

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

PRIMEFLIGHT AVIATION SERVICES, INC.,
Respondent,

and

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

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

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWER
TO RESPONDENT'S EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. PROCEDURAL HISTORY OF THE CASE

The case was litigated before Administrative Law Judge Mindy Landow on October 18-20, 2016. On March 9, 2017, Judge Landow issued her Decision in Case Nos. 29-CA-177992, 29-CA-179767, and 29-CA-184505, in which she found that Respondent committed violations of the National Labor Relations Act (“Act”), as alleged in the Amended Consolidated Complaint and Notice of Hearing dated October 3, 2016.¹

Specifically, the Judge found that Respondent is a *Burns* successor that is obligated to recognize and bargain with the Union as the exclusive collective bargaining representative of Respondent’s bargaining unit employees. *See NLRB v. Burns Security Services*, 406 U.S. 272 (1972). On this basis, the Judge found that Respondent violated Sections 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with the Union since the Union made a bargaining demand on May 23, 2016. The Judge found that Respondent further violated Sections 8(a)(1) and (5) of the Act by:

- (1) Since May 23, 2016, failing to provide information that is necessary and relevant to bargaining;
- (2) Since about August 26, 2016, unilaterally changing employees’ terms and conditions of employment, without providing to the Union notice and an opportunity to bargain, by deducting pay from employees’ paychecks to account for unpaid break time;
- (3) Since about September 12, 2016, unilaterally changing employees’ terms and conditions of employment, without providing to the Union notice and an opportunity to bargain, by changing employee work schedules, including changing employees’ scheduled work days and reducing employees’ hours;

¹ Contemporaneously with the administrative proceedings, on September 26, 2016, the Regional Director filed a Petition for Temporary Injunctive Relief Under Section 10(j) of the Act with the Eastern District of New York. On October 24, 2016, the District Court granted in part the Regional Director’s Petition and ordered that Respondent recognize the Union, bargain in good faith with the Union, and provide to the Union information that is relevant to and necessary for collective bargaining. Respondent appealed the District Court’s Order to the Second Circuit Court of Appeals, and the Regional Director filed a cross-appeal. Proceedings before the appellate court are ongoing. EDNY Docket No. 16-CV-5338; 2d Cir. Docket No. 16-3877.

Finally, the Judge found that Respondent violated Section 8(a)(1) of the Act when, in or about June 2016, Respondent's Supervisor Erick Brazao-Martinez threatened employees with discharge because they engaged in activities in support of the Union.²

II. FACTUAL OVERVIEW

Background

Respondent provides services to various airlines at airports across the country. Tr. 27. At JFK Airport, pursuant to a contract with airline JetBlue Airways Corp. ("JetBlue"), Respondent provides terminal services in Terminal Five. Tr. 216-17; Jt. 2. Respondent provides four types of terminal services: skycap curbside services, baggage handling services, line queue³ services, and wheelchair services. Tr. 218. Descriptions of these services can be found below.

- "Wheelchair services" means helping disabled JetBlue customers into and out of wheelchairs, and pushing the wheelchairs through the terminal, e.g. to the ticket counter, to the gate of departure, onto the airplane, off the airplane, to a connecting flight, to baggage claim, to the parking facility, to the curbside area, etc. Tr. 219.

² In addition to the Judge's findings, Paragraph 10 of the Amended Consolidated Complaint and Notice of Hearing also alleged that Respondent violated Section 8(a)(1) of the Act by requiring its employees, as a condition of employment, to sign an unlawful arbitration agreement. Following the administrative hearing, on January 13, 2017, the Supreme Court granted certiorari in three consolidated cases that deal with the issue of unlawful arbitration agreements: *Lewis v. Epic Systems Corporation*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016); *National Labor Relations Board v. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5th Cir. 2015). 137 S. Ct. 809 (January 13, 2017). Based upon motions of the General Counsel and Respondent, and over the Charging Party's opposition, on February 28, 2017, the Judge ordered that Paragraph 10, and all subparagraphs therein, be severed and held in abeyance pending further decision of the Supreme Court or the Board. For this reason, the Judge made no finding with regard to the unlawful arbitration agreement allegation. See also *National Labor Relations Board v. Alternative Enterm't, Inc.*, No. 16-1385 (6th Cir. May 26, 2017).

³ Also known as line monitor services or checkpoint services.

- “Line queue services” means directing customers to different points of entry at the security checkpoint (e.g. TSA pre-check, “even more speed,” etc.) and monitoring the size and number of carry-ons that passengers take to the security checkpoint. Tr. 220.
- “Baggage handling” services means assisting customers in moving their baggage at the ticket counters and baggage carousel areas, transporting bags behind the scenes to be inspected by TSA before being loaded on departing flights, etc. Tr. 221.
- “Skycap services” means assisting customers with baggage at a curbside location, as well as checking customers’ identification, issuing baggage tags and boarding passes, etc. Tr. 222.

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

The Union’s Bargaining Relationship with Predecessor Air Serv

Immediately before Respondent took over the terminal services in Terminal Five, Air Serv performed the bulk of the terminal services. Tr. 218. On March 25, 2015, Air Serv and the Union entered into a recognition agreement. GC 3. The recognition agreement states that, based on a card check performed by Arbitrator Gary Kendellen, the Union “has demonstrated majority support among the full-time and regular part-time employees [excluding statutory exclusions] employed by Air Serv at client [sic] at Newark Liberty, John F. Kennedy International and

LaGuardia Airports (the ‘Bargaining Unit’).” The agreement does not specify any job titles.
GC 3.

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

In March 2016, Respondent successfully bid on a contract with JetBlue, under which it agreed to provide all four types of terminal services in Terminal Five commencing on May 9, 2016.⁴ Tr. 216, 218, 229. Respondent and JetBlue memorialized their relationship by executing a “general terms agreement,” and a “statement of work.” Jt. 2 at 1, 23.

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

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

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

⁴ Henceforth, all dates refer to the year 2016, unless otherwise noted.

confirm that Barry had succeeded in removing from the hiring process all employees who had not previously worked for Air Serv on the JetBlue account in Terminal Five. GC 5.

Between April 5 and May 7, Respondent hired all 367 employees⁵ that it would employ on its first day of operation, May 9. GC 8. Respondent conducted its hiring without any input from JetBlue. Tr. 19. Between May 7 and June 6, roughly its first month of operation, Respondent did not hire any additional employees, and the workforce remained static. Tr. 271.

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

- All seven employees in the Wheelchair Services Supervisor classification (presented in the order shown in GC 8): Sherwin Arice, Mark A. Felix⁶, Erick R. Brazao-Martinez,⁷ Nancy L. Joshua, Keisha P. Newsome, Carlos A. Galarza, Josue E. Joachim, Krystelle Gaeton;
- Taylor Champagne, the only employee in the Wheelchair Services Manager classification;

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

⁶ Additionally, Mark A. Felix must be excluded because he only appears in Respondent's payroll records during the weeks beginning July 14 and July 21. Thus, it appears that he was not hired until well after the Union's May 23 bargaining demand. GC 4.

⁷ In Paragraph 4(b) of its Answer, Respondent admits that Wheelchair Services Supervisor Erick Brazao is a supervisor within the meaning of Section 2(11) of the Act, and an agent within the meaning of Section 2(13).

- Mandica Telfer, the only employee in the Supervisor classification;
- Kemal Bacchus and Troy Bowry, both employees in the Duty Manager classification;
- Debra Gray,⁸ the only employee in the General Manager classification; and
- All three employees in the Office Hourly Support classification: Flordeliz Cabrera, Gloria Beatriz Curotto and Annakaye Louise Barnes.⁹

Throughout the entire first month of operations, up until Respondent began to hire additional employees on June 6, the bargaining unit consisted of 351 employees (367 minus the sixteen excluded individuals) in the non-supervisory job categories: baggage handling staff, skycap services staff, line queue staff, wheelchair services staff, and wheelchair services dispatcher. GC 8. Of those 351 bargaining unit employees, GC 8, 183 had previously worked for Air Serv, Jt. 1. Thus, throughout the first month of operations, 52% of Respondent's unit employees had worked for predecessor Air Serv.

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

The Judge agreed with Counsel for the General Counsel's figures and calculations, described above, which vary slightly from Respondent's. ALJD 11, n.6. In doing so, she relied on various exhibits, as follows. GC 8 is the list of hires that Respondent provided during the administrative investigation. During the hearing, Respondent introduced another list of hires, R

⁸ Additionally, Debra Gray must be excluded because she was terminated on May 19, before the Union's May 23 bargaining demand.

⁹ Employee Omar Duhaney testified that "Annakaye" interviewed him before Respondent hired him, and she and "Gloria" participated in the hiring process. Tr. 169. Duhaney also testified that "Flo" conducted part of the training, and he viewed her as a "Manager." Tr. 172. Furthermore, Respondent's payroll records show that Office Hourly Support employees receive a meaningfully higher rate of pay, \$14 to \$16 per hour, as compared to unit employees, \$8.35 (plus tips) to \$12 per hour. GC 4.

