

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

OXFORD ELECTRONICS, INC. D/B/A  
OXFORD AIRPORT TECHNICAL  
SERVICES AND WORLDWIDE FLIGHT  
SERVICES, INC., JOINT EMPLOYERS;

OXFORD ELECTRONICS, INC. D/B/A  
OXFORD AIRPORT TECHNICAL  
SERVICES AND TOTAL FACILITY  
MAINTENANCE, INC., JOINT  
EMPLOYERS; AND

OXFORD ELECTRONICS, INC. D/B/A  
OXFORD AIRPORT TECHNICAL  
SERVICES AND TWIN STAFFING, INC.,  
JOINT EMPLOYERS

and

Case 13-CA-1 15933

INTERNATIONAL UNION OF OPERATING  
ENGINEERS LOCAL 399, AFL-CIO

TRANSPORTATION WORKERS UNION OF  
AMERICA - LOCAL 504, AFL-  
CIO(OXFORD ELECTRONICS, INC. D/B/A  
OXFORD AIRPORT TECHNICAL  
SERVICES, WORLDWIDE FLIGHT  
SERVICES, INC., TOTAL FACILITY  
MAINTENANCE, INC., AND TWIN  
STAFFING, INC.)

and

Case 13-CB-1 15935

INTERNATIONAL UNION OF OPERATING  
ENGINEERS LOCAL 399, AFL-CIO

**BRIEF IN SUPPORT OF EXCEPTIONS**

Total Facility Maintenance, Inc. (“Total”) and Twin Staffing, Inc. (“Twin”) by Howard & Howard Attorneys PLLC submit this Brief in Support of Exceptions.

**Adoption By Reference**

To avoid needless repetition, Total and Twin adopt by this reference the Brief in Support of Exceptions, and arguments therein, filed by Oxford Electronics, Inc. and Transportation Workers Union Local 504 (“Local 504”).

**I. STATEMENT OF THE CASE**

This case involves employers that won a bid to perform certain work at the Chicago O’Hare International Airport, Terminal 5 (“T5”). Oxford Electronics, Inc. and Worldwide Flight Services, Inc. (“Oxford/WFS”) won the bid. Local 504 has been certified as the nationwide bargaining representative for the employees of WFS. Oxford/WFS applied their existing Collective Bargaining Agreement with Local 504 (“CBA”) to the workers at T5. Subcontractors Total and Twin were told they would have to apply the Local 504 CBA in order to contract with Oxford/WFS.

**A. Standard of review.**

The Administrative Law Judge (“ALJ”) found all of the witnesses to be credible. Decision page 4, fn. 4. Accordingly, the Board’s normal policy—to not overrule an ALJ’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect, *Standard Dry Wall Products, Inc.*, 91 N.L.R.B. 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951)—is inapplicable. Instead, the Board should review the ALJ’s findings and legal conclusions *de novo*.

## **B. CICA TEC.**

In 1990, the City of Chicago planned to construct a new international terminal and related facilities at Chicago-O'Hare International Airport. The international terminal is referred to as Terminal 5 or T5. A variety of participating airlines intended to use this terminal and entered into a CICA Terminal Equipment Corporation Agreement ("Agreement"). (R.O. 28.) CICA TEC members include Airline Managers for all the airlines that operate at Terminal 5, as well as a management company. (Tr. 419-420.) CICA TEC has a management committee. (Tr. 420-421.)

Twenty-seven to twenty-eight airlines operate out of Terminal 5. (Tr. 421.) The participating airlines became the members of CICA TEC. (R.O. 28, Sec. 1.26; Tr. 82.) CICA TEC is a management Consortium of all 27-28 airlines. (Tr. 421, 484.) The Agreement established an Executive Director, which was the current operator under the CICA TEC Operating Agreement. (R.O. 28, Sec. 1.46; Article 7.) Dave Woodcock is the President of CICA TEC. (Tr. 448, 509-510.)

CICA TEC owns the conveyer system, jet bridges, a scissor lift and a fork lift for Terminal 5. (Tr. 307-308; 547.) CICA TEC purchases all tools. (Tr. 558.) If new equipment is required, CICA TEC's approval is necessary. (Tr. 547.)

CICA TEC can ban an employee from T-5 (Tr. 519), although this does not mean the employee is discharged. CICA TEC established certain procedures which were applicable to everybody at Terminal 5. (Tr. 520; R.O. 15.) The procedures require each airline or ground handling agency to train personnel. CICA TEC's Jack Ranttila provided the procedures to Robert Jensen. (Tr. 521.) CICA TEC's procedures are applicable to the employees of Total and Twin. (Tr. 548-549.)

CICA TEC had to approve any Collective Bargaining Agreement between its contractor and the applicable union. (Tr. 90.) CICA TEC required that the workforce be represented by a union. (R.O. 10.)

