance of ground service equipment, and baggage system maintenance. *See* Bd. Exh. 2 at 1-2.

A. ASIG's Operations at MCO

Since 2012, ASIG has provided baggage handling services on behalf of the airlines at MCO under a contract with the Greater Orlando Aviation Authority ("GOAA"), which is responsible for the operation of the baggage handling system ("BHS") at MCO. Tr. 47:5-48:3.

ASIG employs approximately 112 employees, known as encoder operators, in this capacity. It is this group of employees that is the subject of the election petition in this matter. ASIG also performs aircraft fueling for most of the commercial airlines operating at MCO; those employees are not covered by the instant petition. Bd. Exh. 2 at 2; ER Exh. 4; Tr. 131:25-134:19.

ASIG's encoder operators manage the operation of roughly thirty miles of baggage conveyor belts that run throughout MCO. Tr. 132:11-19. The operation of the BHS includes ensuring that luggage properly proceeds through the airport's scanning and x-ray procedures and resolving baggage pileups and congestion. Tr. 133:8-18.

B. History of Representation of ASIG's Encoder Operators at MCO

In late 2012, when ASIG assumed the BHS work at MCO, it was notified that the employees had already selected Local 74 to represent them. Tr. 48:5-8. At the time, however, there was no collective bargaining agreement in effect. Tr. 48:9-13. ASIG voluntarily recognized Local 74 and negotiated a collective bargaining agreement with a duration of three years, running from November 28, 2012, to November 27, 2015. ER Exh. 5; Tr. 48:14-49:14. This period coincided with the contractual term of ASIG's first contract with GOAA. Tr. 66:2-4. The collective bargaining agreement stated that it was entered into "in accordance with the provisions of the Railway Labor Act." ER Exh. 1 at 2. The ASIG fuelers at MCO also are represented by Local 74, under a separate agreement. Bd. Exh. 2 at 2.

C. The October 2, 2015, to November 27, 2016, Collective Bargaining Agreement

In 2015, GOAA mandated wage increases for certain positions at the airport by the start of October 2015. *See* Tr. 50:24-51:9. At the same time, ASIG's contract with GOAA had been extended for an additional year. Tr. 66:5-9. In response to these events, ASIG and Local 74 began negotiating a successor agreement and in September 2015, they drafted and signed a

Memorandum of Agreement which memorialized the negotiated terms of their new agreement and provided that the portions of the prior agreement not addressed would remain unchanged. ER Exh. 2; Tr. 50:2-22. The Memorandum of Agreement also provides that the parties' new agreement "shall be effective October 2, 2015 – November 27, 2016." ER Exh. 2; Tr. 50:15-16.

These dates were intentional. The parties' new agreement was set to begin on October 2, 2015 – the same day that GOAA's mandated pay increases were set to take effect. The expiration date of this new agreement was set to be November 27, 2016 – one year from the expiration date of the prior collective bargaining agreement and the date on which the most recent extension of ASIG's contract with GOAA was set to expire. The Memorandum of Agreement clearly states that these would be the controlling dates in the first paragraph of the document and on page 3, right above where the information relating to what the new wage rate would be. Tr. 52:19-53:9; Tr. 65:13-66:1; ER Exh. 2.

Local 74 conducted a vote to ratify this new agreement around October 19, 2015. Tr. 82:2-83:18. Jonathan Rosario, a Business Representative for Local 74, testified at the hearing that he took copies of the Memorandum of Agreement along with "yes/no" ballots to ASIG's BHS employees. As Mr. Rosario explained, the agreement was translated for those employees who could not read English, the employees were provided with the Memorandum of Agreement, and were permitted to ask questions regarding its provisions prior to casting their ratification vote. Tr. 82:2-83:18.

After the employees ratified the agreement, Shemeeka Simmons, ASIG's Director of Human Resources and Employee Relations, began drafting a formal version of the parties' agreement. The Memorandum of Agreement formed the basis for this document. Tr. 51:16-19. This document correctly reflected the October 2, 2015, to November 27, 2016, duration agreed to

by the parties and stated in the Memorandum of Agreement on both its cover page and in Appendix A, which established new wage rates. ER Exh. 1 at 1, 17. Due to a clerical error, however, these dates were not reflected on the agreement's signature page. ER Ex. 1 at 16; Tr. 53:23-12; 85:2. As Ms. Simmons testified, in writing the agreement, she used a prior agreement and updated the relevant portions based on the terms of the Memorandum of Agreement. *See* Tr. 63:20-64:10. However, while she correctly noted that the new beginning date of the agreement was "October 2, 2015," she overlooked the remaining language that stated that the agreement would remain in "full force and effect" for one year from "that date." ER Exh. 1 at 16; Tr. 53:23-54:12; Tr. 63:6-64:10; Tr. 64:25-65:6.

Both parties signed the agreement without noticing this error. ER Exh. 1 at 16. And as both parties testified at the hearing, they have always understood the expiration of the agreement to be November 27, 2016, and have acted accordingly. Tr. 54:13-21. Until CWA filed this petition, neither ASIG nor Local 74 had noticed the duration language on the signature page and did not believe that the agreement ended on any date other than November 27, 2016. Tr. 61:12-23; Tr. 66:10-20; Tr. 84:23-85:6; Tr. 123:1-19. In fact, Mr. Rosaria explained that not only has the union has always understood November 27, 2016, to be the agreement's expiration date, but that the union had begun the process of establishing dates to negotiate a new agreement "because we were coming upon the expiration." Tr. 86:3-6.