4, which was admitted over objection. Upon close inspection, R 4 is substantially similar to GC 8, except that it distorts the composition of the workforce in subtle ways, which has the effect of diluting the Union's majority support. R 4 adds three indisputably supervisory employees who never worked for predecessor Air Serv: General Manager Joshua David Heady, Duty Manager Jeannette Bourdier, and Office Manager Esme Linda Subaxon. Additionally, R 4 misclassifies employees whose job titles changed, from unit positions to supervisory positions (and vice versa) after the first month of operations, and most pertinently, after the Union's bargaining demand on May 23.¹⁰ Unit employees who are misclassified in supervisory positions are Wheelchair Services Staff Pedro Soto Jr. (not a predecessor employee) and four predecessor employees: Line Queue Staff Ruth N. Springer, Wheelchair Services Staff Roland O. Pencile, Line Queue Staff Mona L. Singh, and Wheelchair Dispatcher Johanna E. Martinez. Additionally, R 4 incorrectly lists two supervisory employees, Wheelchair Services Manager Taylor Champagne and Wheelchair Services Supervisor Mark Felix, with bargaining unit titles (Wheelchair Services Staff). Neither Champagne nor Felix worked for predecessor Air Serv. Finally, and inexplicably, R 4 completely omits Baggage Handler and predecessor employee Shiquita Dickey, who appears in GC 8 and all of Respondent's payroll records beginning in the week of May 9. Although GC 8 and R 4 look very similar, Respondent's exhibit was quite obviously altered to serve Respondent's litigious purpose of diluting the Union's majority support.

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

¹⁰ Respondent's payroll records, GC 4, shows individual employees' job titles on a weekly basis.

On May 9, Respondent commenced operations in Terminal Five, and began providing all four types of terminal services, including the three that Air Serv had provided through May 8 (line queue, baggage and skycap). Tr. 216-18, 229. Paragraph 7(b) of the Complaint alleges, and Respondent admits in its Answer, that “since about May 9, 2016, Respondent has continued to operate the portion of Air Serv’s business at JFK Airport in basically unchanged form.” Employees from the line queue, baggage and wheelchair classifications testified that their jobs did not change in any material way. Tr. 84; 96; 106; 108; 110; 114; 117-22; 125-27; 132-33. The evidence establishes that the only changes to their jobs pertained to minor, superficial changes such as using a different kind of time clock and wearing a uniform that displays the company name “PrimeFlight” instead of “Air Serv.” *Id.*

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

Since beginning operations on May 9, Respondent has utilized its workforce interchangeably among job classifications, requiring employees to frequently perform work in job classifications other than the one they were hired into. Baggage employee Denzyl Prince testified that since Respondent has taken over, he has performed the wheelchair duties upon request and he has observed wheelchair employees doing baggage work. Tr. 122-24. Wheelchair employee Omar Duhaney testified that, in addition to his wheelchair duties, he

performs baggage duties “five times a week.” Tr. 186. Additionally, over the course of two months, Duhaney observed baggage employees performing wheelchair work on a daily basis and observed line queue employees performing wheelchair work about twice per week. Tr. 187.

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

By letter dated May 23, to Respondent’s General Counsel, the Union’s Deputy General Counsel Brent Garren demanded that Respondent recognize the Union as the representative of “Respondent’s employees at JFK Airport, the majority of whom were formerly Air Serv employees represented by Local 32BJ.” Jt. 3. The letter continued,

These are employees working at Terminal Five on the Jet Blue account, providing baggage handling, skycap and check point services. As we understand it, the appropriate bargaining unit also includes employees providing wheelchair assistance. We request recognition for a unit of all full-time and regular part-time employees at Terminal Five on the Jet Blue account, excluding supervisors, office clericals, and guards as defined in the NLRA. Jt. 3.

The Union, by Garren, and Respondent, by Senior Vice President of Human Resources William Stejskal III, engaged in further correspondence, ending with the Union’s June 15 letter, in which the Union reiterated its bargaining demand. Jt. 3. There is no dispute that throughout the correspondence, Respondent failed and refused to recognize the Union as the collective bargaining representative of the bargaining unit employees. Respondent did not recognize the Union until it did so on an interim basis, as ordered by the Eastern District of New York on October 24 (in the related 10(j) proceeding).¹¹

¹¹ The parties’ correspondence also concerned information that the Union requested in its May 23, 2016 letter, and which Respondent had not provided at the time of the hearing. Respondent does not dispute that it did not provide the information, and does not except to the Judge’s finding that it violated Sections 8(a)(1) and (5) by failing to provide the information. The only relevant exception, number 15, merely disputes the legal conclusion. Respondent’s brief does not develop any argument whatsoever on the information violation. For this reason, the

After the Bargaining Demand, Respondent Resumes Hiring Wheelchair Staff

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

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

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

In the midst of Respondent's post-bargaining demand hiring spree, in June, Wheelchair Services Employee Omar Duhaney learned from Union Organizer Mike Cassaday that the Union

facts relevant to the information that the Union requested have been omitted from this section. Those facts can be easily ascertained, if necessary, by reviewing Jt. 3.

was organizing a march in Terminal Five. Tr. 187. Duhaney agreed to attend the march, but ultimately did not attend because of a threatening statement that his supervisor made. Tr. 189.

About a week after learning about the Union march, Duhaney arrived at work and reported to the dispatch office, as usual. Tr. 189-90. There were some other employees present, including wheelchair agent Joan (last name unknown) and dispatcher Jessica (last name unknown). At about 2:55 AM, shortly before Duhaney's 3:00 AM shift was scheduled to begin, his supervisor, Erick Brazao-Martinez, made an announcement. Tr. 189. Duhaney's uncontradicted testimony establishes that Brazao-Martinez said, "don't join the Union. We've only been with PrimeFlight for a couple of months. Be smart, guys. If you join the Union, you will get fired." Tr. 189. Dispatcher Jessica replied, "that's why I'm not joining no Union." Tr. 191. At that point, Duhaney punched the clock and began his shift. Tr. 191.

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

Paragraph 17 of the Complaint alleges, and Respondent admits, that since about August 26, Respondent has been deducting pay from employees' paychecks to account for unpaid break time. Employee Allison Halley testified that on or about September 13, Flo¹² asked Halley to sign a form. Tr. 101. The form states that thirty minutes per day will be deducted from employees' pay to account for break time. GC 2. Halley testified that before Flo asked Halley to sign the form, Halley had never seen the form before, and Respondent had never before deducted break time from her pay. Tr. 101-02.¹³

¹² Presumably "Office Support" employee, Flordeliz Cabrera.

¹³ In Exception 11, Respondent asserts that the Judge erred by her "refusal to credit Respondent's evidence that Respondent had implemented a policy of deducting 30 minutes of pay each day to account for employees' meal breaks." Respondent does not mention Exception 11 at all in its brief. The exception is wholly without merit

Paragraph 18 of the Complaint alleges, and Respondent admits, that since about September 12, Respondent has changed employees' scheduled work days and reduced employees' hours. Paragraph 20 of the Complaint alleges, and Respondent admits, that Respondent engaged in the conduct described in paragraphs 17 and 18 without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct.¹⁴

JetBlue's Minimal Control Over Respondent's Operations, Including Personnel Decisions

Substantial record evidence pertains to the minimal amount of control that air carrier JetBlue exerts over Respondent's operations, and in particular, Respondent's personnel decisions. With regard to hiring employees, Respondent stipulated that it has exclusive control over hiring employees at JFK. Tr. 19. With regard to promotions and demotions, Respondent stipulated that JetBlue does not provide commendations for Respondent's employees, Tr. 21, and Division Vice President Matthew Barry admitted that JetBlue has not requested that he promote or demote any employee, Tr. 295. With regard to discipline, Barry testified that he is unable to point to any example of any employee who Respondent disciplined or terminated at JetBlue's request. Tr. 288. Furthermore, there is no provision in either of Respondent's contracts with JetBlue – the general terms agreement or the statement of work – that gives JetBlue this type of control. Jt. 2. Respondent's discipline and termination policies are set forth in its employee

because the Judge did find that Respondent implemented such a policy, and correctly found a violation of Section 8(a)(5) because Respondent implemented the policy unilaterally, without providing to the Union notice and an opportunity to bargain. See *Flambeau Airmold Corp.*, 334 NLRB 165 (2001) (enforcement of previously unenforced rule constituted unilateral change).

¹⁴ Again, although Respondent excepts to the Judge's legal conclusion that Respondent violated Sections 8(a)(1) and (5) by these unilateral changes, Exception 16, Respondent develops no argument on this point in its brief. Rather, Respondent's argument rests on its positions that (1) it is not subject to the Board's jurisdiction, and (2) it is not a *Burns* successor. These two arguments are addressed in full below.

handbook, which lists rules of conduct and procedures for determining discipline. Jt. 2, §§ 701-722.

