UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

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PRIMEFLIGHT AVIATION SERVICES, INC.

and

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 32BJ
----------X

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

CHARGING PARTY SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ's RESPONSE TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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INTRODUCTION

Charging Party SEIU Local 32BJ (the "Union") respectfully requests that the NLRB affirm the ALJ's cogent decision ("ALJD") finding that PrimeFlight Aviation Services' ("PrimeFlight" or the "Employer") operations at John F. Kennedy International Airport ("JFK") are under the NLRB's jurisdiction and that the Employer is a *Burns* successor that failed to recognize and bargain with the union and imposed unilateral changes in terms and conditions of employment. The Union's brief will address only the jurisdictional issue and relies on the General Counsel's brief in all other respects. The Employer challenges the Board's standard to determine the jurisdictional line between the NLRA and the Railway Labor Act, set forth in *Allied Aviation of New Jersey,* 362 NLRB No. 173 (2015), *enf'd sub nom. Allied Aviation Serv. Co. of New Jersey v. NLRB,* 854 F.3d 55 (D.C. Cir. 2017). The Employer relies on a misreading of *ABM Onsite Servs.-West v NLRB,* 849 F.3d 1137 (D.C. Cir. 2017), which remanded a similar jurisdictional issue for a more thorough rationale. Therefore, the Union will examine the jurisdictional standard in depth, including analysis of the legislative history, the statutory text and judicial and agency precedent.

NLRA jurisdiction exists because PrimeFlight is an independent contractor, which controls its own business policies and operations. It is a national company that freely seeks work from many airline and at many airports, and independently pursues opportunities for profit or loss. JetBlue Airways Corp. ("JetBlue"), the customer at JFK, does not exercise jurisdictionally significant control over the Employer's operations at JFK. The contract between JetBlue and PrimeFlight, the General Terms Agreement ("GTA"), Jt. Ex.-2, emphasizes PrimeFlight's autonomy. JetBlue has no meaningful control at all over personnel decisions, which are controlled by the Employer's comprehensive and detail Employee Handbook, CP Ex.-1.

PrimeFlight alone controls hiring, discharge and discipline, promotion/demotion. Only PrimeFlight supervises its employees. Primeflight employees wear uniforms with the PrimeFlight logo and PrimeFlight largely controls training. JetBlue has no more control over business operations and no more access to PrimeFlight records and operations than any carrier has in a typical relationship with a subcontractor.

The NLRB should affirm the ALJD without referral to the National Mediation Board ("NMB"). The NLRB may do so consistent with its referral doctrine. The NMB has declined jurisdiction in factually similar cases, the NLRB would be incorporating the NMB's expertise and there is no danger of inconsistent opinions or forum shopping. Alternatively, the Board should reformulate its referral doctrine so that it may decide this case. Referral to the NMB would cause inordinate delay.

I. STATEMENT OF FACTS

A. PrimeFlight Is An Independent Company and Not a Captive of JetBlue

PrimeFlight is a national company. It provides various services to various airlines at many different airports. Tr. 28. Division Vice President Matt Barry oversees 11 airports at which PrimeFlight provides services, including JFK, LaGuardia, Newark and Albany. Tr. 215; Jt. Ex. 2, Statement of Work ("SOW") # 1-4. PrimeFlight's parent, SMS, is not an airline, and PrimeFlight is not owned by or under common ownership with any airline. Tr. 307; 13-14. PrimeFlight has a corporate Human Resources department. Tr. 307.

PrimeFlight provides skycap, wheelchair, baggage handling, and security line services to JetBlue at JFK, Terminal 5. Jt. Ex. 2, SOW. It bid on and won the work that had formerly been performed by other contractors, namely Air Serv for skycap, baggage and security line services and PAX Assist for wheelchair services. Tr. 297. The GTA designates PrimeFlight as having an independent contractor relationship with JetBlue. Jt. Ex. 2, ¶ 22.5.

B. PrimeFlight Controls Its Labor Relations and Policies

PrimeFlight has complete control over its labor relations and policies. The GTA stresses that the employees are "considered employees of [PrimeFlight] for all purposes and will under no circumstances be deemed to be employees of JetBlue." Jt. Ex. 2, ¶ 9.3. PrimeFlight's control is manifest in its Employee Handbook, dated April 15, 2016, which has a comprehensive and detailed set of employment policies. CP Ex. 1. The Employee Handbook does not indicate that JetBlue played any role in developing any of the Handbook's provisions. Tr.303. The Handbook apparently applies to all Prime Flight employees with nothing indicating any exclusion from its coverage. It applies throughout the country, since it indicates that "state law may vary state to state." CP Ex. 1, Legal Compliance.

1. Hiring, Promotion and Demotion

PrimeFlight stipulated that it had complete and exclusive control over hiring its employees at JFK. Tr. 19. Employee testimony confirmed the stipulation. Tr. 86; 168. JetBlue does not direct PrimeFlight concerning promotions and demotions, Tr. 295, nor does it provide commendations for PrimeFlight employees. Tr. 21.

2. Wages and benefits

PrimeFlight pays the employees. Tr. 84; 183-84. PrimeFlight determines the wages it will pay and bids for work based on its own compensation policy. Tr. 297. Similarly, PrimeFlight determines its own benefit policies and bids based on those policies. Tr. 297-98. The PrimeFlight Employee Handbook specifies its benefit package. CP Ex.-1, §§ 301-316. These benefits include vacation, holiday, time off to vote, bereavement leave, jury duty, witness duty, benefits continuation (COBRA) and health insurance. The Employer offers an insurance package including dental, vision, life, accidental death & dismemberment, short term disability,

and flexible spending account. *Id.,* § 301. Retirement benefits are provided through a 401(k) Retirement Savings Plan. *Id.* No evidence shows any JetBlue influence over wages or benefits.

3. Discharge and Discipline

PrimeFlight controls its discipline and discharge policies and decisions. The Employee Handbook details the rules of conduct for employees and the procedures for determining discipline. Jt. Ex. 2, §§ 701-722. These rules include drug and alcohol use, sexual and other prohibited harassment, attendance, personal appearance, and workplace etiquette. *Id.*

PrimeFlight normally uses progressive discipline in which counseling is followed by a written warning, then a suspension and discharge only for the fourth offense. *Id.*. § 716. Matt Barry was unaware of PrimeFlight ever disciplining an employee at JetBlue's request. Tr. 288. PrimeFlight introduced no evidence of any JetBlue request to discipline a PrimeFlight employee.

Nothing in the GTA gives JetBlue the authority to terminate or have PrimeFlight terminate an employee. JetBlue has never requested that PrimeFlight terminate or remove an employee. Tr. 285, 287. The GTA, Jt. Ex. 2, does not give JetBlue a general right to demand removal of PrimeFlight employees from its account. The GTA provides only two extremely limited situations in which JetBlue has a right to have PrimeFlight employees removed. GTA permits JetBlue to demand removal of employees "unable to work in harmony or shall interfere with any labor employed by JetBlue or any tenant. . . ." *Id.,* ¶ 7.6. JetBlue can demand removal of a skycap found to be "collecting revenue outside of the system." *Id.,* GTA, Jt. Ex. 2, SOW, SkyCap Services, ¶ 5. In that case, PrimeFlight must remove the employee only from baggage checking services, not from other work on the JetBlue account.

C. PrimeFlight Supervises Its Employees

PrimeFlight is exclusively responsible for supervising its employees. It has a full supervisory structure, including managers, supervisors and leads. Tr. 303. The GTA is clear that PrimeFlight shall "at its sole cost and expense, furnish all ... supervision ... " Jt. Ex. 2, ¶ 9.1. PrimeFlight "shall be solely responsible for supervision of such employees ... " *Id.*, ¶ 9.3. Barry conceded that "PrimeFlight is solely responsible for managing its employees." Tr. 288. JetBlue does not direct employees. Tr. 95.

PrimeFlight assigns employees to their posts. Tr. 111; 122-23; 181; 185. PrimeFlight is solely responsible for staffing. Tr. 288. It is responsible to provide an adequate number of employees. GTA, Jt. Ex. 2, ¶ 9.2. JetBlue provides feedback on staffing levels "if the service is poor." Tr. 246.

PrimeFlight "builds the schedule," i.e., assigns employees to their shifts. Tr. 288-289; 295-96. PrimeFlight changes employees' schedules. Tr. 97. It assigns days off. Tr. 295. PrimeFlight authorizes time off and decides whether employees may swap shifts. Tr. 296. JetBlue does not direct PrimeFlight employees to work overtime. Tr. 297. PrimeFlight decided independently to have employees work overtime to deal with its perceived understaffing. Tr. 296-97.

D. PrimeFlight Controls Training

As the GTA makes clear, PrimeFlight "shall provide its employees ... with all necessary initial and recurrent training, including familiarization with JetBlue Policies." Jt. Ex. 2, ¶ 10.9; see also ¶ 8.6, 8.7 and 8.8; Tr. 89; 171; 178; 182. PrimeFlight classroom training consists of three components. Tr. 262. PrimeFlight controls the content of two of the components: the "internal company training module" and the "PrimeFlight technology application." *Id.*

PrimeFlight has its own detailed training manuals, including a 37-page Wheelchair Assistance Training Manual. CP Ex. 2. The other component is "JetBlue policies, procedures, training,"for which PrimeFlight employees conduct the training based on instructions from JetBlue. *Id.* In addition, PrimeFlight conducts its own on-the-job training program. Tr. 303.

E. Employees Are Identified As PrimeFlight, Not Carrier, Employees

PrimeFlight employees are held out to the public as such, not as JetBlue employees. All uniforms bear the PrimeFlight logo, not JetBlue's. Tr. 92; 175; 302; GTA, Jt. Ex. 2, SOW, Skycap Services, ¶ 2, 1.l; Wheelchair, ¶ 1.9; and Baggage Handling, ¶ 2. Indeed, JetBlue insisted that the PrimeFlight uniforms "look unique (not JetBlue)." GC Ex. 6. JetBlue approved PrimeFlight's proposed uniforms without changes. Tr. 283. The employees' ID badges say PrimeFlight, not JetBlue. Tr. 87.