D. The Instant Petition and Decision

On November 4, 2016, CWA filed a petition to represent ASIG's encoder operators at MCO. Bd. Exh. 1. Though CWA was well aware that Local 74 currently represents those employees, it did not list Local 74 in the portion of the petition that requests information on the employees' recognized or certified representative. *Id.* Nor did CWA provide the information

requested in the petition regarding the expiration date of the most recent contract. *Id.* ASIG and Local 74 challenged CWA's petition on the basis that there was a valid collective bargaining agreement that bars CWA's petition. ASIG also contended that the NLRB lacks jurisdiction because ASIG is a carrier covered by the RLA, as the NMB has previously held. In the alternative, ASIG requested that this matter be referred to the Board in Washington, D.C. so that the Board may seek an advisory opinion from the NMB on the affect of its prior decisions regarding ASIG's status as an RLA carrier.

Following a hearing, the Regional Director for Region 12 issued a Decision and Direction of Election rejecting these contentions and refusing to allow the matter to be referred to the NMB for an advisory opinion. D.D.E. 3, 5. On December 30, 2016, the Regional Director notified the parties that the election would take place on January 12, 2017. That election took place, and CWA obtained a majority of the votes cast.

III. STANDARD OF REVIEW

As relevant here, the Board should grant review where "a substantial question of law or policy is raised because" there is an "absence of" reported Board precedent or there has been a "departure from, officially reported Board precedent." *See Constellation Brands, U.S. Operations, Inc. v. Nat'l Labor Relations Bd.*, 842 F.3d 784, 788 (2d Cir. 2016) (internal quotation marks omitted) (quoting 29 C.F.R. § 102.67(d) (2015)).

IV. REASONS FOR GRANTING REQUEST FOR REVIEW

A. The Regional Director's Decision Departs From Officially Reported Board Precedent Concerning the Contract-Bar Doctrine

ASIG and Local 74 entered into a valid collective bargaining agreement with a duration of less than three years that did not expire until November 27, 2016. The relevant parties – including CWA's own witness – consistently testified that it was the parties' intent and

understanding that this agreement would remain in force until this date. CWA, however, filed its petition on November 4, 2016, which was well after the close of the 30-day "window" for filing petitions during the pendency of a contract. *See* Bd. Exh. 2 at 2-3. Nevertheless, the Regional Director's Decision and Direction of Election disregarded these facts and held that the contract-bar doctrine did not apply. In doing so, the Regional Director misinterpreted and misapplied prior Board holdings such that the decision represents a substantial departure from established Board precedent. Accordingly, Board review is warranted to correct this error and ameliorate any confusion that would result for permitting the Regional Director's decision to stand.

1. The Board's Contract-Bar Doctrine

Under the Board's longstanding contract-bar doctrine, "a valid existing collective bargaining agreement generally operates as a bar to the filing of a representation petition by a rival union." *NLRB v. Katz's Delicatessen of Hous. St., Inc.*, 80 F.3d 755, 760 n.3 (2d Cir. 1996) (citing *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 290 n.12 (1972); *NLRB v. Rock Bottom Stores, Inc.*, 51 F.3d 366, 370 (2d Cir. 1995); and *Corporation de Servicios Legales de Puerto Rico*, 289 NLRB 612 (1988)). "The rule was formulated by the Board in an effort to reconcile the NLRA's goals of promoting industrial stability and employee freedom of choice." *Bob's Big Boy Family Rests. v. NLRB*, 625 F.2d 850, 851 (9th Cir. 1980).

As part of achieving that balance, the Board permits a challenging union to file an election petition only within a 30-day window beginning 90 days prior to the expiration of the contract and ending 60 days prior to its expiration; the 60-day period prior to the contract's expiration thus "is an 'insulated period' during which no petitions may be filed." *Katz's Delicatessen*, 80 F.3d at 760 n.3 (quoting *Leonard Wholesale Meats Co.*, 136 NLRB 1000, 1001 (1962)); *Bob's Big Boy*, 625 F.2d at 851. The requirement that petitions be filed within that 30-

day window "is strictly construed, and petitions filed on the 59th day are generally dismissed." *Bob's Big Boy*, 625 F.2d at 851 (citing *Brown Co.*, 178 NLRB 57 (1969)).

2. The Hearing Evidence Establishes that the Contract Between ASIG and Local 74 Did Not Expire Until November 27, 2016

In a unique twist of events, each of the three parties presented a witness who was involved in negotiating the contract and the Memorandum of Agreement that was the basis of the contract: Shemeeka Simmons (Director of Human Resources and Employee Relations) for ASIG; Jonathan Rosario (Business Representative) for Local 74; and Gregorio Rivera, a Local 74 shop steward (and member of the team that negotiated the contract) who now supports CWA's efforts. Their testimony establishes the following facts regarding when the contract expires, and thus the applicability of the contract-bar doctrine.

In late 2012, ASIG took over the BHS work at MCO from another company. When ASIG assumed this work, it understood that the employees had already selected Local 74 to represent them, but that there was no collective bargaining agreement in effect at the time. ASIG recognized Local 74 and negotiated a three-year contract, from November 28, 2012, through November 27, 2015. Tr. 47:5-13, Tr. 48:5-49:14; ER Exh. 5. The three-year duration corresponded with the duration of ASIG's initial arrangement with GOAA. Tr. 66:2-4.