JetBlue can request that Respondent remove a skycap found to be “collecting revenue outside of the system,” but in no other scenario. Jt. 2 at 24, SkyCap Services, ¶ 5. There is no provision that requires Respondent to terminate the employee, or do anything other than remove the employee from performing baggage services work. *Id.* Counsel for the General Counsel asked Matthew Barry, “how many times has PrimeFlight removed an employee at JFK at JetBlue’s request?” Barry replied, “zero.” Tr. 287.

JetBlue’s Minimal Control Over The Manner In Which Respondent Conducts its Business

JetBlue compensates Respondent according to a per-flight flat rate, regardless of Respondent’s business expenses. Tr. 245. The general terms agreement requires Respondent to, “at its sole cost and expense, furnish all labor, supervision, equipment, facilities, materials and supplies, and other requisites necessary for the proper performance of the Services at each Airport.” Jt. Ex. 2 at 9, ¶ 9.1. Additionally, the agreement ensures that Respondent is responsible for purchasing and maintaining “all equipment, material, supplies, and any special equipment required to perform the Services, unless otherwise stated in a SOW,” and the statement of work contains no such exceptions. *Id.* at ¶9.5. Respondent supplies its own wheelchairs, tablets, office equipment, and a software system called Centrak, which tracks wheelchair usage. Tr. 251-53. In terms of actually providing the contracted-for services, JetBlue provides broad specifications of work that must be performed, Jt. 2 at 23-30, but Respondent’s Training Manual specifies in great detail how employees should get the job done. CP 2. Respondent’s supervisors, and not JetBlue, oversee employees on a day-to-day basis. Tr. 288.

JetBlue's Limited Right to Access Respondent's Records

JetBlue may monitor how well Respondent performs its duties, and may access relevant records “at all reasonable times,” and “during regular business hours [...] with at least ten business day’s prior written notice.” Jt. 2 at 13, ¶13.1-13.2. JetBlue has requested staffing reports when Respondent’s performance did not meet expectations, and Respondent has provided them. Tr. 239, 246.

JetBlue Does Not Supervise Respondent's Employees

Matthew Barry conceded that “PrimeFlight is solely responsible for managing its employees.” Tr. 288. His testimony demonstrates that Respondent meets its responsibility by way of a complete supervisory structure, including managers, supervisors and leads. Tr. 303. Barry’s testimony comports with the contractual language. The general terms agreement is clear that Respondent shall “at its sole cost and expense, furnish all . . . supervision.” Jt. Ex. 2 at 9, ¶ 9.1. The agreement goes on to state, “the employees of Business Partner engaged in performing Services hereunder will be considered employees of Business Partner for all purposes and will under no circumstances be deemed to be employees of JetBlue,” and Respondent “shall be solely responsible for supervision of such employees . . .” *Id.* at ¶ 9.3. Employee Allison Halley testified that JetBlue does not direct employees’ work, and there is no contrary testimony. Tr. 95. Rather, Barry admitted that Respondent assigns employees to shifts, Tr. 288, days off, Tr. 295, authorizes employees to swap shifts, Tr. 296, and assigns overtime, Tr. 296-97.

Respondent Exercises Primary Control Over Employee Training

The general terms agreement makes clear that Respondent “shall provide its employees ... with all necessary initial and recurrent training, including familiarization with JetBlue Policies.” Jt. Ex. 2, at 11, ¶ 10.9. Employees Halley, Prince and Duhaney consistently testified that agents of Respondent, and not JetBlue, trained them. Tr. 89; 171; 178; 182. Matthew Barry testified that Respondent’s classroom training consists of three components, two of which are controlled exclusively by Respondent (the “internal company training module” and the “PrimeFlight technology application”). Tr. 262. The other component is “JetBlue policies, procedures, training,” for which JetBlue trains Respondent’s trainers, but does not directly train Respondent’s employees. *Id.* In addition, Respondent conducts its own on-the-job training program. Tr. 303.

Respondent’s employees are held out to the public as employees of Respondent, and not of JetBlue.

Employees wear uniforms that show the PrimeFlight logo, not the JetBlue logo. Tr. 92; 175; 302. Employees also use identification badges that show the PrimeFlight name, not JetBlue. Tr. 87. Although JetBlue reviewed Respondent’s proposed uniforms, JetBlue approved Respondent’s proposal with no changes. Tr. 283. Most pertinently, the parties agreed on uniforms that “look unique (not JetBlue).” GC 6.

III. ARGUMENT

(A) The Judge’s Credibility Determinations Should Be Affirmed (Exceptions 9, 10).

It is axiomatic that the Board gives broad deference to and will not overturn an Administrative Law Judge’s credibility findings unless it is convinced by a clear preponderance

of the evidence that those credibility resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Respondent fails to meet this demanding burden of proof in its exception to the Judge’s refusal to credit Northeast Mid-Atlantic Division Vice President Matthew Barry’s testimony, Exception 9. Respondent’s argument is wholly without merit and must be rejected.

The Judge properly found that Respondent’s main witness, Barry, lacked credibility because his testimony was “conclusionary and vague.” ALJD 16, line 29. Respondent relies exclusively on Barry’s testimony in support of its bare assertion that upon commencing operations, Respondent determined that it needed to continue hiring employees until its original workforce of 367 employees increased to over 500. While Barry did say as much, the Judge correctly found that his testimony lacked credibility because there is absolutely no testimony in the record from other supervisors or managers to corroborate Barry’s contention that Respondent made concrete plans, before the Union’s May 23 bargaining demand, to hire additional employees. Moreover, even though Barry testified that Respondent originally aimed to hire “around 500” employees, Barry admitted that there is no document in evidence that refers to any hiring goal at all. Tr. 236, 282.

Although Respondent attempts to prop up Barry’s testimony by vaguely referring to “various e-mails” that supposedly lay out Respondent’s hiring plan, R. Br. 34, the truth is that there is no document in the record that corroborates Barry’s testimony. Rather, the entirety of Respondent’s documentary evidence consists of three e-mails, which utterly fail to establish that any hiring plan was in place before the Union’s May 23 bargaining demand, as Barry asserts:

- R. Ex. 1 is an e-mail exchange between Respondent and JetBlue managers, dated May 12 and 13, which refers to service shortfalls during Respondent’s first week of

operation that were caused by Respondent having only “261 ids cleared,” out of the 367 employees who Respondent had hired at the time. As Barry admitted, successfully performing wheelchair duties requires employees to possess identification credentials, also called ID’s or badges, in order to access certain areas of the airport. Tr. 231. Thus, the exhibit attributes Respondent’s early service shortfalls to Respondent’s failure to timely clear its employees’ badges. Notably, the exhibit does not mention hiring at all.

- R. Ex. 2 is a May 18 e-mail from Barry to other Respondent managers, which obliquely mentions “recruiting” as one of six tasks to focus on during the following ten days, including safety, schedules, the status of every employee’s badge, payroll, and tip sheets. Conspicuously, the exhibit does not lay out any hiring plan, except to mention that one additional administrative hire had been authorized “if needed.”
- R. Ex. 3 is a July 19 e-mail, sent nearly two months after the Union’s May 23 bargaining demand, from a JetBlue manager to other JetBlue and Respondent managers. In the e-mail, JetBlue requests that Respondent provide information about staffing costs. Again, the exhibit does not mention hiring at all.

The simple fact is that there is no evidence supporting Barry’s claim that Respondent made concrete plans during the period before the Union’s May 23 bargaining demand to hire 500 people. In light of this fact, and after thoroughly analyzing the above-summarized evidence, the Judge correctly identified Barry’s testimony as “conclusionary and vague,” and concluded that it is not worthy of credit. ALJD 16, lines 26-41. Respondent cannot point to any evidence, let alone a clear preponderance of evidence, to show that the Judge erred in making this credibility

determination. For these reasons, the Judge’s determination to discredit Barry should be affirmed.¹⁵

(B) The Record Evidence and Controlling Board Law Overwhelmingly Support the Judge’s Finding that Respondent is Subject to the Board’s Jurisdiction.

Respondent attempts to argue that it is not an “employer” within the meaning of the Act because it subject to the Railway Labor Act, which falls under the jurisdiction of the National Mediation Board. *See* 29 U.S.C. 152(2) (defining “employer” to exclude “any person subject to the RLA”); 29.U.S.C. 152(3) (defining “employee” to exclude “any individual employed by an employer subject to the RLA”). Because Respondent is attempting to claim the benefit of an exclusion from the Act, Respondent bears the burden of proving that it is subject to the RLA. *See NLRB v. Ky. River Community Care, Inc.*, 532 U.S. 706, 711 (2011) (in determining burden of proof for exemption from the Act’s definition of “employee,” apply “the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits”).

The Judge correctly found that Respondent failed to meet its burden of proof based on the record evidence and controlling Board law, which holds that the Board has jurisdiction over typical airline contractors where the contracting air carrier does not exercise “meaningful control over personnel decisions.” *Allied Aviation Serv. Co. of New Jersey*, 362 NLRB No. 173 (2015),

¹⁵ Respondent does not except to any other credibility determination. To the extent that Exception 10 pertains to the Judge’s determination to credit the un rebutted testimony of employee Omar Duhaney, who witnessed Respondent’s supervisor threaten employees with discharge for supporting the Union, there is zero record evidence that would justify discrediting Duhaney. No witness contradicted Duhaney’s account. Respondent sets forth no reason that Duhaney should not be credited, and no reason to support its contention that the Judge erred by finding an independent violation of 8(a)(1). Thus, the Judge’s determination to credit Duhaney should be affirmed, and Exception 10 should be overruled.