F. PrimeFlight Has A Typical Subcontractor Relationship with JetBlue

PrimeFlight's relationship with JetBlue is a typical independent contractor arrangement. The GTA requires PrimeFlight to, "at its sole cost and expense, furnish all labor, supervision, equipment, facilities, materials and supplies, and other requisites necessary for the proper performance of the Services at each Airport." Jt. Ex. 2, ¶ 9.1. The GTA ensures that PrimeFlight is responsible for purchase and maintenance of "all equipment, material, supplies, and any special equipment required to perform the Services, unless otherwise stated in a SOW." *Id.* at 9.5. The SOW does not create any exceptions to this general statement. Rather, it specifies that PrimeFlight is to provide wheelchairs. Jt. Ex. 2, SOW, Wheelchair, ¶ 5.1. Barry confirmed that PrimeFlight supplies some equipment, including wheelchairs, tablets, and office equipment. Despite the GTA, he asserted that JetBlue provides other equipment. Tr. 251-53. PrimeFlight

supplies its own technology system, SynTrack, that tracks wheelchair usage and need. Tr. 245; 251-53.

Barry testified that JetBlue provides PrimeFlight with office space and locker and break rooms. Tr.248-50. He conceded that the GTA requires PrimeFlight to provide its own premises. Tr. 250. He tried to reconcile his testimony with the GTA by saying that the SOW modifies the GTA for particular locations. *Id.* But the SOW nowhere states that JetBlue will provide premises.

JetBlue provides general specifications of the work it needs performed. GTA, Jt. Ex. 2, SOW. But PrimeFlight specifies in great detail how its employees should accomplish JetBlue's desired results. Wheelchair Assistance Training Manual. CP Ex. 2.

JetBlue monitors PrimeFlight's performance of its duties, including requiring staffing reports when PrimeFlight's performance is substandard, Tr. 239, 246; and daily briefings attended by PrimeFlight management, Tr. 258, 263, 303. JetBlue retains the contractual authority to audit relevant records, GTA, Jt. Ex. 2, ¶ 13.1-13.2. JetBlue requested information when PrimeFlight asked for an increase in its payments. Tr. 260.

II. ARGUMENT

A. *Allied Aviation/Airway Cleaners Standard Governs*

Employers and employees covered by the Railway Labor Act ("RLA") are outside NLRA jurisdiction. NLRA, § 2(2) and 2(3). When an employer is not a rail or air carrier engaged in the transportation of freight or passengers, the NLRB/NMB applies a two-part test to determine whether that employer is subject to the RLA:

> First, the NMB determines whether the nature of the work is that 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.

Airway Cleaners, 41 NMB at 262.

PrimeFlight workers perform work "traditionally performed by employees" of air carriers. Since PrimeFlight is not owned by a carrier, the only issue is whether PrimeFlight is "directly or indirectly owned or controlled by or under common control with any carrier" by air. RLA, Section One, First; 45 USC § 151, First. The NMB looks to several factors to infer jurisdictionally significant control, including:

> 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, role in personnel decisions, degree of supervision of the company's employees, whether employees are held out to the public as carrier employees, and control over employee training.

Airway Cleaners, 41 NMB at 267.

Control is jurisdictionally significant only if it is more extensive than that found in a "typical subcontractor relationship." *Allied Aviation,* slip op. at 2. RLA jurisdiction requires the carriers to have "'meaningful control over personnel decisions'", particularly "hiring, firing and/or discipline." *Id.* slip op. at 1, citing *Airway Cleaners LLC,*41 NMB 262, 268 (2014). The Board in *Allied Aviation* also cited *Bags, Inc.*, 40 NMB 165 (2013) and *Menzies Aviation*, 42 NMB 1 (2014). *See also Aero Port Services, Inc.*, 40 NMB 139 (2013); *Air Serv Corp.*, 39 NMB 450, recon. den'd, 39 NMB 477 (2012); and *Huntleigh USA Corp.*, 40 NMB 30 (2013).

B. The Allied Aviation *Standard Implements Congressional Intent*

The *Allied Aviation* standard correctly implements Congress' intent expressed in the control requirement. The legislative history, an analysis of the text, and decades of judicial and agency precedent compel this conclusion.

1. Legislative History Supports *Allied Aviation*

Congress intended the control requirement to exclude from the RLA independent contractors performing air transportation services. Indeed, Congress specifically refused to

extend RLA jurisdiction to independent contractors. When Congress enacted the RLA in 1926, it initially covered only rail "carriers." At the time, it was the only federal legislation protecting the right to collectively bargain. Some railroads responded to the enactment of the RLA by creating wholly-owned subsidiaries in an effort to evade the Act's strictures. *See, e.g., Reynolds v. N. Pac. Ry. Co.,* 168 F.2d 934, 941 (8th Cir.), *cert. denied,* 335 U.S. 828 (1948). Congress reacted in 1934 by amending the definition of "carrier" under RLA, Section 1, First; 45 U.S.C. § 151, First, to include companies owned or controlled by carriers. As amended, § 151, First provides in relevant part:

> The term 'carrier' includes ... any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates ... in connection with the transportation ... of property transported by railroad ...

Joseph Eastman, the Federal Coordinator of Transportation and drafter of the 1934 amendment, had initially sought to extend the RLA to all employees doing rail transportation work, regardless of whether they worked for a carrier – *i.e.*, "to bring within the scope of the act operations which form an integral part of railroad transportation, but which are performed by companies which are not now subject to the Railway Labor Act." 3 Michael H. Campbell & Edward C. Brewer, III, The Railway Labor Act of 1926, A Legislative History, at 10. (Excerpts attached as an Appendix). Thus, his draft would have added to the definition of "carrier" "any company operating any equipment or facilities or furnishing any service included within the definition of the terms 'railroad' and 'transportation' as defined in the Interstate Commerce Act." *Id.* Critically, the amendment as originally proposed had no limitation requiring railroad control or ownership. That is, under that original formulation, RLA jurisdiction would have turned on function alone.

The railroads objected that the amendment would "affect their contracts for all kinds of work." *Id.* at 145. In response to those and other railroad objections, Eastman revised the amendment with the intent to avoid "possible conflicts with N.R.A. [National Recovery Administration] codes." *Id.* The revised amendment, which was ultimately enacted, added the operative language that incorporated an additional criterion for RLA jurisdiction: carrier control. "The term 'carrier' includes . . . any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad ...." *Id.* Thus, Congress specifically considered extending RLA coverage to include independent contractors performing rail carrier work but rejected this overly broad approach in favor of including only those companies that are owned or controlled by a rail carrier, and excluding independent contractors.

In *R.R. Ret. Bd. v. Duquesne Warehouse Co.*, 326 U.S. 446 (1946), the Supreme Court repeatedly cited RLA legislative history to determine whether a warehouse company owned by a railroad was an employer under the Railway Retirement Act ("RRA"), 45 U.S.C. § 231 *et seq.*,[1] and the Railroad Unemployment Insurance Act ("RUIA"), 45 U.S.C. § 351 *et seq.*[2] It did so because the RLA, RRA, RUIA, and the Carrier Taxing Act (now the Railroad Retirement Taxing Act, 26 U.S.C. § 3201 *et seq.*) form an integrated system of railway labor legislation that rely on a common definition of covered employer. *Id.* at 451. *See also Herzog Transit Svcs. v. U.S. R.R. Ret. Bd.,* 624 F.3d 467, 471-72, n.11 (7th Cir. 2010) (coverage of RLA "not materially different" than RRA); *Reynolds*, 168 F.2d at 941 (Carrier Taxing Act adopted RLA definition of carrier); *Marriott In-Flite Services,* 171 NLRB 742, 752 (1968) ("Congress intended uniformity of interpretation of the definition of carrier" in the different rail labor acts).

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[1] An "employer" under the RRA includes: "any company which is directly or indirectly owned or controlled by, or under common control with, one or more" rail carriers. 45 U.S.C. § 231(a)(1)(i).

[2] An "employer" under the RUIA includes "any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith . . . ." 45 U.S.C. § 351(a).

The *Duquesne* Court highlighted the gist of Eastman's testimony on the language that was adopted — "I am inclined to believe that for the present it would be well not to go beyond carriers and their subsidiaries engaged in transportation." *Id.* at 451 n.6. It also cited Senator Robert F. Wagner's statement that the amendment was intended to make the statute "more clearly applicable to subsidiaries of railroad companies . . ." *Id.* at 452 n.10. The Court relied on the Senate Report's declaration that the de facto control sustaining RLA jurisdiction "may be exercised not only by direct ownership of stock, but by means of agreements, licenses, and other devices which insure that the operation of the company is conducted in the interests of the carrier." *Id.* [3]

Congress extended the RLA to cover air transportation in 1936. *Bhd. Of R.R. Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 318, n. 16 (1991), citing 45 U.S.C. §§ 181-182. The legislative history does not contain any concern with covering independent contractors in the air transportation industry.

2. Statutory Textual Analysis Supports NLRA Jurisdiction

A close analysis of the critical phrase "directly or indirectly owned or controlled by or under common control with any carrier" supports NLRA jurisdiction over independent contractors such as PrimeFlight at JFK. This reading of "control" is made clear by the phrase "under common control with any carrier." Courts read the phrase "common control" to refer to a legal right of control. "Necessary to a finding of common control is the existence of corporate entities . . . which are in parallel position, both controlled by a single additional corporate entity such as subsidiaries owned by a common parent." *Union Pac. Corp. v. United States,* 5 F.3d

[3] The report also stated that the amendment extended RLA jurisdiction to "substantially all" companies in rail transportation. *Id.* At that time, most companies in rail transportation were carriers or wholly owned subsidiaries. *Herzog,* 624 F.3d 475. But as demonstrated *infra,* RLA coverage did not extend to independent contractors, including those performing services integral to rail transport on a long-term, continuing basis.