During this initial three-year period, GOAA authorized a pay raise for the encoder operators that would go into effect in October 2015. ASIG's contract with GOAA had also been extended for an additional year at that time. Thus, ASIG and Local 74 took that opportunity to negotiate a new CBA. Tr. 50:17-51:12; Tr. 66:5-9. In September 2015, they negotiated the terms of a new collective bargaining agreement, which they memorialized in a three-page Memorandum of Agreement executed by the parties. This document outlined the changes that

would be made from the prior agreement; the portions of their prior contract not addressed in the Memorandum of Agreement would continue unchanged. Tr. 50:2-52:17; ER Exh. 2.

Because the parties had opened the contract early, they made the new contract effective on October 2, 2015, the date on which GOAA had mandated that pay increases go into effect. The expiration date of the contract was November 27, 2016, one year from when the prior collective bargaining agreement was scheduled to expire and the date on which the extension of ASIG's contract with GOAA was set to end. The Memorandum of Agreement clearly stated in two places the new contract's beginning (October 2, 2015) and ending (November 27, 2016) dates: in the first paragraph of the document and on page 3, right above where the information relating to what the new wage rate would be. Tr. 52:19-53:9; Tr. 65:13-66:1; ER Exh. 2.

Local 74 conducted a ratification vote of the new contract among the employees on or about October 19, 2015. To conduct that vote, Mr. Rosario took copies of the Memorandum of Agreement with him to the BHS, along with copies of a "yes/no" ballot. The employees were permitted to review the Memorandum of Agreement and ask questions about it prior to voting; Mr. Rosario also translated the document into Spanish for those who could not read English. Tr. 82:2-83:18.

After ratification, Ms. Simmons undertook the task of taking the changes in the contract memorialized in the Memorandum of Agreement and creating the formal contract for the parties' execution. Ms. Simmons correctly reflected the contract's beginning (October 2, 2015) and ending (November 27, 2016) dates on the cover and in Appendix A, where the new wage rate was set forth. ER Exh. 1 at 1, 17. However, in the "Duration of Agreement" clause, although she correctly noted that the effective date was October 2, 2015, she overlooked that the rest of the clause stated that the contract would remain in "full force and effect" for one year from "that

date." *Id.* at 16; Tr. 53:23-54:12; Tr. 63:6-64:10; Tr. 64:25-65:6. Indeed, both parties overlooked that inconsistency, and signed the contract with that language, which was at odds with what they had negotiated, what they had memorialized in the Memorandum of Agreement ratified by the employees, and what they stated elsewhere in the new contract. ER Exh. 1, 16. This error never became an issue, however, and the parties have always understood that the contract did not expire until November 27, 2016, and have acted accordingly. Tr. 54:13-21. In fact, until CWA instituted this proceeding, neither ASIG nor Local 74 had ever noticed the inconsistency between the language in the Duration of Agreement clause and the contract's negotiated expiration date, and no employee had ever brought it to ASIG's attention. Tr. 61:12-23; Tr. 66:10-20; Tr. 84:23-85:6; Tr. 123:1-19.

This testimony – key portions of which were confirmed by CWA's own witness – establish that ASIG and Local 74 reached mutual agreement that the contract would expire on November 27, 2016; that November 27, 2016, was the sole expiration date included in the Memorandum of Agreement that was distributed to employees as part of the ratification process;[3] that the employees ratified the new contract based on the Memorandum of Agreement, which included that expiration date; and that ASIG and Local 74 have consistently acted since then with the understanding that the contract did not expire until November 27, 2016. Tr. 52:19-

[3] There was some confusion during Mr. Rivera's direct examination about whether it was the entire, formal contract itself (ER Exh. 1) that Mr. Rosario shared with the employees during the ratification process, rather than just the Memorandum of Agreement (ER Exh. 2). Tr. 114:7-25. On cross-examination, however, Mr. Rivera clarified that the document Mr. Rosario shared with the employees during the ratification vote was the Memorandum of Agreement, and that its stated expiration date of November 27, 2016, accurately reflected the parties' agreement. Tr. 119:2-121:11; Tr. 122:18-25. Moreover, based on Ms. Simmons' testimony that she did not create the formal document until after the Memorandum of Agreement had been ratified – as demonstrated by the fact the document is not signed until November 2015 – it would have been impossible for the full, formal contract to have been the document shared by Mr. Rosario among the employees in mid-October. ER Exh. 1.

53:22; Tr. 54:13-21; Tr. 81:17-83:25; Tr. 118:3-119:4. There can be no doubt that the contract remained in force until November 27, 2016, and that CWA did not file the petition within the appropriate window for doing so under the Board's contract-bar doctrine.

3. At Most, the Duration Clause Contains a Scrivener's Error that Does Not Change the Parties' Intent

The Board and the courts repeatedly have held that in interpreting a contract, the intent of the parties controls. *See, e.g., Cont'l Ins. Co. v. Roberts*, 410 F.3d 1331, 1336 (11th Cir. 2005) ("We all know that, in interpreting contract provisions, the intent of the parties is of first importance."); *In Re Resco Prod., Inc.*, 331 NLRB 1546, 1548 (2000) ("In interpreting a contract, the parties' intent underlying the contract language is paramount and is given controlling weight."). It is equally well accepted that a mere scrivener's error does not change or interfere with the parties' intent. *See Begner v. United States*, 428 F.3d 998, 1006–07 (11th Cir. 2005) ("Any mistake in a contract, consisting of some unintentional act or omission, and manifestly a mere clerical error, in no sense changing the contract or the relations of the parties thereto, is relievable at law.'" (quoting *Benedict v. Snead,* 271 Ga. 585, 519 S.E.2d 905 (1999))); *Filtron Co., Inc.*, 134 NLRB 1691, 1703 (1961) (accepting explanation that ambiguity was result of typographical error and interpreting agreement in line with the parties' intent). [4]