2015 WL 4984885, *enf'd*. 854 F.3d 55 (D.C. Cir. April 18, 2017) (enforcing Board Order, which asserted jurisdiction over contractor that provided fueling services to airlines, and granted summary judgment where contractor refused to recognize and bargain with union, in violation of Section 8(a)(5) of the Act). In its brief, Respondent essentially concedes that it is a typical airline contractor by focusing almost all of its argument on a doomed attempt to persuade the Board to retreat from the controlling precedent and revive an outdated test, which would require a far lower level of carrier control and would exclude from the Act's coverage many airline contractors. The Board has no choice but to recognize that the Judge properly applied the controlling precedent to a record replete with evidence showing minimal carrier control, and correctly concluded that Respondent is covered by the Act.

1. Under the control test, as refined by recent Board and NMB decisions, the critical inquiry is whether JetBlue exercises meaningful control over Respondent's personnel decisions (Exception 4).

The Board and the NMB have jointly crafted a two-part test in order to determine whether an employer and its employees are subject to the RLA in a case such as this one, where the employer is not a rail or air carrier engaged in the transportation of freight or passengers.

Airway Cleaners, LLC, 41 NMB 262 (2014).

First, the NMB determines whether the nature of the work is that traditionally performed by employees of rail or air carriers [the function test]. Second, the NMB determines whether the employer is directly or indirectly owned or controlled by, or under common control with, a carrier or carriers [the control test]. Both parts of the test must be satisfied for the NMB to assert jurisdiction. *Id.* at 267.

Because no party disputes that Respondent satisfies the function test, or that Respondent is not owned by an air carrier, the dispositive question is whether JetBlue exercises sufficient control over Respondent to exclude Respondent from the Board's jurisdiction. *See id.*

In order to assess whether an air carrier exercises sufficient control over a contractor, the Board and the NMB have historically examined six factors of control:

[1] the extent of the carrier's control over the manner in which the company conducts its business, [2] access to the company's operations and records, [3] role in personnel decisions, [4] degree of supervision of the company's employees, [5] whether employees are held out to the public as carrier employees, and [6] control over employee training. *Id.* at 267-68.

In recent years, however, the Board and the NMB have refined the control test to focus primarily on control over “personnel decisions [...] emphasiz[ing] in particular [...] control over hiring, firing, and/or discipline.” *Allied Aviation*, 2015 WL 4984885, slip op. at *1 (analyzing post-2012 NMB decisions applying the control test, and finding that the NMB emphasizes control over hiring, firing and discipline) (citing *Airway Cleaners, LLC*, 41 NMB at 268; *Menzies Aviation, Inc.*, 42 NMB 1, 7 (2014); *Bags, Inc.*, 40 NMB 165, 170 (2013)). Absent evidence showing that an air carrier exercises meaningful control over a non-carrier employer’s hiring, firing and discipline, the control test will classify the non-carrier employer as “a typical subcontractor” subject to the Board’s jurisdiction. *Allied Aviation*, 2015 WL 4984885, slip op. at *2. Thus, under the control test as it has been refined, the critical inquiry focuses on whether JetBlue exercises meaningful control over Respondent’s personnel decisions.

Here, the Judge correctly chose to apply the refined control test, with emphasis on personnel decisions, rather than the outdated test, which applies six factors of equal weight. ALJD 9. In doing so, the Judge made reference to *Allied Aviation*, cited above, as well as *Primeflight Aviation Services, Inc.*, Case No. 12-RC-113687, 2015 WL 3814049, slip op. at *1 n.1 (June 18, 2015). In *PrimeFlight*, a recent case involving the same Respondent as the instant case, the Board explicitly recognized the NMB’s “shift” since 2012, which ceded to the Board jurisdiction over typical airline contractors. *Id.* (unanimous Board decision denying

Respondent's request for review of Regional Director's conclusion that Board has jurisdiction) (Member Johnson "acknowledges that these cases represent a shift by the NMB from earlier opinions in which it had asserted jurisdiction on similar grounds, and that this view is currently extant NMB law").

Respondent argues in Exception 4 that the Judge should not have recognized the "shift" in the jurisdictional analysis employed by the NMB and the Board. Respondent's argument boils down to a contention that the Judge erred by quoting controlling Board law that is directly on point. ALJD 10, lines 35-37, 50-52. Obviously, the Judge was correct to recognize the shift in the law and would have erred by performing the outdated jurisdictional analysis that Respondent urges, which would incorrectly give equal weight to all six factors of control listed in *Airway Cleaners*.

2. The Board has jurisdiction over Respondent because all of the factors of control, and especially control over personnel decisions, show that JetBlue does not exercise meaningful control over Respondent (Exceptions 1, 5, 6).

In Exceptions 1, 5 and 6, Respondent unpersuasively argues that the proper application of the control test shows that JetBlue exercises sufficient control over Respondent to exclude Respondent from the Board's jurisdiction. The Judge's finding, that Respondent does fall under the Board's jurisdiction, is amply supported by record evidence showing that Respondent failed to meet its burden to prove sufficient control by JetBlue. Rather, the evidence shows that Respondent is a typical airline contractor that controls its own operations, including personnel decisions.

With regard to the critical inquiry, meaningful control over personnel decisions, the evidence shows that Respondent exercises nearly exclusive control over hiring, firing, and

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

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

At most, JetBlue has an extremely limited right to request that Respondent move an employee from one job classification to another. JetBlue can request that Respondent remove a skycap found to be "collecting revenue outside of the system," but in no other scenario. Jt. 2 at 24, SkyCap Services, ¶ 5. Even then, Respondent is only required to remove the employee from performing baggage services work. *Id.* Significantly, Respondent need not remove the employee from the JetBlue account altogether, or terminate him or her. *Id.* Counsel for the

General Counsel asked Matthew Barry, “how many times has PrimeFlight removed an employee at JFK at JetBlue’s request?” Barry replied, “zero.” Tr. 287.

Respondent argues that, even though it has not happened yet, JetBlue retains the right to require Respondent to remove an employee from its account. R. Br. 19. This claim is completely unsubstantiated by the credited evidence. Instead, the general terms agreement states that Respondent is responsible for addressing disciplinary issues, with the limited exception of employees who are found to be “collecting revenue outside of the system.”

This limited right pales in comparison to the right, which other airline contractors frequently cede to airlines, to request that a particular employee be removed from that airline’s account altogether. For example, in *Local 660, United Workers of America (Alstate Maintenance, Inc.)*, ALJ Green analyzed contractual language that gave an airline much more control than JetBlue has over Respondent. *See* 2016 WL 2732017, 29-CB-103994 (May 9, 2016), recommended order adopted absent exceptions, 2016 WL 3743257 (July 12, 2016). In that case, the parties’ agreement stated:

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

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

Inc., 42 NMB at 2 (no RLA jurisdiction where airline had authority to require contractor to remove employee from account).

In sum, all the record evidence convincingly establishes that Respondent possesses nearly exclusive control over personnel decisions, the most important factor in the refined control test. *See Allied Aviation Serv. Co.*, 2015 WL 4984885, slip op. at *1. By devoting only one sentence in its 37 page brief to “involvement in hiring, firing and disciplinary decisions,” Respondent essentially admits that its evidence of JetBlue’s control over Respondent’s personnel decisions is woefully lacking. R. Br. 19. In her decision, the Judge exhaustively analyzed all of the facts in evidence and arrived at the correct conclusion, that JetBlue exercises insufficient control over Respondent’s personnel decisions to establish RLA jurisdiction.

3. The Board has jurisdiction over Respondent because JetBlue does not exercise sufficient control over other, less important facets of Respondent’s operation (Exceptions 1, 5, 6).

In addition to analyzing control over personnel decisions, the Judge thoroughly examined the refined control test’s less important factors, such as the extent of JetBlue’s control over the manner in which Respondent conducts its business, access to Respondent’s operations and records, the degree of supervision exercised by JetBlue, JetBlue’s control over training and whether the employees in question are held out to the public as airline employees. *See Airway Cleaners, LLC*, 41 NMB at 267-68. Based on the complete record evidence, the Judge properly concluded that Respondent, and not JetBlue, has control over each of these factors.

- a. Respondent, and not JetBlue, controls the manner in which Respondent conducts its business.

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

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

- b. JetBlue's limited right to access Respondent's records shows that JetBlue does not exercise sufficient control over Respondent.