523, 526 (Fed. Cir. 1993) (quoting *Union Pac. Corp. v. United States*, 26 Cl. Ct. 739, 750 (1992)) (interpreting the Railroad Taxing Act). *See also Trans-Serve, Inc. v. United States*, 2004 U.S. Dist. LEXIS 7784 at * 10 (W.D. La. 2004), (citing cases involving common control, all of which involve an entity having a legal right of control); *Livingston Rebuild Ctr., Inc. v. R.R. Ret. Bd.*, 970 F.2d 295 (7th Cir. 1992) (common control present because the same individual was a principal investor in one entity and the controlling shareholder of another); *AMR Services Corp.*, 18 NMB 348, 351 (1991) (common control exercised through holding company owning airline and contractor).

"A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Svcs., Inc.*, 551 U.S. 224, 232 (2007). Since "control" is read to mean legal right of control in the phrase "under common control," it should have the same meaning in the phrase "directly or indirectly controlled by."

Congress linked the terms "owned" and "controlled" in the phrase "directly or indirectly owned or controlled by." This linkage helps define "controlled" as requiring a similar content, albeit in a different form, as "owned." The "common sense canon of *noscitur a sociis* . . . counsels that a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U. S. 285, 294 (2008).[4]

The RLA covers entities "indirectly controlled by" carriers. Congress's use of "indirect" was intended to extend RLA coverage to controlled enterprises regardless of the form through which control is exercised, so long as the degree of control is equivalent to control exercised

[4] In *Williams*, the Court interpreted a criminal statute concerning child pornography. It "narrowed the meaning" of two of the acts constituting criminal conduct to comport with the sense of the other words in the series.

through ownership.[5] The plain English meaning of "indirect" does not reduce the extent of control necessary for jurisdiction. An "indirect" route gets one to the same place as the direct route, just by a different path. Hence, Merriam-Webster Dictionary gives "roundabout" as a synonym for "indirect."[6] Thus, the plain language of the statute makes RLA coverage dependent upon a showing of control far greater than that of a client over an independent service contractor.

3. Over 50 Years of Precedent Finds NLRA Jurisdiction over Independent Contractors

In 1937 the Supreme Court made clear that independent contractors are outside the scope of the RLA. In *Virginian Ry. Co. v. Sys. Fed'n No. 40,* 300 U.S. 515 (1937), a carrier was obligated to comply with an NMB certification for its own employees performing heavy repair work on rail cars because their work was sufficiently related to rail transportation to affect interstate commerce. *Id.* at 554-56. The Court acknowledged that the employees doing the same work would *not* be covered by the RLA if they were employed by an independent contractor.

> It is no answer, as petitioner suggests, that it could close its back shops and turn over the repair work to independent contractors. Whether the railroad should do its repair work in its own shops, or in those of another, is a question of railroad management. *It is petitioner's determination to make its own repairs which has brought its relations with shop employees within the purview of the Railway Labor Act.*[7]

Id. at 557 (emphasis added).

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[5] *Delpro Co. v. Bhd. of Railway Carmen,* 519 F. Supp. 842, 847 (D. Del. 1981), *aff'd,* 676 F.2d 960 (3d Cir.), *cert. denied,* 459 U.S. 989 (1982), is an example of "indirect" ownership or control. A group of carriers owned the stock of a company, Trailer Train. Delpro, the contractor at issue, was a wholly owned subsidiary of Trailer Train. The court, upholding an NMB determination, found RLA coverage because the contractor was "indirectly owned by a group of carriers."

[6] Merriam-Webster Dictionary, *Indirect*, http://www.merriam-webster.com/dictionary/indirect (last visited Mar. 29, 2017).

[7] The Court then referenced the nature of the work performed by these employees because the case turned on the function test, not the control test.

Subsequently, in *Duquesne Warehouse Co.*, the Court explained that the "control" language in the RLA's definition of "carrier" was aimed at corporate subsidiaries, affiliates and those under similar control. *Duquesne Warehouse,* 326 U.S. at 451.

The Eighth Circuit stressed that Congress specifically decided to exclude independent contractors from the RLA and related statutes in *Reynolds v. N. Pac. Ry. Co., supra.* The court in *Reynolds* found that two companies providing boarding camp and general services to railroads were not "directly or indirectly owned or controlled" by a carrier and were therefore excluded from the Carrier Taxing Act. 168 F.2d at 936. The court noted that Congress was aware of the use of "outside contractors of services such as those here involved, and it chose not to include such contract workers generally or as a class in the scope of this railroad legislation." *Id.* at 941. Indeed, "when it was proposed in 1934 to bring all the contracting companies performing services which were an integral part in railroad transportation within the definition of a 'carrier' in the Railway Labor Act . . . Congress would not accept the proposal." *Id.* (citations omitted).

Since the companies at issue in *Reynolds* had the "dignity and status of actual business enterprises," *id.* at 935, and neither had "lost in effect its identity or status as a separate business enterprise in furnishing the services involved," *id.* at 940, they were outside the ambit of Carrier Taxing Act and therefore also outside the coverage of the RLA.[8]

The Third Circuit reached the same conclusion, finding that the Railroad Retirement Act did not cover employees of independent contractors in *Martin v. Fed. Sec. Agency*, 174 F.2d 364 (3d Cir. 1949). The contractor operated grain elevators for the railroad in a long term relationship integral to the transportation of grain. *Martin v. Fed. Sec. Agency,* 73 F. Supp. 482, 484 (W.D. Pa. 1947). The Circuit Court stated:

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[8] Subsequently, in *Kelm v. Chicago, St. P., M & O Ry. Co.*, 206 F.2d 831 (8th Cir. 1953), the Court confirmed that the 1947 amendments to the Railroad Retirement Taxing Act did not bring independent contractor companies under the railway legislation, as discussed *infra.*

> We do not think that the Congress intended to exclude widows and orphans of the employees of independent contractors of carriers from the benefits of the Act, but only that it sought by Sec. 1532, and kindred sections, to prevent carriers from escaping the obligations laid upon them in the Railroad Retirement Act and the Carrier Taxing Act by the devices of organizing separate and distinct companies or contracting with companies over whose business policies and operations it, by various means, had the *definite legal right to control.*

174 F.2d at 367 (emphasis added).

The court was "favorably impressed" with the understanding that:

> control has reference to the control of a company attained through financial arrangements, stock ownership, voting trust, interlocking directorates, and other corporate and business devices which have regard to its management, business policies, or corporate functions. Railroad Retirement Board Regulation 202.4 [codified at 20 C.F.R. 202.4] defines such control as the "mean, method or circumstances, irrespective of stock ownership, to direct . . . the policies and business of such a company . . ."

Id. at 366.

In *Nicholas v. Denver & RGWR Co.,* 195 F.2d 428, 433 (10th Cir. 1952) and *Kelm v. Chicago, St. P., M. & O. Ry. Co.,* 206 F. 2d 831 (8th Cir. 1953), the courts again held that the Carriers Taxing Act did not cover independent contractors. These courts noted that Congress also specifically rejected covering independent contractors in 1946, when it amended the Carriers Taxing Act through the Railroad Retirement Taxing Act.

> While the bill as originally introduced was intended among other things to bring independent contractors of that kind and their employees within the purview of the legislation, and whatever the purpose of Congress may have been in other respects, the legislative history indicated clearly that the final action of Congress represented a deliberate intent and purpose to leave such contractors and their employees outside the scope of the act insofar as employment taxes were concerned.

Nicholas, 195 F.2d at 433

See also Pa. R. R. Co. v. United States, 70 F. Supp. 595 (Ct. Cl. 1947) (independent contractor not covered by Carrier Taxing Act even though for many years it performed work integral to rail transport, all of the equipment was owned by the carrier,

the work was performed under the general supervision of the carrier and the carrier had the power to remove contractor employees); *New England Freight Handling v. Hassett*, 33 F. Supp. 610 (D. Mass. 1940) (freight handler not covered by Carrier Taxing Act because it was an independent contractor).

The Sixth Circuit enforced a NLRB decision finding an in-flight caterer to be under NLRA jurisdiction in *Dobbs House, Inc. v. NLRB,* 443 F.2d 1066 (6th Cir. 1971). The carriers provided "detailed instructions" as to how the caterer's employees should perform their work, had "unlimited access to every phase of the catering operations," gave direct orders to the employees on occasion, and had the right to and did in fact on ten occasions have objectionable contractor employees removed at various airports. *Id.* at 1069-70. Yet, because the carriers had no authority to discipline the caterer's employees and did not "hire, promote, demote or control the pay, hours, shifts or working conditions," the court held that the carriers did not exercise sufficient control over the contractor to bring it under the coverage of the RLA.

The *Dobbs House* court contrasted the facts before it to cases in which jurisdictionally significant carrier control was present. It distinguished cases involving wholly-owned subsidiaries. *Id.* at 1070-71. It also distinguished a case in which the contractor could do no work for any other company without the permission of the controlling carrier and the controlling carrier covered the losses and shared in the profits of the contractor. *Id.* at 1071. Finally, it distinguished a case in which the contractor was permitted to perform services only for a single carrier, which provided all of the premises and equipment and paid part of the salaries of some of the contractor's employees. *Id.* at 1071-72. In contrast, Dobbs House sold "its services to whomever it will and can," and thus did not have an exclusive contracting relationship with any particular airline or airline consortium. *Id.*

In recent years, four district courts have examined airline control, and all found independent contractors outside RLA jurisdiction. The court in *Air Serv Corp. v. SEIU Local 1*, No. 16-10882, 2016 U.S. Dist. LEXIS 166437 (E.D. Il. Dec. 2, 2016) rejected the employer's request for an injunction against a strike under the RLA after finding no evidence of control greater than that found in a typical contractor relationship. The court that granted the §10(j) injunction in this case found it "resoundingly clear" that the employer was under the NLRA. *Paulsen v. PrimeFlight Aviation Services,* 2016 U.S. Dist. LEXIS 146786, *13, 207 L.R.R.M. 3434 (E.D.N.Y. 2016). *See also Roca v. Alphatech Aviation Services, Inc.,* 961 F. Supp. 2d 1234; 1239-40 (S.D. Fl. 2013) ("Meticulous work instructions and prior approval of an independent contractors' employees will not convert those employees into a carrier's employees for RLA purposes.")[9]; and *Cunningham v. Elec. Data Sys. Corp.*, No. 06-3530, 2010 U.S. Dist. LEXIS 32112 (S.D.N.Y. Mar. 30, 2010) (rejecting RLA defense to overtime requirement).