Here, the unanimous hearing testimony – including from Mr. Rivera, CWA's witness – establishes that ASIG and Local 74 intended the contract to expire on November 27, 2016. In light of that, as well as the clear expression of that intent in the Memorandum of Agreement and elsewhere in the final contract, it is clear that the language in the Duration of Agreement clause

[4] A scrivener's error occurs when the parties have the same intent with respect to a provision or clause, but their "written agreement errs in expressing that intention." *Am. States Ins. Co. v. First Fin. Ins. Co.*, No. C05-2098RSL, 2007 WL 4615503, at *4 (W.D. Wash. Dec. 28, 2007) (quoting *Reynolds v. Farmers Ins. Co.*, 90 Wash. App. 880, 885 (1998)).

was a classic scrivener's error. In *JPMorgan Chase Bank, N.A. v. Winget*, 602 F. App'x 246 (6th Cir.), *cert. denied,* 136 S. Ct. 689 (2015), the Sixth Circuit Court of Appeals held that "[w]herever an instrument is drawn with the intention of carrying into execution *an agreement previously made,* but which by mistake of the draftsman or scrivener . . . does not fulfill the intention, but violates it, there is ground to correct the mistake by reforming the instrument." *Id.* at 275 (emphasis added). That is precisely the case here: due to a drafting error, the Duration of Agreement provision does not fulfill the undisputed agreement previously reached between ASIG and Local 74 that the contract would run though November 27, 2016. The parties' intent is what controls in a situation like this, and it must be given effect – meaning that CWA's petition is subject to the contract-bar and under longstanding Board precedent, its petition should have been dismissed.

4. The Regional Director's Decision Departs From Board Precedent by Holding that the Contract-Bar Doctrine Does Not Apply Because the Contract Was Not Ratified

The Regional Director held that the parties' contract did not act as a bar because it was not ratified prior to the filing of CWA's petition. D.D.E. 20-21. In support of this holding, the Regional Director cites several Board cases that have held that where "ratification is a condition precedent to contractural validity by express contractural provision, the contract will be ineffectual as a bar unless it is ratified prior to the filing of a petition." *Appalachian Shale Prod. Co.*, 121 NLRB 1160, 1163 (1958); D.D.E. 20.

However, in the same decision cited by the Regional Director to support this conclusion, the Board clearly stated that where "the contract itself contains no express provision for prior ratification, prior ratification will not be required as a condition precedent for the contract to constitute a bar." *Appalachian Shale Prod. Co.*, 121 NLRB at 1163. The Regional Director's

application of *Appalachian Shale Products Company* to refuse application of the contract-bar doctrine in the case at hand is a substantial departure from Board precedent for a very simple reason: the contract at issue here does not require prior ratification. ER Exh. 1.[5] And the Regional Director appears to agree as her decision does not suggest that the contract signed by the parties on November 5, 2015, contains any such ratification requirement. Accordingly, the Regional Director's decision to reject application of the contract-bar doctrine on the basis of ratification, despite the contract at issue not requiring ratification, is a substantial departure from established Board precedent and should be overturned.

Moreover, even if ratification was required, the Regional Director clearly erred in finding that the employees had failed to ratify the agreement's November 27, 2016 expiration date. The Regional Director held that because the evidence was unclear as to certain particular aspects of

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[5] The only reference to ratification contained in the contract appears in Appendix A and provides that:

> 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.

ER Exh. 1 at 17. This language, however, does not "by express contractural provision" make "ratification [] a condition precedent to contractural validity." *Appalachian Shale Prod. Co.*, 121 NLRB at 1163. "In order for the Board to find that ratification is a condition precedent to an enforceable agreement, the agreement by the parties to do so must be express." *New Process Steel, Lp & Dist. Lodge 34, Int'l Ass'n of Machinists & Aerospace Workers, Afl-Cio*, 353 NLRB 111, 114 (2008). Requirements for ratification as a condition precedent are not inferred; "the Board requires clear proof that the parties made it a condition precedent to an agreement." *IAM, Local 1746 (United Tech. Corp., Pratt and Whitney Grp.*), 13 NLRB AMR 23022, 1985 WL 1150072 (Dec. 20, 1985); *Machinists Lodge 1746 (United Techs. Corp., Pratt & Whitney Grp.)*, Case 39-CB-761, 1985 WL 54625, at *1 (Dec. 20, 1985). As such, the passing reference to ratification in Appendix A cannot constitute a requirement for ratification as a condition precedent to this agreement.

the ratification process, no ratification occurred. *See* D.D.E. 15-17, 19 (raising questions such as whether there was a ratification meeting, whether there was notice that a vote would occur, how many copies of the Memorandum of Agreement were made available, and how long the ratification process took). In reaching this conclusion, however, the Regional Director improperly overlooked the unimpeached evidence that was presented. As is explained above, following the announcement of GOAA's mandated pay increases, ASIG and Local 74 opened the contract and began negotiating a new agreement. Tr. 50:17-51:12; Tr. 66:5-9. The initial result of these negotiations was the Memorandum of Agreement that outlined the changes that would be made from the prior agreement. Tr. 50:2-52:17; ER Exh. 2. The Memorandum of Agreement stated clearly that the parties' new agreement would run from October 2, 2015, to November 27, 2016. Tr. 52:19-53:9; Tr. 65:13-66:1; ER Exh. 2.