In addition to the manner in which Respondent conducts its business, the limited right of JetBlue to access Respondent's records demonstrates the lack of control that JetBlue has over Respondent. JetBlue may monitor how well Respondent performs its duties, and may access

relevant records “at all reasonable times,” and “during regular business hours [...] with at least ten business day’s prior written notice.” Jt. 2 at 13, ¶13.1-13.2. JetBlue has requested staffing reports when Respondent’s performance did not meet expectations, and Respondent has provided them. Tr. 239, 246. This level of access is typical of an airline contractor under the Board’s jurisdiction. For example, in *Menzies Aviation, Inc.*, the contract allowed the airline to audit the contractor’s records “with reasonable notice,” and the airline conducted a monthly audit of “operational performance, execution, compliance, quality, training, communication, budget, key performance indicators (KPIs) and administrative record keeping.” 42 NMB at 3 (control insufficient to establish RLA jurisdiction). Likewise, in *Local 660*, the airline consortium held a contractual right to audit the contractor’s records to ensure the contractor was billing appropriately. 2016 WL 2732017 at n.5 (control insufficient to establish RLA jurisdiction). Thus, the limited right of JetBlue to access Respondent’s records supports the Judge’s conclusion that JetBlue does not exercise the jurisdictionally significant control over Respondent required to find RLA jurisdiction.

c. Respondent, and not JetBlue, exclusively supervises Respondent’s employees.

In addition to JetBlue’s limited right to access Respondent’s records, Respondent’s exclusive responsibility to supervise its own employees demonstrates the lack of control that JetBlue has over Respondent. Matthew Barry conceded that “PrimeFlight is solely responsible for managing its employees.” Tr. 288. His testimony demonstrates that Respondent meets its responsibility by way of a complete supervisory structure, including managers, supervisors and leads. Tr. 303. Barry’s testimony comports with the contractual language. The general terms agreement is clear that Respondent shall “at its sole cost and expense, furnish all . . . supervision.” Jt. Ex. 2 at 9, ¶ 9.1. The agreement goes on to state, “the employees of Business

Partner engaged in performing Services hereunder will be considered employees of Business Partner for all purposes and will under no circumstances be deemed to be employees of JetBlue,” and Respondent “shall be solely responsible for supervision of such employees . . .” *Id.*, ¶ 9.3. Unsurprisingly, employee Allison Halley testified that JetBlue does not direct employees’ work, and there is no contrary testimony. Tr. 95. Rather, Barry admitted that Respondent assigns employees to shifts, Tr. 288, days off, Tr. 295, authorizes employees to swap shifts, Tr. 296, and assigns overtime, Tr. 296-97. All of these facts support the Judge’s conclusion that Respondent, and not JetBlue, controls its own supervision of employees like a typical subcontractor under the Board’s jurisdiction.

d. Respondent, and not JetBlue, exercises primary control over employee training.

In addition to Respondent’s exclusive control over supervision, Respondent’s primary control over employee training demonstrates the lack of control that JetBlue has over Respondent. The general terms agreement makes clear that Respondent “shall provide its employees . . . with all necessary initial and recurrent training, including familiarization with JetBlue Policies.” Jt. Ex. 2, at 11 ¶ 10.9. Employees Halley, Prince and Duhaney consistently testified that agents of Respondent, and not JetBlue, trained them. Tr. 89; 171; 178; 182. Matthew Barry testified that Respondent’s classroom training consists of three components, two of which are controlled exclusively by Respondent (the “internal company training module” and the “PrimeFlight technology application”). Tr. 262. The other component is “JetBlue policies, procedures, training,” for which JetBlue trains Respondent’s trainers, but does not directly train Respondent’s employees. *Id.* In addition, Respondent conducts its own on-the-job training program. Tr. 303. All of these facts support the Judge’s conclusion that Respondent, and not

JetBlue, exercises primary control over the training of employees, like a typical subcontractor under the Board's jurisdiction.

- e. Respondent's employees are held out to the public as employees of Respondent, and not of JetBlue.

In addition to Respondent's primary control over employee training, the fact that Respondent's employees are held out to the public as employees of PrimeFlight, and not JetBlue, demonstrates the lack of control that JetBlue has over Respondent. Employees wear uniforms that show the PrimeFlight logo, not the JetBlue logo. Tr. 92; 175; 302. Employees also use identification badges that show the PrimeFlight name, not JetBlue. Tr. 87. Although JetBlue reviewed Respondent's proposed uniforms, JetBlue approved Respondent's proposal with no changes. Tr. 283. Most pertinently, the parties agreed on uniforms that "look unique (not JetBlue)." GC 6. There can be no doubt that Respondent's employees are held out as PrimeFlight employees, which supports the Judge's conclusion that JetBlue does not exercise sufficient control over Respondent to exclude Respondent from the Board's jurisdiction.

- f. Based on all these facts, the Judge correctly found that Respondent fails to meet its burden of proving that JetBlue exercises sufficient control over Respondent.

Based on an exhaustive review of all of the above evidence, the Judge correctly concluded that JetBlue possesses insufficient control over Respondent to confer RLA jurisdiction. Just like the employer in *Allied Aviation*, Respondent does not argue that the airline at issue exercises meaningful control over Respondent's personnel decisions. *See* 362 NLRB No. 173. Because the record contains no such evidence, the only elements of control that Respondent can identify are generalized, broad constraints placed upon it by JetBlue, akin to standards of performance, and no greater than that found in "a typical subcontractor relationship." *See id.* Because this low level of control over secondary indicia is insufficient to

confer RLA jurisdiction, the Judge arrived at the only possible conclusion: Respondent falls under the Board's jurisdiction.

4. The federal courts have approved of the control test, as refined by recent Board and NMB decisions, which brings typical airline contractors under the Board's jurisdiction.

Respondent concedes that the Board, in reliance on "the NMB's retraction of jurisdiction" over airline contractors, has crafted the "heightened standard for carrier control" that the Judge applied. R. Br. 16. Nonetheless, Respondent argues that the Board must "retreat" from the controlling, extant law and return to "the traditional model" because, in Respondent's flawed view, "the federal courts will not recognize" the Board and the NMB's refined control test, which focuses the jurisdictional analysis on meaningful control over personnel decisions. R. Br. 16. This is a blatant misrepresentation of federal jurisprudence for two reasons. First, Respondent misconstrues the holding of the only federal court decision that Respondent cites on this point, *ABM Onsite Services-West, Inc. v. National Labor Relations Board*, 849 F.3d 1137 (D.C. Cir. March 7, 2017). Second, Respondent completely fails to cite to a subsequent opinion from the same court, which enforced the seminal Board Order that explicitly recognized the refined control test's emphasis on personnel decisions. *Allied Aviation*, 854 F.3d 55 (D.C. Cir. April 18, 2017).¹⁶

As the Board is aware, *ABM Onsite* concerned a unanimous Board Order requiring an employer, an independent contractor for a consortium of airlines, to recognize and bargain with a union after the Board certified that union as the bargaining representative. *ABM Onsite Services-*

¹⁶ Decisions of the federal courts, other than those of the Supreme Court of the United States, are not controlling authority. For this reason, Model Rule of Professional Conduct 3.3(2)(a) is not implicated here ("a lawyer shall not fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.")

West, Inc., 362 NLRB No. 179 (August 26, 2015), 2015 WL 5081421, slip op. at *1. The employer raised RLA jurisdiction as a defense in the underlying representation hearing, but after receiving evidence into the record, the Regional Director rejected the defense and directed that an election be conducted. *Id.* Following the union’s certification, in the subsequent unfair labor practice proceeding, a unanimous Board granted the union’s motion for summary judgment and ordered the employer to recognize and bargain with the union. *Id.* The employer then petitioned the D.C. Circuit Court of Appeals to review Board’s Order.

Contrary to Respondent’s representations, the Court of Appeals recognized that a fair reading of recent NMB opinions could “require greater carrier control over personnel matters than the record evinced here,” and did not reject this heightened standard. *ABM Onsite*, 849 F.3d at 1146-47. Rather, because the NMB has never articulated a rationale for applying a more rigorous control test, the Court merely held that “the NLRB is not free to simply adopt the NMB’s new approach without offering a reasoned explanation for that shift.” *Id.* at 1146. For this reason, the Court remanded to the Board, with the caveat that the Board’s Order would have been enforceable had the Board arrived at the same result, but by one of two suggested paths:

First, [the Board] could have attempted to offer its own reasoned explanation for effectively whittling down the traditional six-factor test. It would have needed to explain why such a change was appropriate, how the new test reasonably interprets the RLA, and why the NLRB has decided to determine for itself the appropriate test rather than keeping with its past practice of referring such questions to the NMB and deferring to their formulation of the test for RLA jurisdiction. Or the NLRB could have simply referred this matter to the NMB and asked that agency to explain its decision to change course. If the NLRB were persuaded, it could then have adopted the NMB’s explanation as its own. *Id.* at 1147.

Thus, contrary to Respondent’s argument, the Court of Appeals did not reject the refined control test. Neither did the Court take issue with the result of that test, which is to bring typical airline contractors under the Board’s jurisdiction.