Airway Cleaners is consistent with NMB decisions reaching back to the 1930s. *See, e.g., Erie Railroad Co.,* 1 NMB 20, 21 (1973) (employer was "an independent contractor not subject to the RLA); *Sabena Belgian World Airlines*, 3 NMB 25, 25 (1956) (no jurisdiction over employees because the caterer-employer operated as an "independent contractor" even though the chef was a Sabena employee and Sabena provided the kitchen facilities and vehicles); *Great Lakes Airlines,* 4 NMB 5 (1961) (no jurisdiction because employees work for and receive compensation from contractor and are not carrier employees); and *Pinkerton's,* 5 NMB 255, 257 (1975) (no RLA jurisdiction because employer was "an independent corporation, [and] its airline related activities are clearly *de minimus* . . .").

[9] The court was concerned that an expansive reading of the control test would "embrace a large and heretofore undefined swath of non-air carriers," eliminating overtime protection for their employees." 961 F.Supp. 2d at 1240. 29 USC § 207 exempts employees covered by the RLA from overtime protection.

In *Miami Aircraft Support,* 21 NMB 78, 82 (1993), the NMB declined jurisdiction because the contractor ("MAS") was a typical independent contractor.

> There is no evidence that a carrier or carriers control the manner in which MAS does business. MAS is an independent company, which contracts with air carriers through a competitive bidding process. MAS controls its own budgets and expenditures, and is responsible for its own profitability. The carriers do not have access to MAS business or personnel records, except for training records which are checked periodically to verify compliance with FAA regulations and contract terms.

See also Dynamic Science, Inc., 14 NMB 206, 206 (1987) (no RLA jurisdiction when contractor "pays all wages and benefits" and "directly supervise[s] the employees, impose[s] discipline and do[es] the hiring and firing."); *CFS Air Cargo, Inc.,* 13 NMB 369, 369 (1986) (even though airline instructed contractor employees on certain tasks, no RLA jurisdiction because contractor "pays the employees and provides the benefits" and the airlines have "no control over hiring or firing"); *Allied Maintenance Corp.,* 13 NMB 255, 256 (1986) (no RLA jurisdiction when contractor-carrier contract specified that the employees were "*exclusively under the direction and control*" of the contractor, which was "*an independent contractor in every respect.*" (emphasis in original)); *Ogden Aviation Services,* 20 NMB 181, 184 (1993) (same); *Ebon Services,* 13 NMB 3, 4 (1985) (personnel policies set independently of carriers and embodied in Ebon's personnel manual); *Ogden Aviation Services,* 23 NMB 98, 103-07 (1996) (employee handbook contains policies and procedures, including three-step disciplinary procedure, and had no carrier input, demonstrating independent decision making.); *Flight Terminal Security Co.,* 16 NMB 387, 396 (1989) (no RLA jurisdiction when contractor has its own supervisory structure).

The NLRB has rejected RLA jurisdiction over independent contractors going back over 50 years. In addition to *Allied Aviation* and *Dobbs House,* in *Marriott In-Flite Services* the

Board found NLRA jurisdiction over an airline caterer. The ALJ wrote: "[C]ontrol does not mean simply specifications in some detail as to the nature of the services to be performed and the method used, but control of the management and business policy of the subordinate company." 171 NLRB at 752. The ALJ cited many cases in which the NLRB had asserted jurisdiction over airport independent contractors, *id.* at 750 n.11, and no NMB case finding RLA jurisdiction absent common ownership. *Id.* at 751 n.16. *See also Hot Shoppes, Inc.*, 143 NLRB 578, 580 (1963) (no RLA jurisdiction since contractor's employees are not employees of carrier even though the carrier directed their work while they are on the airfield); *Wings & Wheels, Inc.*, 139 NLRB 578, 580 (1962), *enf'd*, 324 F.2d 495 (3d Cir. 1963) (company that forwarded freight by truck to and from airlines not under the RLA, because not itself a common carrier by air); *D & T Limousine,* 207 NLRB 121 (1973) (no RLA jurisdiction over independent contractor even though carrier provided all on-site supervision).

In sum, the decisions of the courts, the NMB and the NLRB show that it has long been the case that independent contractors are not subject to RLA jurisdiction even when they perform functions traditionally performed by carriers.[10] The ALJD here is fully consistent with those decisions.

C. Allied Aviation/Airway Cleaners Standard Fleshed Out

Allied Aviation correctly finds NLRA jurisdiction when there is a "typical subcontractor relationship" between the carrier and the contractor. The D.C. Circuit noted that the NMB and NLRB have not "explained what a typical contract for services looks like . . ." *ABM Onsite,* 849 F.3d at 1144 n.4. In fact, the explanation is firmly rooted in case law describing the contours of

[10] Indeed, a diligent search of NMB cases shows that the concept and term "derivative carrier" did not even exist until 60 years after the 1934 amendments, first appearing in *Federal Express Co.,* 23 NMB 32, 1995 NMB Ltr. LEXIS 14, * 47 (1995).

the typical subcontractor relationship. As the district courts in *Cunningham,* 2010 U.S. Dist. LEXIS 32112 at *25, and *Roca*, 960 F. Supp. 2d at 1374, concluded, the key issues are control over business operations and control over personnel issues/supervision. Access to records and operations, training and how the employees are held out to public are secondary factors, useful in shedding light on control over operations. These cases confirm that a "typical subcontractor" which retains control over is essential business operations and over its employees is not covered by the RLA.

1. Control over Business Operations

The critical issue in control over business operations is whether the airlines have a "definite legal right of control" or equivalent power over the contractor's "business policies and operations." *Martin,* 174 F.2d at 367.[11] Central to this inquiry is whether the "operation of the [contractor] is conducted in the interest of the carrier." *Duquesne Warehouse,* 326 U.S. at 451 n.10. A typical contractor has entrepreneurial freedom to earn a profit or suffer a loss unrestricted by the carrier's interests. It may sell "its services to whomever it will and can" and does not have an exclusive contracting relationship with any particular airline or airline consortium. *Dobbs House,* 443 F.2d at 1071-72. It has its own budget, controls its own expenditures and is responsible for its own profits. *Miami Aircraft Support,* 21 NMB at 82. A typical contractor markets itself to the airlines based on its efficiency, quality, low cost and innovation and has corporate resources devoted to obtaining and retaining business. In contrast, a company that is subject to the carriers' determining what work a company may accept and taking responsibility for its profits and losses is atypical and likely under airline control for RLA purposes. *Thaddeus Johnson Porter Servs., Inc.,* 3 NMB 81, 83 (1958) ("[U]nlike most

[11] This is different than some NMB cases decided in 1997-2011 which looked at whether the carrier influenced operations as a more expansive and amorphous criterion.

corporations, the final decision to accept new business rests not with the [contractor] but with the recipients of the [contractor's] services."). The typical contractor seeks work in the market place and performs services for multiple airlines at multiple airports. *Air Serv Corp.*, 39 NMB at 479 (listing performing work for more than one company as a factor). [12]

Clauses in contracts specifying an independent contractor relationship indicate a typical customer-independent contractor relationship and are highly probative of NLRA jurisdiction. *Allied Maintenance*, 13 NMB at 256 (service contract specified contractor was "an independent contractor in every respect"); *Stanley Smith Sec.*, 16 NMB 379, 381 (1989) (independent contractor which has complete control over conduct of employees).

Carriers take a variety of measures to ensure that the contractor performs the services efficiently, safely, with high quality, at low cost and in compliance with carrier specifications and legal requirements. These measures are typical and do not show jurisdictionally significant control. Carriers often provide "meticulous work specifications," *Roca*, 960 F. Supp. 2d at 1374 or "detailed instructions," *Dobbs House*, 443 F.2d at 1069-70; *see also Ogden*, 23 NMB at 106 (work requirements which are "in the nature of those necessary to ensure the carriers' efficient operations rather than an imposition of control" do not create RLA jurisdiction). Carriers invariably have frequent communication with contractors concerning operational issues. *E.g.*, *Bags, Inc.*, 40 NMB at 167 (daily conference calls between airline and contractor).

Carriers typically impose training and other requirements to assure safety and regulatory compliance. *Aero Port Services*, 40 NMB at 141 (carriers providing procedures for fulfilling TSA safety requirements not control); *Bags, Inc.*, 40 NMB at 169 (FAA required training not

[12] The idea that a contractor may be "controlled" by a variety of airlines operating under different contracts has no basis in the legislative history or the pre-1980s case law. Control means control by a particular airline over the contractor, as is clear from Congress and the courts' concern over evasion of the RLA by a specific carrier manipulating corporate forms.

evidence of carrier control); *Pinkerton, supra*; *Ogden*, 23 NMB at 104 (carrier provides safety and, hazardous material training and training for cleaning and loading aircraft, yet no control). Carrier control over the content of and carrier conducting training is not determinative for jurisdiction. *Huntleigh,* 40 NMB at 132-33.

Contractors typically, if not universally, perform services when the carriers need them and schedules are often tied to flight times. *Ogden,* 23 NMB at 106 (scheduling is necessarily dependent upon flight schedule); *Glenway, Inc.,* 17 NMB 257, 259 (1990) (contractor necessarily must conform its schedule to arrivals). Carriers' determining when the work is to be performed does not create RLA jurisdiction.

Carriers typically have access to the contractor's operations and records to assure proper performance of the contract. Access limited to monitoring contractor performance is not jurisdictionally significant. *Signature Flight Support,* 32 NMB 214, 224-25 (2005) (access to records limited to safety and security items); *Miami Aircraft Support*, 21 NMB at 82 (access limited to verifying compliance with regulations and contract terms); *Ogden*, 23 NMB at 103 (no general access to operations and records, but limited access for security and safety purposes); *cf. Wabash R.R. Co. v .Finnegan,* 67 F. Supp. 94, 101-02 (E.D. Mo. 1946) (carrier controlled sham independent contract because, *inter alia,* carrier maintained payroll records).