Local 74 then held a ratification vote on these terms through "yes/no" balloting in October 2015. As the hearing testimony established, the voting employees were presented with the Memorandum of Agreement and were able to ask any questions they might have before voting. Tr. 82:2-83:18. The employees ratified the terms of the Memorandum of Agreement through this vote, after which Ms. Simmons memorialized the terms contained in the Memorandum of Agreement into the formal contract that was signed by the parties. Accordingly, the uncontested evidence established that the employees were informed that the new agreement would remain effective until November 27, 2016, and voted to approve this date.

For these reasons, the Regional Director's decision holding that the contract-bar doctrine could not apply because the contract was not ratified not only draws a clearly erroneous interpretation of the facts, but substantially departs from official Board precedent. Accordingly,

the Board should grant ASIG's request for review and dismiss the petition pursuant to the contract-bar doctrine.

5. The Regional Director's Decision Departs From Board Precedent By Holding that the Contract-Bar Doctrine Does Not Apply Despite Consistent Testimony of the Parties' Intent

In rejecting the applicability of the contract-bar doctrine, the Regional Director misinterpreted and misapplied several Board decisions concerning situations where the parties' intent could not be determined or the employees were provided a different contract than signed by the parties.

The Regional Director held that the contract-bar doctrine did not apply in this case because "[t]he Board ha[s] held that contracts containing conflicting effective dates do not create a contract bar." D.D.E. 21. In support of this conclusion, the Regional Director relies on *Cabrillo Lanes*, 202 NLRB 921 (1973). *Cabrillo Lanes*, however, does not support this proposition. As an initial matter, *Cabrillo Lanes* did not involve a contract containing a scrivener's error or even any issue of contract interpretation. Instead, it concerned a determination of which of two executed contracts that contained materially different terms controlled. *See id.* at 921 ("It was to resolve the question of which contract is to control that the Acting Regional Director ordered the record be reopened and that a further hearing be held . . . ."). As the Board explained, the employer had presented one contract with a duration of September 1, 1968, to September 1, 1971, and that included an automatic renewal clause. *Id.* The union, however, presented a second executed contract with the same duration, but that did not include a provision providing for its automatic continuation. *Id.* at 922. The Board was thus concerned with "determin[ing] which of the two contracts in evidence [was] controlling." *Id.*

Ultimately, the Board declined to find a contract bar because, on "the circumstances of this case, on the evidence presented, [it could] not determine which contract [was] controlling." *Id*. In reaching this conclusion, the Board focused on the lack of evidence regarding the parties intent. Specifically, the Board noted that "we are faced with a situation where there are in evidence conflicting contracts, each purported to be the one the Employer and Union agreed upon in the course of their negotiations." *Id.* at 922-23. Moreover, "[e]ach contract [was] duly signed by an authorized representative of the Employer and the Union and [was] fully complete in itself but each contract has a different termination provision." *Id.* at 923.

Cabrillo Lanes thus bears little resemblance to the case at hand. First, the case before the Regional Director here did not involve determining which of two validly executed contracts should control. There is no dispute that the October 2, 2015, to November 27, 2016, contract was the controlling agreement. Nor is there any dispute that the parties intended that the contract would run from October 2, 2015, to November 27, 2016. However, as the witnesses and the hearing officer agreed, due to a mistake, this date was not reflected on the agreement's signature page. Tr. 63:17-19 ("[Shemeeka Simmons]: Yeah, it's definitely an error. Hearing Officer: We all – we've acknowledged it's an error.").

The Regional Director's reliance on *Cabrillo Lanes* also disregards the central holding in that case: that the contract-bar doctrine should not apply where the parties' intent cannot be determined based on the evidence presented. *See id* at 922. The Regional Director's decision ignores this holding and instead crafts a new – much broader – rule that whenever there is ambiguity, the contract-bar doctrine does not apply. Such a holding is unsupported by, and inconsistent with, the Board's case law. For instance, in *Snyder Engineering Corp*. 90 NLRB 783 (1950), the Board held that even though portions of the contract were "inartistically drafted"

and "ambiguous," where the "uncontradicted testimony" reveals the parties "mutual intent," such ambiguity "do[es] not render [the agreement] inoperative as a bar." *Id.* at 784.

The Board's decision in *Bob's Big Boy Family Restaurant*, 235 NLRB 1227 (1978), which the Regional Director also cited in support of her refusal to apply the contract-bar doctrine, is even less supportive of that conclusion. There, the parties executed an agreement with a duration clause that "provided that the contract would be effective from the date of signing until December 31, 1977." *Id.* at 1228. After executing the agreement, the document was placed in the employer's vault. *Id.* A different version of the agreement was distributed by the union to the employees, however, which included a cover page not on the original that provided "in bold, black print on its cover, the dates of 'January 1, 1975 through December 31, 1977.'" *Id*. The employer knew of this version and "acquiesced to its distribution." *Id.*

The petitioner argued that for the purposes of determining whether a petition was barred by the contract-bar doctrine, the dates on the cover page distributed to the employees and not the dates in the version kept in the employer's vault should control. *Id.* The Board agreed, holding that "[i]t was not unreasonable nor unlikely that employees as well as outside unions, such as Petitioner, would rely on the dates contained on the cover of the contract printed by the [union.]" *Id.* As the Board explained, "[i]n these circumstances, the Employer and the [Union] created a situation which precluded a clear determination by a potential petitioner of the proper time for filing a new petition." *Id.* Accordingly, the Board held that "the Employer should be estopped from asserting contract-bar against this petition, in this situation." *Id.*