Not only does Respondent ignore the fact that the Court of Appeals took no issue with the result in *ABM Onsite*, but Respondent also ignores the fact that the Court doubled down on its approval of Board jurisdiction over typical airline contractors in another decision issued one month later, *Allied Aviation*. 854 F.3d 55. In that case, the Court enforced a unanimous Board Order finding Board jurisdiction over an airline contractor where the Board (1) found insufficient evidence of carrier control; (2) explicitly acknowledged that the appropriate control test emphasizes whether an air carrier has meaningful control over the contractor's personnel decisions; and (3) acknowledged, by reference to NMB Member Geale's dissents in *Airway Cleaners*, 31 NMB 262 and *Menzies Aviation, Inc.*, 42 NMB 1, that all six control factors are relevant to the analysis, despite the emphasis on personnel decisions. By making explicit reference to these three points, the Court provided a model for crafting an enforceable Board Order, and signaled its approval of the refined control test.

Thus, in contrast to Respondent's distorted version of current federal jurisprudence, the two recent Court of Appeals cases show that the federal courts will enforce a Board Order finding jurisdiction over a typical airline contractor, such as Respondent, where the evidence is insufficient to show jurisdictionally significant control by an air carrier, such as JetBlue. In fact, in *ABM Onsite*, the Court went so far as to invite the Board to settle the issue once and for all, by spelling out the refined control test that it applied in *Allied Aviation*, and providing a rationale for the post-2012 departure from the less demanding standard.

- 5. The Board should not refer the case to the NMB or abandon the refined control test, as Respondent suggests (Exceptions 2, 3).**

Respondent urges the Board to decline the Court of Appeals' invitation to provide a rationale for the refined control test and either (1) refer the case to the NMB for a jurisdictional determination, or (2) abandon the control test that the Board and the NMB have refined over recent years, and revert to the outdated test, which applies six factors of equal weight. Either approach would severely damage employees' Section 7 rights, which the Board is obligated to protect.

When the Board refers a case to the NMB, "the Board loses control of the pace of the decisional process." *Fed. Exp. Corp.*, 317 NLRB 1155, 1158 n.19 (1995) (Chairman Gould dissenting). Any delay will inevitably undermine employees' Section 7 rights, which the Board is statutorily obligated to protect. While referral would result in harmful delay, there is no compelling reason for the Board to postpone making its decision. The parties already developed a highly detailed record in the administrative proceeding, which the Judge aptly summarized in her decision. For this reason, the Board has all the information that it needs to make a sound determination, and would gain nothing by referring this case to the NMB.

Although Respondent argues in Exception 3 that the Judge erred by failing to refer this case to the NMB, there is no obligation to do so. On the contrary, "there is no statutory requirement" for the Board to refer a case to the NMB, and the Board "will not refer a case that presents a jurisdictional claim in a factual situation similar to one in which the NMB has previously declined jurisdiction." *Spartan Aviation Indus., Inc.*, 337 NLRB 708, 708 (2002) (rejecting non-carrier's argument that ALJ should have referred case to NMB because record evidence sufficient to analyze two part test for RLA jurisdiction). In nearly identical factual situations applying to airline contractors similar to Respondent, the NMB has repeatedly declined jurisdiction. *Menzies Aviation, Inc.*, 42 NMB at 7 (declining jurisdiction over

contractor that provided ramp, baggage, and airport handling services to airline); *Airway Cleaners*, 41 NMB at 267-269 (declining jurisdiction over contractor that provided cleaning and maintenance to airlines); *Bags, Inc.*, 40 NMB at 169 (declining jurisdiction over contractor that provided skycap, wheelchair and unaccompanied minor services to airlines); *Air Serv Corp.*, 39 NMB 450, 459 (2012) (declining jurisdiction over contractor that provided shuttle bus transportation services between airport parking areas and terminal buildings). Thus, there is no basis in law that would require the Board to refer this case to the NMB, and referral would serve no purpose except to delay the appropriate determination.

In addition to advocating for referral to the NMB, Respondent urges the Board to abandon the control test that the Board and the NMB have refined over recent years, and revert to the outdated traditional approach, which applies six factors of equal weight. There is no case law that compels this result, and no principled reason to depart from the controlling precedent. Respondent attempts to argue that the Board should retreat to the outdated test because doing so would supposedly (1) avoid the possibility of disruption in air travel, and (2) avoid a “splintered labor environment.” R. Br. 13, 30. Neither purported reason justifies departing from the controlling precedent.

First, Respondent argues that the Board should abandon the refined control test in order to return independent contractors to the NMB’s jurisdiction, and thereby deprive employees of their limited right to engage in work stoppages, as protected by the Act. While it is true that the RLA is more sensitive to potentially disruptive labor disputes than the Act, nothing in the RLA suggests that the RLA covers all companies in which a work stoppage could interfere with air travel. Quite the opposite. The RLA requires a contractor to satisfy both the function and the control test; in other words, the two-part test specifically excludes from RLA coverage

independent contractors whose function is vital to air travel, but who are not sufficiently controlled by air carriers. To extend RLA coverage to independent contractors (which the Board does not even have the power to do) and exempt them from the Act's coverage, the Board would have to wholly disregard the second part of the two-part test. This would work a radical change in the law, for which there is no precedent.

The case relied on by Respondent in support of this departure from precedent is *Verrett v. SABRE Grp., Inc.* 70 F. Supp. 2d 1277, 1281 (N.D. Okla. 1999). The case is inapposite. In *Verrett*, the Court applied both the "function" and "control" tests and found the control test to be satisfied because, unlike Respondent, the employer in *Verrett* shared common ownership with the air carrier. *Id.* The RLA's text makes clear that common ownership satisfies the control prong of the two-part test. 45 U.S.C. § 151 (RLA coverage extends to "any company which is directly or indirectly owned or controlled by or under common control with any carrier"); *Verrett* at 1281 ("the 'control' prong of the two-part test is readily satisfied in corporate structures where the subject company and an airline are both owned by the same corporate holding company"). Thus, the Board must reject Respondent's misguided attempt to eviscerate the two-part test and exclude from the Act's coverage, in one fell swoop, all contractors who perform work that is traditionally performed by employees of air carriers.

After raising the specter of disruptive labor disputes, Respondent contends that the Board should return to the outdated six-factor control test in order to avoid a "splintered labor environment." However, there is no evidence that the old six-factor control test ever produced the uniform results that exist in Respondent's imagined utopia. On the other hand, the treatise that Respondent cites throughout its brief provides a comprehensive history of the splintered results produced over the years by the traditional test that Respondent advances. *See generally*

Brent Garren, *NLRA and RLA Jurisdiction over Airline Independent Contractors: Back on Course*, 31 ABA J. LAB. & EMP. L. 77, 92 (2015) (“between 1980 and 1996, the NMB rejected RLA jurisdiction in roughly half of its cases”).

Moreover, even with respect to a single contractor operating at different locations, the Board and the NMB have always made jurisdictional determinations on a case by case basis. *See, e.g., Air Serv Corp.*, 39 NMB at 455–56 (“because contracts and local practices might vary in a determinative manner for different employee groups, different operations, and in different locations, the NMB’s opinion is based on the record before it in each case.”) Respondent itself provides the perfect example. Although the Board has found PrimeFlight’s operation at LaGuardia Airport in 2008 to be covered under the RLA, *PrimeFlight Aviation Services*, 353 NLRB 467 (2008),¹⁷ the Board also found PrimeFlight’s operation at Luis Muñoz Marín Airport, in San Juan, Puerto Rico to be covered under the Act. *Primeflight Aviation Services, Inc.*, 2015 WL 3814049, slip op. at 1 n.1 (unanimous Board decision denying Respondent’s request for review of Regional Director’s conclusion that Board has jurisdiction). More recently, in Case No. 29-RC-198504, Region 29 conducted a hearing to take evidence concerning Respondent’s present day operation at LaGuardia Airport, and a decision is pending. Altering the jurisdictional analysis, as Respondent urges, would do nothing to obviate the need for a case by case analysis, and would not lead to more consistent results than the refined control test that current Board and NMB precedent requires.

¹⁷ In Exception 2, Respondent argues that the Judge should have deferred to the Board’s 2008 decision pertaining to Respondent’s operation at LaGuardia Airport. The Judge was correct to independently analyze the instant case because the earlier PrimeFlight decision (1) employs the outdated six-factor analysis, based on cases decided before the NMB ceded to the Board jurisdiction over typical airline contractors; (2) was made by a two-member Board, which lacked a quorum, *See New Process Steel v. NLRB*, 560 U.S. 674 (2010) (Board could not exercise its delegated authority once its membership fell from three members to two); *PrimeFlight Aviation Services, Inc.*, 353 NLRB at 467 (two members: Chairman Schaumber and Member Liebman); (3) analyzed Respondent’s operations at LaGuardia over ten years ago, in 2006, which are irrelevant to, and highly distinguishable from, Respondent’s current operations at JFK Airport.

6. The Board should accept the District of Columbia Circuit Court of Appeals' invitation to explain the control test, as refined by recent Board and NMB decisions.