Airport contractors virtually always work on premises controlled by the carriers.[13] Sometimes the carriers provide office space and/or break rooms, folding the cost into the economics of the contract. The contractors typically provide certain equipment and/or supplies, while the carriers provide other equipment and/or supplies. *E.g., Menzies, supra*; *Huntleigh USA*

[13] In-flight caterers often have off site kitchens, *e.g., Hot Shoppes, supra.* Shuttle bus drivers may work near, but not on, premises controlled by the airlines. This fact appears to play no role in NMB determinations. *See Air Serv,* 39 NMB 450 (shuttle bus at JFK is NLRA) and *Air Serv Corp.,* 35 NMB 201 (2008) (shuttle bus at Memphis under RLA).

Corp., supra. The percentage of equipment or work space provided and working at the airport are significant only if they show that the contractor is a dependent, captive contractor of a carrier, rather than an independent entity. *Wabash R.R. Co. v. Finnegan,* 67 F. Supp. at 101-02 (carrier controlled sham independent contractor because, *inter alia,* it supplied all equipment).

Typically, carriers have influence over staffing levels. Particularly, if the carrier pays the contractor on a cost-plus basis or a set rate for each hour of labor, the carrier will carefully monitor its expenses by controlling staffing. However, typically, the carrier does not determine the workers' shift assignments, give permission for time off or assign overtime. *Air Serv,* 39 NMB at 453 (airline consortium set bus schedule but did not assign drivers to routes).

The typical relationship has the employees wearing uniforms with the contractors' logo, while the airlines approve the uniform. Airline approval of uniforms does not speak to the NMB's criterion of how the employees are presented to the public and has no legal significance.[14] Employees' wearing the same uniform regardless of the airline for which they are performing services is indicative of contractor independence. *Huntleigh USA Corp.,* 14 NMB 149 (1987). However, a minority of contractor employees wear airline uniforms. No cases appear to turn on whose uniform are worn by the employees. *See, e.g., Roca, supra*; *Cunnigham, supra.*

2. Control Over Personnel Decisions and Supervision

The typical airport subcontractor controls its own personnel decisions and supervises its employees. RLA jurisdiction requires the carriers to have an on-going, substantial role in hiring, firing, discipline and supervision. Service contract provisions specifying that the employees are employed by, under the control of and/or are supervised by the contractor are highly probative of

[14] That some NMB cases from 1997-2011 have cited airline approval of uniforms as indicating control underlines the need to fully flesh out the meaning of the *Airway Cleaners* standard.

a typical contractor relationship. *Elsinore Aircraft Services,* 20 NMB 355, 355 (1993) (contract affirms independent contractor relationship and contractor has sole authority over employees); *Combined Contract Serv.,* 18 NMB 163, 166 (1991) (contract specified that employees are employed by and under the control of the contractor).

Similarly, typical contractors have personnel policies that apply to their employees regardless of the airline for which they are performing services. Such policies usually appear in employee handbooks over which the airlines have no control. *Air Serv,* 39 NMB at 453 (handbook setting all terms and conditions of employment had no reference to airline control); *Ebon Servs., Int'l,* 13 NMB 3 (1985) (personnel policies in handbook are set by contractor independently of airlines).

Typical contractors control disciplinary rules and procedures and make their own decisions on whether to discharge or discipline. *Ogden,* 23 NMB at 103 (contractor having its own three-step disciplinary process indicates it controls discipline). Contractors are the effective decision makers. *Bags, Inc., supra.* Carriers' reporting employee misconduct and even requesting specific personnel action does not turn them into decision makers.

A carrier typically (indeed, almost universally) has the right to compel a contractor to remove an employee from the carrier's account.[15] *E.g., Dobbs House,* 443 F.2d at 1069; *Pa. R.R. Co.*, 70 F. Supp. at 599-601. The right to remove by itself is not jurisdictionally significant. The critical issues is whether the contractor decides whether to discharge the employee decide to transfer, lay off with eligibility for rehire, or discipline the employee. *Menzies,* 42 NMB at 6 (airlines report employee misconduct but contractor determines discipline). The NMB found service contract language that allowed for removal of employees but left discharge decisions

[15] That JetBlue's right to have PrimeFlight employees removed is so limited as to be inconsequential makes NLRA jurisdiction exceptionally clear.

with the contractor indicative of a lack of carrier control. *Andy Frain*, 19 NMB 161, 162-63 (1993) (contract which allows airline to have employees removed but makes contractor responsible for supervising employees "illustrates the lack of significant direct or indirect control"); *Ogden Aviation Services,* 20 NMB 181, 189 (same).[16]

The contractors supervise the employees and typically have a substantial supervisory structure. *Flight Terminal Security, supra.* Airlines often play some limited and/or sporadic role in instructing contractor employees about their duties, but this is not jurisdictionally significant. *Dobbs House,* 443 F.2d at 1069 (carrier may correct employees who depart from specifications or authorize such departures and gives direct orders during loading); *Hot Shoppes, Inc.,* 143 NLRB at 579 (airline personnel give direct orders on the airfield and employees required to follow their recommendations); *Signature Flight Support,* 32 NMB at 221 (carrier oversees fueling and supervises oil servicing).

Contractors make hiring decisions. A carrier influencing hiring of the manager or an occasional employee is not significant. *Huntleigh*, 40 NMB at 132 (airline approval for hiring manager). Carriers regularly set certain eligibility requires for hiring such as ability to lift a certain weight or ability to speak English. Carriers universally require background checks and drug tests. These requirements do not constitute control over hiring. *Id.*

D. The Record Fully Supports NLRA Jurisdiction Over PrimeFlight

The evidence clearly supports the ALJ's finding that JetBlue is under NLRA jurisdiction. The judge emphasized PrimeFlight's control over disciplinary decisions and procedures, hiring, pay rates, benefits and work requirements. PrimeFlight supervises the employees. It largely

[16] Some cases suggest that whether the contractor has a second account at the airport to which it might transfer an employee who was removed is significant. But since contractors gain and lose accounts frequently, attaching significance to the second account would create instability and inconsistency, with a contractor possible moving in and out of NLRA jurisdiction with each contract cycle.

determines training requirements. The employees wear uniforms with the PrimeFlight logo. ALJD at 10. Since JetBlue's influence is largely "generalized, broad constraints which related to standards of performance," it exercises control "no greater that [that] found in a typical subcontractor relationship." *Id.*

PrimeFlight controls its own business operations. "The relationship between JetBlue and [PrimeFlight] is that of independent contractors . . . and neither party shall have the power or authority to obligate or bind the other party in any manner whatsoever." GTA, Jt. Ex. 2, ¶ 22.5. The GTA requires PrimeFlight to "at its sole cost and expenses furnish all labor, supervision, equipment, facilities, materials, supplies, and any other requisites . . . ." ALJD at 8; Jt. Ex.-2, ¶ 9.1. PrimeFlight supplies the detailed work specifications such as the wheelchair training manual. CP Ex.-2. PrimeFlight is an independent company just as the employer in *Miami Aircraft Support, supra.*

PrimeFlight exclusively controls all aspects of labor relations, including personnel decisions and supervision, as demonstrated by the GTA. PrimeFlight has exclusive control over its Employee Handbook, which sets out detailed and comprehensive employment policies. ALJD at 8. PrimeFlight hires, supervises, schedules, assigns, promotes, demotes, discharges and disciplines without ceding any control to JetBlue. *Id.* PrimeFlight set its employees' wages and benefits without any JetBlue input. *Dynamic Science, Inc.,* 14 NMB 206 (1987); *CFS Air Cargo, Inc.,* 13 NMB 369 (1986). In particular, JetBlue does not have a general right to have PrimeFlight employees removed from its account. ALJD at 8.

As the ALJ discussed, ALJD 9-10, JetBlue exercises less control than the airlines in *Bags, Inc.,* 40 NMB 165, 168 (2013), one of which "determine[d] the hours of operations and the number of employees needed per shift." In both cases, the carriers inform the contractor if they

believe the operations are short staffed. *Id.* Carrier supervisors bring to Bags issues with its employees immediately or in weekly meetings. *Id.* The carriers provided Bags with standard operating procedures, *id.* at 166, while JetBlue provides only the SOW, and PrimeFlight uses its own training manual detailing how the work is to be performed. Bags was required to "use its best efforts to follow any instructions provided by Delta's designed management representatives ...regarding the standards, procedures and practices to be followed in furnishing Services . . ." *Id.* at 167. "Alaska tells Bags how to run operations if there are performance issues . . ." *Id.* at 167. JetBlue does not exercise similar control over PrimeFlight. Just as PrimeFlight has daily briefings with JetBlue, Bags has a daily conference call with its carriers. *Id.* The carriers provided some of the equipment and the premises to Bags, just as JetBlue provides some equipment and the premises to PrimeFlight. *Id.* at 167. Just as JetBlue can fine PrimeFlight for substandard performance, GTA, Jt. Ex. 2, SOW, ¶ 6, so the carriers could fine Bags. 40 NMB at 166. The carriers had "full access" to Bags' records concerning employment qualifications. *Id.* at 168. In *Bags* and for PrimeFlight, the employees are held out to the public as employed by the carrier, not the contractor. In both cases, the carrier had to approve the uniform, and the uniform bore the logo and name of the contractor, not the airline. *Id.* at 167.

JetBlue exercises less control over training than the carriers in *Bags.* The carriers provide Bags with "all training manuals and standard operating procedure manuals" and directly trained employees on "pre-employment computerized skycap and wheelchair training, additional disability training, dangerous goods and hazmat, and additional customer service training." The carriers also trained the Bags trainer for off-site check in service. *Id.* at 166-67. By contrast, PrimeFlight largely controls the content of the training and its employees conduct all the classroom and on-the-job training.

E. PrimeFlight's Substantive Argument Against Allied Aviation Are Meritless

1. NMB Decisions From 1997-2011 Are Inconsistent with Congressional Intent

PrimeFlight cites a number of NMB opinions, all but one of which date from 1997-2011.[17] Employer's Brief ("ER Br.") at 14-18. During that 14 year interval, the NMB found RLA jurisdiction based on the kind of influence a client always has over a contractor performing services on the client's premises. The NMB never reconciled these decisions with its previous rejection of RLA jurisdiction for independent contractors, never explained how these decisions are consistent with the statutory text or the legislative history and never addressed the judicial precedent cited above. The 1997-2011 decisions are wrongly decided and lack a principled rationale.