Again, the Regional Director's reliance on this case to refuse application of the contract-bar doctrine in the case at hand is a substantial departure from Board precedent. In *Big Boy Family Restaurant*, the Board articulated the principle that for the purpose of calculating whether

a petition is timely under the contract-bar doctrine, the dates most apparent to the employees should control. There, the version of the contract distributed to the employees contained a cover page that conspicuously stated one operative period and a duration clause that contained another. The Board held the dates on the cover page should control. *Id.*

The Regional Director's decision here does the exact opposite. Despite the fact that the contract here states on its cover page that the agreement would run from October 2, 2015, to November 27, 2016, and all of the parties understood these to be the effective dates, the Regional Director relied instead on a provision that the unanimous testimony established was an unintended mistake that none of the relevant parties were even aware of until the petition was filed. This is not only a substantial departure from the Board's precedent, but runs directly at odds with the holding in *Big Boy Family Restaurant*. Based on *Big Boy Family Restaurant*, the Regional Director should have applied the conspicuous and unanimously accepted dates stated clearly on the agreement's cover page.

In relying on *Cadrillo Lanes* and *Big Boy Family Restaurant* to refuse to apply the contract-bar doctrine, the Regional Director thus dramatically departed from the Board's precedent. Moreover, the Regional Director's decision to ignore this unambiguous evidence presents an important issue of Board policy. The contract-bar doctrine was created to "promot[e] industrial stability and employee freedom of choice." *Bob's Big Boy Family Rests.*, 625 F.2d at 851. The Regional Director's decision undermines this purpose by failing the give effect to the unimpeached intent of the parties, thus infusing uncertainty into the effect of untold numbers of collective bargaining agreements. Accordingly, the Board should grant ASIG's Request for Review, clarify that Regional Directors may not disregard clear and unimpeached evidence into

the meaning and intent of agreements, and dismiss the petition pursuant to the contract-bar doctrine.

B. The Regional Director's Decision Departs From Board Precedent Because it Ignores Prior NMB Rulings Finding that ASIG Is A Carrier Under the RLA

1. All Employees of a "Carrier" are Subject to the RLA

The RLA defines the term "carrier" in relevant part as "any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service . . . in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad." 45 U.S.C. § 151, First. That definition, like most of the RLA, was extended to cover air carriers in 1936. 45 U.S.C. § 181.

Typically, the NMB and the Board apply a two-part test to determine whether an employer who does not fly aircraft for the transportation of freight or passengers is nonetheless a carrier subject to the RLA. That test looks at whether the nature of the work performed by the employees is the type of work that is traditionally performed by airline employees (the "function" criteria), and whether RLA carriers own or control, directly or indirectly, the employer and its employees (the "control" prong). *See, e.g. Evergreen Aviation Ground Logistics Enterprises, Inc.*, 327 NLRB 869, 869 n.1 (1999); *ServiceMaster Aviation Services*, 325 NLRB 786, 787 (1998).

However, when an entity has been deemed to be an RLA carrier, then the presumption is that all of its employees are governed by that statute. *See* RLA Section 1, Fifth, 45 U.S.C. § 151, Fifth (the term "employee" as used in the RLA "includes every person in the service of a carrier . . . who performs any work defined as that of an employee or subordinate official"); RLA

Section 201, 45 U.S.C. § 181 (extending RLA to cover air carriers "and every air pilot or other person who performs any work as an employee or subordinate official of such carrier"). In *Federal Express Corp.,* 23 NMB 32 (1995), the NMB relied on this statutory language to conclude that FedEx's employees other than its pilots and aircraft mechanics – such as couriers, tractor-trailer drivers, and operations agents – were covered by the RLA. As the NMB explained:

> The Railway Labor Act does not limit its coverage to air carrier employees who fly or maintain aircraft. Rather, its coverage extends to virtually all employees engaged in performing a service for the carrier so that the carrier may transport passengers or freight.

Id. at 72. Accordingly, "[i]t has been the Board's consistent position that the fact of employment by a 'carrier' under the Act is determinative of the status of *all* that carrier's employees as subject to the Act." *REA Express,* 4 NMB 253, 269 (1965) (emphasis in original).

2. The NMB Has Held That ASIG and its Fleet Service Employees Are Subject to the RLA on a Nationwide Basis

The NMB has held ASIG to be a carrier as that term is defined in 45 U.S.C. § 151, First and 45 U.S.C. § 181. Moreover, the NMB's holdings in this regard have specifically included the craft or class of Fleet Service Employees, of which baggage handling employees such as the MCO encoder operators are a part.

The circumstances that led to the NMB declaring ASIG to be a carrier on a nationwide basis started in March 2004, when a union filed a representation petition with the NMB seeking to represent ASIG's aircraft fuelers and ground handling employees working at the Tampa International Airport. *Aircraft Service Int'l Group,* 31 NMB 508 (2004). ASIG objected to the petition because, among other things, it believed that the appropriate system for representation purposes under the RLA was all of ASIG's operations nationwide, not just Tampa. The NMB agreed and held (1) that the proper system for representation was in fact all of ASIG's facilities nationwide (including MCO), and (2) that the IAM's petition should be divided into two separate

cases, one involving the craft or class of Mechanics and Related Employees and a second involving the Fleet Service Employees craft or class (which includes baggage handling employees). *Id.* at 519. [6]

The NMB ordered ASIG to submit a separate List of Potential Eligible Voters in each case which included all employees working for ASIG nationwide in the relevant craft or class. *Id.* ASIG did so; those lists included aircraft fuelers working at MCO at the time (in the Mechanics and Related Employees list) and MCO employees performing baggage handling and ground handling functions (in the Fleet Service Employees list). Tr. 174:13-175:8. In October 2004, the NMB dismissed both cases on the ground that the union did not demonstrate the support of a sufficient number of employees to justify holding an election among either craft or class. *See Aircraft Service Int'l Group*, 32 NMB 1 (2004); *Aircraft Service Int'l Group*, 32 NMB 3 (2004). This proceeding established that ASIG "was subject to RLA jurisdiction and that the appropriate system for representation under the RLA includes all [ASIG's] facilities nationwide." *Signature Flight Support/Aircraft Service Int'l, Inc.,* 32 NMB 30, 39 (2004).