As explained in the sections above, Respondent is undeniably subject to the Board's jurisdiction under controlling, extant Board law. To protect the Section 7 rights of Respondent's employees, who have been deprived of their full panoply of rights for over a year since Respondent began operating at JFK Airport on May 9, 2016, the Board must craft an Order that will be enforced by a federal court. To do so, the Board should follow the road map laid out by the District of Columbia Circuit Court of Appeals in *ABM Onsite* and *Allied Aviation*: first, articulate the refined control test that the Board is applying; second, provide a rationale for departing from the less demanding standard that was applied in cases prior to 2013.

- a. The refined control test can be easily articulated because the Board and the NMB have been consistently applying the control test for years.

Articulating the control test is simple. In order to determine whether an air carrier has jurisdictionally significant control over a non-carrier employer, the Board and the NMB examine the six traditional factors, including “[1] the extent of the carrier's control over the manner in which the company conducts its business, [2] access to the company's operations and records, [3] role in personnel decisions, [4] degree of supervision of the company's employees, [5] whether employees are held out to the public as carrier employees, and [6] control over employee training.” *Airway Cleaners, LLC*, 41 NMB at 267. Among those factors, the Board and the NMB focus primarily on whether the air carrier exercises meaningful control over the contractor's personnel decisions, including hiring, firing, and discipline. *Allied Aviation*, 2015 WL 4984885, slip op. at *1. The contractor is covered by the Act if this analysis demonstrates, with emphasis on control over personnel decisions, that the parties maintain a typical

subcontractor relationship. *Id.* In three sentences, this is the control test, as it has been refined by the Board and the NMB in recent years.

b. The refined control test is supported by a well-reasoned rationale.

As the Court of Appeals stated in *ABM Onsite*, providing a rationale for the refined control test requires an explanation as to (1) why the test is appropriate, (2) how the test reasonably interprets the RLA, and (3) why the Board decided to articulate the test, rather than defer to the NMB to formulate the test.

First, the refined control test is appropriate, and in fact necessary, in order to ensure that the Act protects the employees that it was designed to protect. *See Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) (Board “must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach”). By the Act’s plain language, coverage under the Act ends where the RLA exemption begins. *See* 29 U.S.C. 152(2) (defining “employer” to exclude “any person subject to the RLA”); 29.U.S.C. 152(3) (defining “employee” to exclude “any individual employed by an employer subject to the RLA”). Since the NMB has retracted RLA jurisdiction to exclude independent contractors, the Board is faced with the choice of either following suit, by applying a test that asserts jurisdiction over independent contractors, or allowing employees who are no longer covered by the RLA to be exempted from both statutes. Reverting to the traditional test, which weighs six equal factors of control, would inevitably cause employees to be caught in between, and without any collective bargaining rights whatsoever. By contrast, continuing to apply the refined control test maintains the coextensive coverage between the Board and the NMB’s jurisdiction that Congress envisioned when it enacted the Act’s definitions section. *See* 29 U.S.C. 152(2), 152(3).

Second, the refined control test reasonably interprets the RLA, based on the plain language of the statute and its legislative history. The statutory text states that a company is subject to the RLA and falls outside the jurisdiction of the Board if it “is directly or indirectly owned or controlled by or under common control with any carrier.” 45 U.S.C. § 151. The text does not specify the “material degree of control” that is sufficient to confer RLA jurisdiction, or the factors to be weighed in assessing that control, even though such an inquiry is inescapable. *See Bags, Inc.*, 40 NMB at 169. Thus, the statutory text does not contradict the refined control test in any way.

In addition to the statute’s text, the legislative history of the RLA supports a test that excludes independent contractors, as the refined control test does. When Congress amended the RLA in 1934 to extend coverage to wholly owned subsidiaries of rail carriers, the original draft of the amendment would have included independent contractors because it did not require that a covered company be controlled by the rail carrier. Instead, the original proposal extended the statute’s coverage, without regard to carrier control, to “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.” *The Railway Labor Act of 1926: A Legislative History* § 2, at 10-11 (Michael H. Campbell & Edward C. Brewer III eds., 1988). This language was later scuttled in favor of a revised amendment, which provided for narrower coverage, as compared to the original proposal that did not require any degree of carrier control. The revised amendment exempted independent contractors by requiring that a carrier have “control” over a company in order for that company to be covered by the RLA. *Id.* at 145. The carrier control requirement survives in the statute’s text to this day, and is given effect by the control test, as refined by the Board and the NMB. 45 U.S.C. § 151 (RLA coverage extends to

“any company which is directly or indirectly owned or controlled by or under common control with any carrier.”) In this way, the legislative history demonstrates that Congress considered covering independent contractors under the RLA, but decided to exclude them in favor of including only those companies that are owned or controlled by a carrier. The refined control test achieves this end. Thus, the refined control test reasonably interprets the RLA, based on both the text and the legislative history of the statute.

Third, the Board need not continue to wait for the NMB to formulate a test that it has been applying for years because “the Board and the NMB each has independent authority to decide whether the RLA bars the NLRB's exercise of jurisdiction.” *Allied Aviation*, 854 F.3d at 62. Instead, the Board should affirmatively act to clarify the control test, and thereby clarify employees’ rights under the two statutes, because to defer to the NMB would result in protracted delay. The longer any ambiguity exists in the coverage of the RLA and the RLA exemption from the Act’s coverage, the longer the affected employees will have essentially no rights under either statute. For this compelling reason, the Board should immediately move forward with the refined control test that it and the NMB have been applying for years.

7. Conclusion

By focusing almost the entirety of its argument on a doomed attempt to persuade the Board to retreat from controlling precedent and revive an outdated test for carrier control, Respondent essentially admits that it failed to meet its burden of proving that JetBlue exercises sufficient control over Respondent’s operation to satisfy the refined control test. Just like in *Allied Aviation*, Respondent mounts no serious argument that any air carrier has meaningful control over its personnel decisions. Having recognized all of these facts, and based on all the

record evidence, the Judge correctly concluded that Respondent is subject to the Board's jurisdiction.

(C) The Record Evidence and Well Settled Board Law Overwhelmingly Support the Judge's finding that Respondent Is Obligated to Recognize and Bargain In Good Faith with the Union as a *Burns* Successor.

1. The Judge Correctly Rejected the "Full Complement" Test In Favor of the "Substantial and Representative Complement" Test (Exceptions 7, 12).

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

Respondent develops no argument with regard to (i) substantial continuity or (iii) the appropriateness of the bargaining unit.¹⁸ With regard to (ii) the majority status, Respondent argues in Exception 7 that the Judge erred in analyzing the composition of Respondent's workforce before Respondent had finished hiring, that is, before the Respondent employed a full complement of employees. However, the test that Respondent advocates, "analysis of PrimeFlight's full complement of employees," R. Br. 31, has no support in the law. In *Fall River Dyeing & Finishing Corp. v. NLRB*, the Supreme Court considered the full complement test and

¹⁸ In Exception 12, Respondent baldly asserts that the Judge erred by finding an appropriate bargaining unit. However, Respondent completely fails to develop any argument on this issue in its brief. Suffice it to say that Respondent has not met its burden of proving that the bargaining unit, a presumptively appropriate single-facility, wall-to-wall unit of Respondent's employees in Terminal Five of the JFK Airport, is inappropriate. *See Trane*, 339 NLRB 866, 867 (2003) (rebutting presumptively appropriate single facility unit requires meeting a "heavy burden").

explicitly rejected it. 482 U.S. 27, 50 (1987) (“petitioner's ‘full complement’ proposal must fail”).

Rather, the majority status calculation under *Fall River Dyeing* examines the snapshot of an employer’s workforce triggered at the time of a union’s bargaining demand, as long as the successor employer employs a “substantial and representative complement” of employees at that time. 482 U.S. at 47 (“the Board, with the approval of the Courts of Appeals, has adopted the ‘substantial and representative complement’ rule for fixing the moment when the determination as to the composition of the successor's work force is to be made”). In order to decide whether a substantial and representative complement exists, the Board examines: whether the employer has substantially filled the unit job classifications designated for the operation, whether the operation was in substantially normal production, the size of the complement on the date of normal production, the time expected to elapse before a substantially larger complement would be at work, and the relative certainty of the expected expansion. *Id.* at 49.

The Judge correctly rejected the “full complement” test that Respondent urges in favor of the “substantial and representative complement” test required by well settled Supreme Court case law, and went on to apply the test by analyzing these factors.

2. The Judge correctly applied the substantial and representative complement test and concluded that the Union’s May 23 bargaining demand triggered the snapshot of Respondent’s workforce to be analyzed for the purpose of the majority status calculation (Exception 7).

Having selected the appropriate test, the Judge went on to apply it to the facts based on record evidence. The Judge correctly applied the test in determining that when the Union made its May 23 bargaining demand, Respondent employed a substantial and representative complement of employees. As of May 23, just like the employer in *Fall River Dyeing*,

Respondent “had hired employees in virtually all job classifications, had hired at least fifty percent of those it would ultimately employ in the majority of those classifications, and it employed a majority of the employees it would eventually employ when it reached full complement.” *See* 482 U.S. at 52.