2. LaGuardia Decision Is Easily Distinguishable

The Employer asserts repeatedly that the facts in the instant case are similar to *PrimeFlight Aviation Services,* 34 NMB 175 (2007), which found RLA jurisdiction over Primeflight's LaGuardia ("LGA") operation.[18] ER Br. 21-24. The facts, however, are quite different. Two-thirds of PrimeFlight's work at LGA came, not from JetBlue, but from American and US Air. *Id.* at 178. Air carriers directly trained one-half of PrimeFlight's LGA workers, while JetBlue does no direct training at JFK. *Id.* at 179. The carriers determined staffing levels, specific assignments and made "all decisions regarding changes in daily assignments." *Id.* at 180. JetBlue makes none of those decisions. The carriers set specific per-hour prices for services at LGA, "which affects wage amounts", *id.* at 180, while JetBlue pays PrimeFlight a

[17] For a more thorough discussion, see Brent Garren, *NLRA and RLA Jurisdiction over Airline Independent Contractors: Back on Course,* 31 ABA J. Lab. & Emp. L. 77 (2015). PrimeFlight cites this article, Er. Br. 25; yet, the Employer does not address, let alone refute, its arguments.

[18] The Employer also relies on *PrimeFlight Aviation Services,* 353 NLRB 467 (2008). However, that two-member decision was abrogated by *New Process Steel, L.P. v. NLRB,* 560 U.S. 674 (2010). *See also Masonic Temple Association of Detroit and 450 Temple, Inc.*, 364 NLRB No. 150, slip op. at 1 n.1 (2016).

fixed rate per turn.[19] Jt. Ex. 2, SOW, ¶ 7, Payment Terms. The carriers exercised their apparently unlimited right to have PrimeFlight remove employees from their accounts and determined discipline of PrimeFlight employees. *Id.* at 180-81. Here JetBlue has almost no right to have PrimeFlight employees removed and has never asked PrimeFlight to discipline or discharge an employee. Some of PrimeFlight's LGA employees wore uniforms identifying themselves as carrier employees, while none do at JFK. *Id.* at 181. In short, the extent of carrier control manifest in the 2007 NMB decision is far more extensive than in the instant case.

3. The Impact of A Potential Strike Does Not Substitute For Airline Control

PrimeFlight suggests that any company in which a strike would disrupt air travel should be under RLA jurisdiction. PrimeFlight boldly asserts that any "modicum" of airline control suffices. ER Br. at 27. It cites *Verrett v. SABRE Grp., Inc.*,70 F.Supp. 2d 1277 (N.D. Okla. 1999), for the proposition that meeting the function test only suffices for RLA coverage.[20] ER Br. 16. However, PrimeFlight's argument flies in the face of the statutory control requirement.[21] Under the two-part test, a non-carrier may be covered by the RLA only if it *both* performs the traditional functions of a carrier *and* is under carrier control. By focusing only on whether a strike by an employer's employees would impact air transportation, PrimeFlight ignores the second part of the test.

That a strike by an employer's employees would affect air transportation may be relevant to the "function" test, but it tells us nothing about whether the employer is under carrier

[19] A turn consists of an airplane's arrival and departure.

[20] *Verrett* involved a company that was under common ownership with an airline. It did not involve the extent of airline control over an independent contractor. The *Verrett* court did not address the control language, did not reconcile its relationship to the claim that function would suffice for RLA coverage and cited no authority in support.

[21] *Verrett* asserts that one of the purposes of the 1934 amendments was to prevent strikes. That the railroads sought to narrow the amendment's coverage demonstrates that it was aimed at preventing employer evasion of the RLA, not protecting the carriers from strikes. If strikes were at issue, the railroads would have sought to expand the reach of the amendment, not contract it.

control.[22] The function prong is expressed in the statutory requirement that an RLA employer "operates any equipment or facilities or performs any service (other than trucking service) in connection with transportation . . . of property transported by railroad . . . ." 45 USC § 151, First. Because the work is in connection with transportation, any strike by employees who satisfy the function prong will by definition have an impact on air transportation. Nonetheless, Congress insisted that a second independent requirement be added to the statute, *viz.*, that a non-carrier employer will be covered by the RLA only when it is "directly or indirectly owned or controlled by or under common control with any" carrier. *Id.*

Neither the NMB nor the NLRB has ever based a jurisdictional determination on the nature of work performed once the function test has been met. For example, the NMB has declined jurisdiction over employees who fuel aircraft, yet no ground handling function could be more essential to air travel than fueling. *AIR BP,* 19 NMB 90 (1991); *Mercury Refueling*, 9 NMB (1982), *Signature Flight Support*, 32 NMB No. 42 (2005). The employer at issue in *Allied Aviation* fueled all aircraft at Newark Liberty Airport, one of the nation's busiest airports. Yet, the NLRB exercised jurisdiction over it, with the approval of the D.C. Circuit. In *Paulsen v. PrimeFlight* 2016 U.S. Dist. LEXIS at * 13, the district court rejected the same strike argument, since it emphasizes the "function factor to the detriment of the substantial control factor."

PrimeFlight's argument would create an obstacle to realizing the twin goals of federal labor policy expressed in both the RLA and NLRA: industrial stability and peace through collective bargaining and the employees' right to freely select or reject a bargaining agent. The "heart" of the RLA is the duty to make and maintain collective bargaining agreements. *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 377-78 (1969). The RLA's

[22] The potential to disrupt air travel is not even a good proxy for the function test. A strike by skycaps would not meaningfully disrupt air travel, especially since some airlines operate without offering skycap services.

"provisions are aimed at the settlement of industrial disputes by the promotion of collective bargaining . . ." *Virginian Ry.*, 300 U.S at 553. Similarly, the NLRA seeks industrial stability through collective bargaining. 29 U.S.C. § 151 (2012).

RLA jurisdiction over contractors would create an almost insuperable barrier to organization, undercutting industrial peace through collective bargaining and employee free choice. The NMB requires elections to be held in nation-wide units. *Summit Airlines Inc. v. Teamsters Local Union No. 295,* 628 F. 2d 787, 795 (2nd Cir. 1980); *Aircraft Servs. Int'l Grp.*, 40 NMB 43, 48 (2012). This is appropriate for carriers whose employees work in a single, integrated transportation system, who have frequent interaction between airports and many of whom travel to different airports. PrimeFlight employs approximately 5,000 workers at approximately 44 airports. Garren, *Back On Course*, at 81. A successful organizing campaign at 44 airports simultaneously for workers performing services for different airlines and who have no interchange or contact among different airports is a practical impossibility. [23]

4. PrimeFlight Has No Legitimate Reliance Interest At Stake

PrimeFlight argues, without citing any authority, that the NMB's decisions from the late 1997 through 2011 imbue PrimeFlight with a reliance interest in extending RLA jurisdiction to its JFK operation. ER Brief at 30. However, PrimeFlight began operations at JFK in May 2016. The NMB had consistently declined RLA jurisdiction over airport independent contractors for the prior four years, starting with *Air Serv Corp.*, 39 NMB 450, *recon'd den'd* 39 NMB 477 (2012). The NLRB had already found the PrimeFlight San Juan operation under NLRA jurisdiction. *PrimeFlight Aviation Services,* 12-RC-113687, denial of request for review, June 18, 2015. In addition, a diligent search has not revealed any cases in which the NLRB finds a legitimate reliance interest in maintaining the absence of a bargaining relationship. *Cf. United*

[23] For a fuller exposition of this argument, *see* Garren, *Back on Course,* at 96-99.

Parcel Service, 318 NLRB 778, 781 (reliance interest in maintaining decades of bargaining under NLRA).

5. Inconsistent Results and Splintering Arguments are Meritless

PrimeFlight argues unconvincingly that NLRA jurisdiction over the JFK operation will produce an unacceptable "patchwork" in which some PrimeFlight operations are under the NLRA and others under the RLA. ER Brief, p. 15-16; 30. PrimeFlight ignores the well-settled law that jurisdictional determinations vary by "location and operation." Hence, there may be differing outcomes for the same employer at different airports.

> Because contracts and local practices might vary in a determinative manner for different employees groups, different operations, and in different locations, the NMB's opinion is based on the record before it in each case. *Air Serv Corp.,* 39 NMB 450, 455-56 (2012).

For example, Huntleigh USA Corporation's operations at Houston and Saint Louis airports are regulated by the NLRA. *Huntleigh USA Corp.*, 40 N.M.B. 130, 138 (2013) (Houston); *Huntleigh USA Corp.*, 14 N.M.B. 149, 150 (1987) (Saint Louis). However, its Oakland airport operations were deemed under the RLA. *Huntleigh USA Corp.*, 29 N.M.B. 121, 127 (2001). The proximity of the airports does not matter: Air Serv is NLRA at LaGuardia, *Air Serv Corp.,* 39 NMB 450,but deemed under the RLA at Kennedy, *Air Serv Corp.,*38 NMB 113 (2011). *See also Oxford Electronics, Inc.,* JD-43-17 at 9, n. 8 (5/31/2017).

The NLRB and Regional Directors have found PrimeFlight operations at three other airports within NLRA jurisdiction, namely: San Juan airport, 12-RC-113687, denial of request for review, June 18, 2015; Philadelphia International Airport, 4-RC-193810, DDE March 29, 2017; and Westchester airport, 02-RC-158251 DDC September 28, 2015 and 02-RC-186447

(DDE November 9, 2016), in addition to the District Court finding on Kennedy Airport. NLRA jurisdiction over JFK strengthens uniformity and stability.[24]

6. NLRA Jurisdiction is Consistent with the D.C. Circuit Decisions

PrimeFlight argues erroneously that the D.C. Circuit's opinion in *ABM Onsite* supports RLA jurisdiction in the instant case. ER Br. 24-29.