The NMB further emphasized this position in later cases. For example, in April 2005, a union filed an application to represent ASIG's ground service employees in Los Angeles. (NMB Case No. CR-6878.) Shortly thereafter, the NMB dismissed the petition on the ground that it

[6] Unlike the NLRA, which permits elections among any "appropriate" unit, elections under the RLA are conducted among specific "crafts or classes" of employees. Examples of such crafts or classes include pilots, flight attendants, mechanics and related employees, passenger service, and fleet service. The NMB has found that aircraft fuelers fall within the Mechanics and Related Employees craft or class, *see United Airlines*, 6 NMB 134 (1977), while baggage handlers are within the Fleet Service Employees craft or class, which includes employees who perform work associated with loading and unloading baggage, delivering baggage to and from baggage areas, sorting baggage, completing baggage-related paperwork, and similar duties, *see Airline Hearings*, 5 NMB 2 (1972).

was barred by the NMB's previous dismissal of the case involving all of ASIG's employees in that craft or class nationwide.

In mid-2012, another union filed an application with the NMB seeking to represent ASIG's ground service employees at Los Angeles. In November 2012, the NMB dismissed the application because it only covered the Los Angeles employees, and not all employees in the craft or class nationwide. In its decision, the NMB reiterated that ASIG "*has been found to be a common carrier as defined in 45 U.S.C. § 151, First and § 181 of the [RLA]*." *Aircraft Service Int'l Group,* 40 NMB 43, 45 (2012) (emphasis added). The NMB also repeated that the "proper system for representation under the RLA includes all ASIG's facilities nationwide." *Id.* at 52.

Despite the NMB's dismissal, in March 2013, the same union filed a petition with the NLRB seeking to represent the same ASIG ground service employees in Los Angeles. (Case No. 31-RC-100047.) The Director of Region 31 issued an order to show cause as to why the petition should not be dismissed on RLA jurisdiction grounds. In response, the union argued, much like CWA argues here, that "the determination of whether a particular representation dispute among airport employees is covered by the RLA or [NLRA] is made on an airport-by-airport basis under the recent NMB's decisions." The Regional Director rejected that contention and dismissed the petition. The Regional Director quoted approvingly the NMB's findings that ASIG was a common carrier as defined in the RLA, and that the appropriate system for representation was all of ASIG's operations nationwide, not one facility, and concluded that the "same Employer and same petitioned-for employees have already been found to be subject to the RLA under the jurisdiction of the NMB." The union requested review of the Regional Director's determination and on October 22, 2013, the NLRB denied that request.

These cases compel the same conclusion here. ASIG has been held to be an RLA carrier nationwide, and thus all of its employees are subject to the RLA, without regard to application of the two-part test to any subset thereof. Moreover, all of ASIG's employees who hold positions within the fleet service craft or class – which would include encoder operators, who perform baggage handling services – have been held subject to the RLA, and it would be inconsistent with that ruling to carve out the MCO encoder operators.

3. The Regional Director's Decision To Disregard The NMB's Prior Rulings Finding That ASIG and its Fleet Service Employees Are Subject to the RLA Departs From Board Precedent and Raises An Important Question of Law and Policy

Pursuant to longstanding precedent, the Board defers to the NMB's determinations of jurisdictional questions under the RLA. *E.g.*, *Swissport USA, Inc.*, 353 NLRB 145, 146 (2008) ("Having received the NMB's opinion, we will give it the substantial deference the Board ordinarily accords to NMB's opinions."); *In Re DHL Worldwide Exp., Inc.*, 340 NLRB 1034 (2003) ("[I]n view of the substantial deference given to the NMB's opinion, we concur with the findings of the NMB."); *ServiceMaster Aviation Servs.*, 325 NLRB at 787 ("[W]e defer to the NMB's determination that it has jurisdiction.").

As the Regional Director acknowledged, in past cases "the NMB concluded that the proper system for representation under the RLA included all of ASIG's facilities nationwide for fleet service employees." D.D.E. 13. The Regional Director, however, refused to defer to these rulings. Instead, the Regional Director concluded that pursuant to the two-part test, ASIG's encoder operator employees at MCO – who are members of the fleet service craft or class – are subject to the NLRA rather than the RLA. D.D.E. 13.

In doing so, the Regional Director ignored both the NMB's holding that once an employer is determined to be a "carrier" under the RLA, that finding "is determinative of the

status of *all* that carrier's employees as subject to the Act," *REA Express,* 4 NMB at 269 (emphasis in original), and the NMB's prior rulings that ASIG is a covered carrier under the RLA. As such, the Regional Director substantially departed from the Board's well-established precedent of deferring to the NMB on issues of RLA jurisdiction.[7] Accordingly, ASIG respectfully requests that the Board grant this Request for Review and dismiss the petition for lack of jurisdiction.