As the Judge noted, at the time of the Union’s May 23 bargaining demand, Respondent had hired employees in all four job classifications that it would employ: baggage handling, skycap, line queue and wheelchair assistance. In each of the first three classifications, an overwhelming majority – between 94% and 100% – of positions had been filled. GC 8. Well over half, or 56%, of the wheelchair employees had been hired.¹⁹ *Compare Mid–America Door & Hardware, Inc.* 1993 WL 735836 at *5 n.22 (June 30, 1993 GC Advice Memo) (Case No. 17-CA-16512) (finding substantial and representative complement where employer had hired “significantly less than 50% of the employees the employer would ultimately employ in” modular casework classification, which composed 65-75% of operation as a whole). Finally, 73% of Respondent’s “full complement” of employees had been hired.²⁰ *Compare NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459 (9th Cir. 1985) (finding representative complement where employer had hired less than half (29 of 65) of full complement) (cited with approval in *Fall River*, 482 U.S. at 33); *Hospital San Francisco*, 293 NLRB 171, 172 (1989) (finding representative complement where employer had hired only 62% of its planned full complement (25 of 40)).

Perhaps most significantly, beginning at midnight on May 9, Respondent began providing *all* of the terminal services in Terminal Five, and thus was in “substantially normal

¹⁹ 174 of 313 wheelchair employees. GC 8.

²⁰ 367 of 507 employees. GC 8.

production.” Although Respondent later hired additional wheelchair employees, there is no evidence that it began providing new services, began operating in new areas, or otherwise expanded its operation in any way after day one of operations, May 9. Tr. 30. Based on all of these facts, the Judge properly applied the *Fall River Dyeing* standard to conclude that a substantial and representative complement of employees existed when the Union made its bargaining demand on May 23.

3. The Judge correctly found that there is no evidence to support Respondent’s contention that it had plans, prior to the Union’s May 23 bargaining demand, to continue hiring (Exception 7).

Despite all of the *Fall River Dyeing* factors that support the Judge’s finding that Respondent employed a substantial and representative complement of employees on May 23, Respondent argues that the majority status calculation should have focused on a later snapshot because Respondent had made plans, with “relative certainty,” 482 U.S. at 49, during the time period before the bargaining demand, to significantly expand its operation. The only evidence that Respondent relies upon to prove its supposedly “concrete plans” (GC 8, page 4) is Matthew Barry’s self-serving testimony, which the Judge properly discredited. By comparison, the certainty of expansion was not contested in the only legal authority that Respondent cites in support of delaying the majority status calculation, *Myers Custom Products*. 278 NLRB 636 (1986). In that case, the relative certainty of the employer’s expansion was not in issue because the parties stipulated that the employer had planned, before commencing operations, to double its workforce over the course of two to three months. *Id.* at 637. By comparison, obviously, the certainty of Respondent’s “expansion” is very much disputed.

Perhaps because there is no probative evidence or legal authority to support its claim, Respondent distracts from the issue of its phantom pre-bargaining demand hiring plans by

pointing to post-bargaining demand hires. R. Br. 33. Although Respondent did hire more employees after the Union's May 23 bargaining demand (beginning on June 6, Tr. 271), this fact is not evidence that Respondent had any plans, before the Union's bargaining demand, to expand its operation. On the contrary, Barry admitted that the industry's "high attrition rate" requires continued hiring in order to have "an appropriate level of folks in the pipeline." Tr. 233. Thus, the evidence shows that Respondent hired more employees, at least in part, simply to maintain the same number of employees in its workforce.

Furthermore, there is no evidence showing that Respondent resumed hiring in order to expand its operation in any way, such as to offer new terminal services, or to operate in new areas of the airport. *Compare Delta Carbonate, Inc.*, 307 NLRB 118, 118 (1992) (representative complement despite employer's plan to expand operation by diversifying product line and expanding customer base); *Hospital San Francisco*, 293 NLRB at 172 (1989) (representative complement despite employer's expanded operation, as evidenced by testimony that employer purchased new equipment, remodeled and expanded its space, and added numerous new medical services). Thus, Respondent cannot rely on its post-bargaining demand hiring as evidence that it had previously planned, with "relative certainty," to expand its operation. *See Fall River Dyeing*, 482 U.S. at 47.

Even if Respondent had originally planned to expand its workforce from about 367 to 507 employees, which the evidence does not support, that kind of planned expansion would be insufficient to delay the majority status calculation. The remaining *Fall River Dyeing* factors demonstrate that Respondent employed a substantial and representative complement beginning on May 9, and continuing through the Union's May 23 bargaining demand. Whereas Respondent had hired over 72% of its supposedly planned full complement on the date of the

bargaining demand (367 of 507), in *Hospital San Francisco*, the employer had hired only 62% of its planned full complement (25 of 40). 293 NLRB at 175. The Board found a substantial and representative complement. *Id.*; see also *Jeffries Lithograph Co.*, 752 F.2d 459 (finding representative complement where employer had hired 45% (29 of 65) of full complement) (cited with approval in *Fall River*, 482 U.S. at 33).

Most significantly, Respondent does not dispute that it was in full operation beginning on May 9, demonstrating that it employed a substantial and representative complement of employees sufficient to provide all of its contracted-for services. From its first day of operation, Respondent contracted with JetBlue to provide four types of terminal services in Terminal Five, and it did so for two full weeks before the Union demanded recognition on May 23. Then, Respondent continued providing all the terminal services for two weeks after the May 23 bargaining demand, with no additional hires until June 6. Tr. 271. In a situation like this, with no gap in operation, and no evidence that Respondent planned to expand its operation in any way, Respondent employed a substantial and representative complement on day one of its operation, May 9, through the day of the Union's bargaining demand, May 23, when Respondent's bargaining obligation attached.

The Judge thoroughly analyzed all of these facts and correctly identified May 23 as the date on which to analyze the snapshot of Respondent's work force. There is no dispute that as of May 23, a majority of the Respondent's employees were former Air Serv employees. Therefore, the Judge correctly concluded that as of May 23, Respondent was a *Burns* successor and was obligated to recognize and bargain in good faith with the Union.

4. Contrary to Respondent's argument, the Judge's decision is not premised on any finding with regard to Respondent's motivation to resume hiring after the Union's May 23, 2016 bargaining demand (Exception 8).

In its argument in support of Exception 8, Respondent attempts to mislead the Board by way of a straw man argument. Respondent argues that the Judge's decision is undermined by her supposedly "blunt but unsupported assumption that PrimeFlight increased staffing for the specific purpose of avoiding union representation of its employee," and "stated suspicion that PrimeFlight made hiring decisions in response to a union demand for recognition." R. Br. 34. Respondent fails, however, to establish that the Judge made any such "assumption" or "stated suspicion" because neither appears anywhere in the record.

With respect to Respondent's post-bargaining demand hiring, the Judge merely noted that, "the hiring of additional employees did not commence until after the Union's initial demand for recognition and bargaining, and there is no convincing evidence that it contemplated doing so prior to that date." ALJD 15, lines 31-33. As explained above, the *Fall River Dyeing* analysis required the Judge to analyze the "relative certainty" of Respondent's pre-bargaining demand plans to expand its operation. The undisputed fact that Respondent hired zero employees during the two weeks before the Union's May 23 bargaining demand is highly probative to this issue. The Judge was correct to rely upon it. In light of this fact and the absolute absence of any other evidence establishing any pre-bargaining demand hiring plans, other than Matthew Barry's self-serving and unsubstantiated testimony (which the Judge rightly discredited), the Judge correctly concluded that the date for determining the composition of Respondent's work force is May 23. The Board must not allow itself to be distracted by Respondent's straw man argument, which attempts to distort the Judge's sound application of the law.

5. Conclusion

As explained above, the Judge thoroughly analyzed all the facts in evidence and correctly found that the date on which to perform the majority status calculation is May 23, 2016. There is no dispute that as of May 23, Respondent employed as a majority of its workforce employees who had worked for predecessor Air Serv. On this basis, and because it is not disputed that the other prongs of *Burns* are satisfied, the Judge correctly concluded that, as a *Burns* successor, Respondent is obligated to recognize and bargain in good faith with the Union.

IV. RESPONDENT'S REQUEST FOR ORAL ARGUMENT SHOULD BE DENIED

Respondent's request for oral argument should be denied because the record and briefs adequately present the issues and the positions of the parties. *See, e.g., Rd. Sprinkler Fitters Local Union 669*, 2017 WL 2274720, 365 NLRB No. 83 (May 23, 2017) (denying request for oral argument).

V. CONCLUSION

For all the reasons discussed above, Counsel for the General Counsel respectfully requests that the Board reject each of Respondent's Exceptions and Respondent's Brief. It is further urged that the Board adopt each of the Administrative Law Judge's Findings of Fact, Conclusions of Law, Remedy and Order, and any other remedy deemed just and proper.

Dated at Brooklyn, New York, June 12, 2017.

/s/ Brady Francisco-FitzMaurice _____

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