First, the Employer turns a blind eye to the D.C. Circuit's enforcing the Board's order in *Allied Aviation,* a decision which post-dated *ABM.* A unanimous NLRB took jurisdiction over a company that fueled all the air carriers at Newark Liberty Airport. The Board found that the carriers exerted no more control than in a typical carrier-contractor relationship and that the carrier did not make major personnel decisions such as hiring and firing. *Allied Aviation,* 362 NLRB No. 173 (2015). The court enforced the Board's decision, rejecting the claim that the NLRB acted arbitrarily or capriciously. And it determined that the Board considered all the relevant factors from the NMB's traditional test. Since the ALJ applied the test from *Allied Aviation* and the NMB cases on which it relied, the D.C. Circuit opinion supports finding NLRA jurisdiction in the instant case.

Even if viewed in isolation from *Allied Aviation,* the D.C. Circuit's opinion in *ABM Onsite* does not support RLA jurisdiction in the instant case. Despite the mischaracterization by PrimeFlight, the D.C. Circuit did not reject the NMB/NLRB *Allied Aviation/Airway Cleaners* jurisdictional test. Rather, the *ABM* court saw the emphasis on whether the airlines controlled personnel decisions as a change from prior precedent. It remanded to the NLRB "to provide some explanation justifying the new test." *Id.,* slip op. at 19. The *ABM* opinion did not interpret or negate the RLA's control requirement. And the court noted that the NLRB "could fairly read

[24] A representation petition has been filed concerning PrimeFlight's operations at LaGuardia airport. There is no Regional Director determination yet. Case No. 29-RC-198504, petition filed May 10, 2017.

recent NMB opinions to require greater carrier control over personnel matters than the record evinced." *ABM Onsite*, slip op at 18. The Board should respond to the *ABM* opinion by providing an explanation for its recent approach the jurisdictional issue.

Moreover, *ABM On-site* is clearly distinguishable on its facts. The *ABM* court found "most notabl[e] that the carriers could establish all standard operating procedures and provided all operating manuals. *ABM,* slip op. at 6. Here, PrimeFlight provides the work specifications such as the wheelchair assist manual, CP-1. There is no evidence of JetBlue providing operating procedures and manuals. The court found it "important" that the carriers had the right to approve any changes in key personnel. *Id.* PrimeFlight stipulated that it was solely responsible for hiring. While ABM employees had to wear uniforms with the carriers' logo, *id.,* none of the PrimeFlight workers wear JetBlue uniforms. To the contrary, JetBlue insists that the uniforms are distinct from JetBlue's. None of these key facts on which the *ABM Onsite* court relied are present in the instant case.

F. The NLRB Should Decide This Matter Rather than Referring It to the NMB

The NLRB should accept the invitation of the *ABM* Court to provide a rationale for the *Allied Aviation* standard rather than refer the issue to the NMB. *ABM Onsite,* slip op. 19. The Board's deciding the case is consistent with referral doctrine. *Federal Express* 317 NLRB 1155 (1995) and *United Parcel Service,* 318 NLRB 778 (1995), *enf'd.* 92 F.3d 1221 (D.C. Cir. 1996). The NLRB generally refers jurisdictional issues to the NMB. *UPS,* 318 NLRB at 780. It does so to "obtain the NMB's expertise," to "minimize the possibility of conflicting agency determinations," to discourage forum shopping, and to promote stability. *Federal Express,* 317 NLRB at 1156. However, this referral policy is discretionary. The NLRB has the statutory authority to resolve jurisdictional matters without referral to the NMB. *Dobbs House,* 443 F.2d

at 1072; *UPS, 92 F.3d* at 1225; *In re Spartan Aviation Industries,* 337 NLRB 708 (2002). The NMB does not have "primary jurisdiction" over resolving NLRA/RLA jurisdictional issues. Nor is there a hierarchy placing the NMB in front of the NLRB in resolving jurisdictional issues. *UPS,* 92 F.3d at 1225. The Board does not refer cases "in situations where NMB precedent provides a clear answer." *ABM,* slip op at 5. *See also UPS,* 318 at 780. The NMB's precedent provides a clear answer to the issue in the instant case. NMB precedent lacks only a clear rationale, not a clear answer.

NLRB decision without referral is consistent with the rationale for referral. The NLRB would not be blazing new ground or resolving a difficult jurisdictional issue. It would merely be providing a rationale for its adoption of clear NMB precedent which involves a much needed modification to the NMB test, not a radically different approach. Because the NLRB's role would be limited to articulating a rationale for NMB precedent, it would be relying on the NMB's expertise and there would be no danger of conflicting decisions. *Federal Express,* 317 NLRB at 1156. The NLRB's explanation of its adoption of the NMB's precedent would not create instability; it would provide much needed stability and clarity. *Id.*

There is no danger of forum shopping since the NLRB would continue to apply the same test as the NMB. *Id.* If a union seeks NLRA jurisdiction over a representation or unfair labor practice case, it must bring the issue to the NLRB. It cannot bring claims of violations of the right to organize, whether under the RLA or the NLRA, before the NMB. The agency does not have jurisdiction over such claims. *ABM Onsite,* slip op at 3. It cannot bring a representation case to the NMB unless it seeks an election in a nation-wide unit. *Aircraft Service Int'l Group,* 40 NMB 43 (2012). Unions do not seek nation-wide units among contractor employees, so the

fear that a union would choose to file with the NMB or NLRB to gain a more favorable jurisdictional determination is groundless.[25]

The Board can provide the rationale easily because *Allied Aviation/Airway Cleaners* does not blaze new ground. While it provides different results than many 1997-2011 NMB opinions, *Allied Aviation* does not add to or delete from the NMB's long-standing six factors relevant to the control prong. It does only two things. It sets a transparent metric against which the factors are measured, *viz.* do the carriers exercise more control over the employer than would be found in a typical independent contractor relationship. And it prioritizes control over personnel decisions and supervision. In the words of the ALJ in *Oxford Electronics, Allied Aviation* sets forth the "Two-Part Test with Emphasis on Control over Personnel." JD-43-17 at 18.

The NMB's traditional test badly needs a standard and priorities among the factors. As the Supreme Court noted, a totality of the circumstances test without any standards is "not a test at all but an invitation to make an ad hoc judgment." *City of Arlington v. FCC,* 133 S. Ct. 1863, 1874 (2013). "The open-ended rough and tumble of factors" without any priority "can become simply a cloak for agency whim or worse." *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004). Prior to the *Airway* cases, "it [was] difficult to draw a principled line between the outcomes, particularly under the NMB's amorphous list of factors." *Cunningham,* 2010 U.S. Dist. LEXIS 32112 at *22.

The Board should avoid the inevitable delay arising from referral to the NMB. The NMB's Office of Legal Affairs has a total of seven lawyers responsible for the entire country. http://www.nmb.gov/about-nmb/officials-staff/office-of-legal-affairs/. The NMB is simply not able to expeditiously resolve the volume of cases engendered by the organizing and bargaining activity among airport contractors. Prior to the issuance of *Airway Cleaners,* the Regions

[25] See Garren, *Back on Course*, pp. 97-98.

routinely referred representation and unfair labor practice cases to the NMB. The result was extraordinary delay as the backlog at the NMB grew. For instance, the Airway Cleaners petition was filed on March 8, 2013, Case No. 29-RC-099871. An election was held in July 2013. The case was then sent to the NMB for an advisory opinion on August 23, 2013. The NMB did not render its decision until September 11, 2014. The Board did not issue a final decision until April 15, 2015.

Moreover, the NMB's priorities are established by its statutory mission, which may differ from the NLRB's priorities. The "Board loses control of the pace of the decisional process once it refers a case to the NMB." *Federal Express,* 317 NLRB at 1158, n. 19 (Chairman Gould dissenting).

The Board should modify its referral policy if it were to conclude that the current policy requires referral. The current policy is based on "the absence of any showing that the historic system of referral has broken down." *Federal Express,* 317 NLRB at 1155. The Board saw no evidence that the "NMB has erred in any [jurisdictional] decision." *Id.* at 1156, n. 6. However, the system has demonstrably broken down. First, given the volume of cases in recent years, prompt resolution of cases has broken down. Second, the *ABM* court has found the NMB's decisions to be arbitrary and capricious because they lack a sufficient rationale. The "modicum of control" decisions from 1997-2011 were wrongly decided. It was precisely the Board's failure to provide an explanation for the NMB's recent opinions and its prior inconsistent opinions finding RLA jurisdiction over independent contractors that led to the *ABM* remand. The NLRB should not repeat the same mistake.

III. CONCLUSION

For the reasons stated above, the NLRB should affirm the ALJ's thoughtful decision. PrimeFlight is an independent contractor that controls its own business operations as the GTA underlines. PrimeFlight controls its personnel decisions, as expressed in the detailed and comprehensive Employee Handbook. Only PrimeFlight has supervisory authority over its employees. JetBlue has only an extremely limited right to have PrimeFlight employees removed from its account and has never exercised that right. PrimeFlight conducts all training and largely controls its content. All employees wear uniforms with the PrimeFlight logo. Clearly, JetBlue exercises less control than is typical in a subcontractor relationship. PrimeFlight's operations at JFK are under NLRA jurisdiction.

Dated: June 12, 2017

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APPENDIX

THE RAILWAY LABOR ACT OF 1926
A Legislative History

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If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within 30 days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

"(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession."

SEC. 6. Section 6 of the Railway Labor Act is amended to read as follows:

"SEC. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change effecting rates of pay, rules, or working conditions, and the time and place for conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

SEC. 7. The Railway Labor Act is amended by striking out the words "Board of Mediation" wherever they appear in sections 7, 8, and 10 of such Act, and inserting in lieu thereof the words "Mediation Board."

The CHAIRMAN. Mr. Eastman has come down this morning to be heard on this measure, and you can go ahead, Mr. Eastman.

STATEMENT OF HON. JOSEPH B. EASTMAN, FEDERAL COORDINATOR OF TRANSPORTATION

Mr. EASTMAN. My name is Joseph B. Eastman, and I am Federal Coordinator of Transportation. I appear in support of this bill, Senate 3266.

Mr. Chairman, I have prepared a rather brief, compact statement, intended to give a birdseye view of the bill, and with your permission I will go ahead with that.