C. The Regional Director's Decision Departs From the Longstanding Board Practice of Seeking An Advisory Opinion From The NMB Where There Is An Arguable Issue of RLA Jurisdiction

For over 50 years, "the Board has followed a general practice of referring cases to the NMB when a party raises a claim of arguable RLA jurisdiction." *D & T Limousine Services, Inc.*, 320 NLRB 859, 859 (1996) (quoting *United Parcel Service*, 318 NLRB 778, 780 (1995)). As the Board has observed, this consistent practice has "important policy advantages." *United Parcel Service*, 318 NLRB at 780. "First, the practice enables the Board to obtain the NMB's expertise on jurisdictional matters most familiar to it." *Id.*; *see also Federal Express Corp.*, 317 NLRB 1155, 1155 (1995) ("[W]e believe the better policy, particularly where there are very

[7] In the alternative, the Board should grant this Request for Review because the Regional Director's Decision and Direction of Election raises an important issue of law due to the absence of binding Board precedent. *See* 29 U.S.C. § 102.67(d)(1)(i) (providing that the Board may grant review where "a substantial question of law or policy is raised because of: (i) The absence of . . . officially reported Board precedent."). In *Federal Express Corp.*, 323 NLRB 871 (1997), the NMB "issued an opinion declaring its view that the Employer is a 'common carrier by air' within the meaning of Section 181 of the Railway Labor Act, 45 U.S.C. § 181, and that, by virtue of that coverage, all of the individuals directly employed in its air carrier business, including those in the trucking operation at issue here, are also covered by the RLA." *Id.* 871-72 (citing *Federal Express Corp.*, 23 NMB 32, 70-73 (1995)). Although the Board agreed with the NMB's determination that the employer and its employees were covered by the RLA, it declined to expressly adopt the NMB's analysis. *Id.* at 872 n.4. The absence of official Board precedent either adopting or rejecting the NMB's rule that once determined to be a carrier, all of a company's aviation-related employees are subject to the RLA, implicates a significant area of law and policy such that review is warranted to definitively resolve this issue.

difficult questions of interpretation under the RLA, is to refer jurisdictional questions of this type to the [NMB].”). “Second, the practice minimizes the possibility of conflicting agency determinations.” *United Parcel Service*, 318 NLRB at 780. Further, as the Board has recognized, “adherence to the long-established and successful practice . . . discourages forum shopping, promotes stability and is consistent with our mandate in Section 1(b) of the Act to ‘provide orderly and peaceful procedures . . . in connection with labor disputes affecting commerce.’” *Federal Express Corp.*, 317 NLRB at 1156 (quoting Labor Management Relations Act of 1947, 29 U.S.C. § 141(b)). Indeed, this practice is so fundamental that it has been codified in the Board’s own Case Handling Manual, which provides that “[t]he Board’s practice is to refer case of arguable or doubtful RLA jurisdiction to the NMB for an advisory opinion on the jurisdictional issue.” NLRB Case Handling Manual § 11711.2 (Sept. 2014).

Although ASIG believes the NMB’s prior decisions make clear that it, and its baggage handler employees at MCO, are subject to the RLA, even if the Regional Director disagreed with this argument, it is incontrovertible that ASIG has “raise[d] a claim of arguable RLA jurisdiction.” *D & T Limousine Services, Inc.*, 320 NLRB at 859. And to the extent there is a question of how the NMB’s prior decisions finding ASIG a carrier on a nationwide basis interact with the two-part test that usually is applied to service providers, this is plainly a “difficult question of interpretation” that would warrant the NMB’s expertise. *See Federal Express Corp.*, 317 NLRB at 1155. Moreover, the Board has previously referred nearly identical matters to the NMB. *See Federal Express Corp.*, 323 NLRB at 871; *Federal Express Corp*. 317 NLRB at 1155. And in both of these cases, the Board either agreed with the NMB’s finding that the company and petitioned-for employees were subject to the RLA, *Federal Express Corp*. 323 NLRB at 872, or affirmed its decision to refer the matter and resubmitted the matter to the NMB for additional

proceedings, *Federal Express Corp*. 317 NLRB at 1156. Nevertheless, despite the clear Board precedent and longstanding practice of allowing such decisions to be referred to the NMB for an advisory opinion, the Regional Director refused to do so.

The Regional Director's decision to deviate from this practice thus raises a significant question of law and an important issue of Board policy that provides a compelling reason for reconsideration. The Regional Director's repudiation of the Board's established practice of referring matters of arguable RLA jurisdiction to the NMB not only stands at odds with over 50 years of Board precedent, but substantially disrupts the process for how questions of RLA jurisdiction are resolved. Accordingly, if the Board declines to dismiss this matter for lack of jurisdiction based on the NMB's prior rulings, the Board should grant ASIG's Request for Review and refer this matter to the NMB for an advisory opinion consistent with the Board's longstanding practice.

V. CONCLUSION

For the reasons set forth above, ASIG respectfully requests that the Board grant ASIG's Request for Review and dismiss the petition either for lack of jurisdiction or pursuant to the contract-bar doctrine, or, in the alternative, seek an advisory opinion from the National Mediation Board on the jurisdictional issue.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of January, 2016, a copy of the foregoing **EMPLOYER'S REQUEST FOR REVIEW OF DECISION AND DIRECTION OF ELECTION ISSUED BY REGIONAL DIRECTOR OF REGION 12 AND BRIEF IN SUPPORT OF REQUEST FOR REVIEW** was sent via electronic mail to:

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