The CHAIRMAN. Go ahead.

Mr. EASTMAN. When the Transportation Act, 1920, was enacted, following the return of the railroads to their private owners after the period of Federal control, an effort was made to provide for the orderly adjustment of labor controversies with the aid of a governmental agency. The Railroad Labor Board was created for that purpose, and the intent was that it should occupy much the same field in the settlement of disputes between the railroads and their employees as the Interstate Commerce Commission occupied in the settlement of disputes between the railroads and their patrons. The Labor Board functioned for a period of about 6 years, but the results were satisfactory neither to the railroads nor to the employees. The trouble was that while it followed the general pattern of the Inter-

state Commerce Commission, and was designed to be an impartial Government tribunal for the settlement of disputes, this Labor Board was given no authority to enforce its decisions, and in that respect differed radically from the Interstate Commerce Commission.

It seemed apparent that one of two things should be done—either the Labor Board should be given real authority, or it should be disbanded and the settlement of disputes left to a procedure of conference and negotiation between the railroads and their employees with the aid of a governmental agency designed solely for mediation purposes. The latter course was followed and resulted in the present Railway Labor Act. That act was worked out in conference between representatives of the railroads and representatives of the employees and was favored by both sides. It was frankly an experiment, dependent largely upon the good faith and good will of the parties, the skill of the Government mediators, and, in the last analysis, the power of public opinion informed in emergencies by a Presidential fact-finding board. The act prescribed a definite procedure for collective bargaining by independent parties freed from interference, influence, or coercion, and set up machinery for mediation, arbitration, and fact finding; but it provided no penalties or other specific means of enforcing the duties which were imposed. The two parties wished to see the experiment tried; they were very hopeful of good results; but neither was sure of the outcome.

This Railway Labor Act has now been tried for a period of nearly 8 years. It has served a very useful purpose and has brought about many good results, but experience has shown that it is in need of improvement. The bill before you, S. 3266, proposes such improvements. It does not depart from the general principles of the present Railway Labor Act, but, instead, is designed to reinforce those principles and provide for their more effective application. It seeks not to overturn but to perfect what has been done.

I am ready to answer any questions as to the details of the bill to the best of my ability, and before I conclude shall present certain amendments which I believe should be made. Doubtless other improvements in language will be found desirable. Before I get to details, however, I wish to indicate to you what are the salient features of the bill.

In the paragraph of section 1 marked "First", there is a change in the present definition of the term "carrier." This change is intended to bring within the scope of the act operations which form an integral part of railroad transportation, but which are performed by companies which are not now subject to the Railway Labor Act. The most important illustration is found in the refrigerator-car companies, which own refrigerator cars operated by the railroads and perform certain functions connected with refrigeration service. Another illustration is found in the companies to which railroads have on occasion contracted out their maintenance work on equipment and even on way and structures. The thought is that concerns which function in this way as an integral part of the railroad transportation system should be subject to the same duties and obligations with respect to labor controversies as the railroads themselves and as the express and sleeping-car companies. This object is attained by including in the definition of "carrier" any company "operating any equipment or facilities or furnishing any service included within the definition of the terms

'railroad' and 'transportation' as defined in the Interstate Commerce Act." Perhaps a better way can be found of accomplishing the desired result, but it was thought that this language would serve the purpose.

I may say that in reading that over last night I am not sure the language does cover all companies to which railroads on occasion have contracted out their maintenance work, and it perhaps should be examined rather carefully from that point of view.

The CHAIRMAN. I am impressed with the fact that instead of defining the terms in this bill you have defined them as defined in some other bill.

Mr. EASTMAN. Yes.

The CHAIRMAN. That is rather poor legislation, isn't it, generally?

Mr. EASTMAN. Well, the definitions in the Interstate Commerce Act are, of course, definitions of long standing.

The CHAIRMAN. I am not objecting to it; I am wondering if they should not be written into this bill.

Mr. EASTMAN. That might, perhaps, be better. Some paraphrasing would have to be done if that were done in that way.

The CHAIRMAN. The very fact it would have to be done is a reason that it should be done. If you define the terms of one act by another act, everybody has to dig it up.

Mr. EASTMAN. I am not sure the language as it stands does cover all that it is intended to cover. I shall be glad to give it further consideration, and to indicate later any changes which I think ought to be made.

As I have already indicated, it is an essential feature of the present Railway Labor Act that the two parties which engage in collective bargaining shall be truly representative of the interests which they purport to represent and wholly independent of each other. This purpose is reflected in the paragraph of section 2 marked "Third", which reads as follows——

Senator WAGNER. You do not agree that this is realistic bargaining where one side controls both sides of the table.

Mr. EASTMAN. No, indeed.

Senator WAGNER. I brought for myself a shower of protests because I made that assertion once.

Mr. EASTMAN (reading):

> Third. Representatives, for the purposes of this act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other.

While this provision stated a noble purpose, it has not proved to be self-enforcing, and the act provided no other means of enforcement. Consequently the purposes were not accomplished. Perhaps I should say it was not entirely accomplished. It has been accomplished in part. This failure has already been twice recognized by Congress in other and more explicit provisions which it has inserted in other statutes. The first recognition was in the amendment to the Bankruptcy Act, which became law on March 3, 1933. I quote paragraphs (p) and (q) of section 77 of that amended act, which read as follows:

> (p) No judge or trustee acting under this act shall deny or in any way question the right of employees on the property under his jurisdiction to join the labor

STATEMENT OF JOSEPH B. EASTMAN, FEDERAL COORDINATOR OF TRANSPORTATION—Resumed

Mr. EASTMAN. Mr. Chairman, I have been over the testimony at these hearings, which you have been kind enough to send me, and have endeavored to consider all of the amendments to the bill which have been presented. I have a written statement here which discusses those amendments in a concise way. I understand that you wish to hurry along this morning, and if I may have the privilege of having the entire statement copied in the record, I shall confine my reading to comments which seem to me to be of particular importance.

The CHAIRMAN. You may go ahead with your statement, and what you do not present before we have to adjourn this morning, we will print at the close of your testimony.

Mr EASTMAN. I shall discuss, first, the amendments to S. 3266 which have been proposed by the railroads

Section 1, paragraph first: The railroads wish to strike out the words "any company" in line 10 of page 1. This amendment would confine the bill to the employees of express companies, sleeping-car companies, and railroads. It would eliminate companies, like refrigerator-car companies, which operate facilities or furnish service forming a part of railroad transportation Most of the illustrations given by Mr. Clement to support his objections to the words "any company" relate to construction work. The language in the bill would not cover outside companies engaged in such work for the railroads, as I read it. He is right in believing that it would cover trucking companies performing terminal service for the railroads. However, he approves of the wording of the present act, and that includes "other transportation facilities used by or operated in connection with any such carrier by railroads". It is plainly broad enough to cover terminal trucking.

The CHAIRMAN. As I recall it, he claimed that it would affect their building of bridges and affect their contracts for all kinds of work. Is that your understanding of the definition?

Mr. EASTMAN. Well, as I read the definition in the bill, as I have said here, I do not think it would cover such construction work. However, I am about to propose an amendment.

While I believe that the railroad objections are largely without basis, the chairman has made a valid criticism of the definition of "carrier" now in the bill, because it requires reference to another act. I can also see difficulties in bringing in trucking operations and certain other operations performed for railroads by outside companies, because of possible conflicts with N.R.A. codes. It is difficult to know just where to draw the line. I am inclined to believe that for the present it would be well not to go beyond carriers and their subsidiaries engaged in transportation. So changed, the definition would read:

> The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and 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.

That, I may say, is some of the language in the Interstate Commerce Act.

The CHAIRMAN. Is there some difference, however? Isn't this reference here to parent, subsidiary, and affiliated, new?

Mr. EASTMAN. Yes. I am confining this now to the railroad subsidiaries because of the possible conflict with N.R.A. codes if we get into the outside field. Going on with that—

and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such carrier.

Now I come to section 1, paragraph 2: The railroads wish to amend lines 13 to 14 on page 2 so that the term "Adjustment Board" would mean any one of the boards of adjustment provided for in this act, instead of the National Board of Adjustment alone. While the bill does not prevent the setting up of regional or system boards of adjustment, the only board which it creates is the National Board of Adjustment, and the proposed amendment would lead to nothing but confusion, unless section 3 were changed as the railroads propose. As I do not favor the latter change, I oppose this amendment on page 2.

Section 1, paragraph 6: The railroads wish to amend the definition of "representative" by adding in line 23 of page 3 the words "severally or collectively". They say that it will "afford equal opportunity to every employee, collectively or individually."

This amendment must be read in connection with other proposed changes, hereinafter noted, which introduce the words "groups of employees". These changes would lead to all manner of confusion, controversy, and internal strife among employees.

The theory of collective bargaining is that employees cannot deal on equal terms with the employer unless they organize. They must deal collectively rather than individually. They may subdivide into crafts or classes, if desired, but whether the organization represents all of the employees or a craft or class, it should be set up by the majority, just as our National Government is set up, or a State or municipal government. Recently the idea has emerged, and apparently it is the idea behind these railroad amendments, that organizations representing the minority as well as the majority ought to be recognized. In any class or craft, therefore, part of the employees might be represented by a national union, if this idea prevailed, part by a company union and still another part by a communist organization.

This idea, in my judgment, is based on the principle "united we stand, divided we fall". It can only cause trouble and confusion. The minority ought to have every opportunity to air their views. As one who has dissented frequently in the past, I am strong for that; but yet I believe in the rule of the majority. Government cannot be subdivided into factions—and the labor union is really a form of government. Any class or craft of employees cannot deal effectively in parts with an employer. Our Civil War was fought over a similar issue, and I see no good reason for encouraging the theory of secession in labor organization. If the majority of the employees want to have a company union, that ought to be the representative organization, and I do not favor compelling the company to deal also with a national union representing a minority. The same principle applies when the situation is reversed.

Certificate of Service

I hereby certify that a copy of the foregoing document, entitled **CHARGING PARTY SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ's RESPONSE TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE,** was served on this 12th day of June, 2017, via electronic mail, on the following parties:

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