**C. Change in contractors.**

Over the years, actual day-to-day operations of Terminal 5 have been sub-contracted to a variety of entities, which change from time-to-time.

CICA TEC had a Maintenance and Operations Services Agreement with Linc Facilities Services, LLC, which had a Collective Bargaining Agreement with International Union of Operating Engineers, Local No. 399 (“Local 399”) from October 1, 2008, to September 30, 2011. (C.P. 2.) Linc Facilities Services, LLC entered into a subcontract for encoder services with Total. (C.P. 3.) Linc merged into ABM Engineering Services Co. on September 1, 2011. (C.P. 7.) Local 399 entered into a collective bargaining agreement with ABM Facility Services for the period October 1, 2011 through September 30, 2014. (G.C. 2.)

CICA TEC issued a Request for Proposal (“RFP”) to potential equipment operators and maintenance contractors in late 2011. (R.O. 9.) The RFP invited submission of responses for providing operations and maintenance support for certain CICA TEC equipment in Terminal 5. The scope of services was set forth in the RFP. (R.O. 9; Tr. 616-617.)

In the fall of 2012, Local 399 first learned that there might be a change in the service contract for unit employees at T5. (Tr. 54.)

Oxford Electronics, d/b/a Oxford Airport Technical Services, was the successful bidder under the RFP. Oxford provides a variety of services to airlines and aviation authorities, as well as consortiums of multiple airlines. (Tr. 413-414.)

In an email of October 15, 2012, David Cunningham, of Oxford, advised Roger McGinty, Local 399's Business Representative, that CICA TEC awarded the contract to Oxford and that Oxford would be subcontracting the work to its parent company, Worldwide Flight Services, Inc. (Tr. 58-59; G.C. Exh. 4.) This brief will typically refer to the two companies as Oxford/WFS. CICA TEC and Oxford entered into the "CICA TEC Maintenance and Operations Services Agreement" ("M & O Agreement") on January 15, 2013. (G.C. Exh.12.)

Worldwide is currently the parent company of Oxford. CICA TEC required that the work performed by Worldwide Flight Services be union represented. (Tr. 424-425; R.O. Exhs. 10 and 11.) Worldwide has a union contract with Transit Workers Union ("TWU") Local 504. (Tr. 414-415.)

The M & O Agreement contemplated that Oxford, the "Contractor," could subcontract certain services under the M & O Agreement to other entities. (G.C. 12, p. 3, 5.) The City of Chicago put requirements on CICA TEC to have a certain amount of MBE and WBE participation. (Tr. 487.)

Jay Rossi, Oxford's Vice President, asked Jimmie Daniels if Total was interested in continuing to employ encoders as a Minority Business Enterprise. (Tr. 327-328.) Daniels met with Rossi and others near the end of 2012, or the beginning of 2013. (Tr. 347-348.)

When Oxford took over, Total retained all the encoders who had previously been working at Terminal 5. (Tr. 333.)

Rossi informed Daniels what wages and benefits Total would have to pay encoders. (Tr. 329.) Total was not free to deviate from the pay rate or benefits mandated under the TWU Local 504 contract. (Tr. 331-332.) Total did not negotiate with TWU Local 504 regarding wages or benefits regarding encoders. (Tr. 333.)

Rossi indicated that some encoders needed to be employed by a Woman's Business Enterprise. Daniels recommended Twin. (Tr. 328.) Rossi also told Daniels that TWU Local 504 would be representing the encoders. (Tr. 328.) Rossi told Twin's President, Taunesha Carpenter, that she would be taking six of the encoders working at Terminal 5; Carpenter did not have the choice as to which individuals would fill those six positions. (Tr. 352-353.)

Oxford ultimately subcontracted labor for encoder work at Terminal 5 through Worldwide Flight Services, to Twin and Total. (Tr. 418.) Total and Twin were awarded subcontracts in order to comply with the MBE/WBE requirement. (Tr. 307, 496-497.) In order for Total and Twin to become subcontractors, Oxford required that they adopt the TWU Local 504 Agreement. (Tr. 499.)

Total entered into a service agreement with Oxford on or about March 7, 2013. (Tr. 328; G.C. Exh. 13.) Twin entered into a service agreement with Oxford on or about March 8, 2013. (Tr. 351; G.C. Exh. 14.) Each service agreement expressly incorporated, by reference, the M & O Agreement.

Before Daniels had a meeting with the encoders, to tell them about TWU Local 504, the encoders already knew of the change and had obtained copies of the TWU's Local 504 Collective Bargaining Agreement. (Tr. 341-342.) Total made no changes independent of the TWU Local 504 Collective Bargaining Agreement. (Tr. 345.) Oxford never advised any job applicants that they would be required to work on a non-union basis. (Tr. 464; 504.) Nor did Total or Twin.

If existing employees at Terminal 5 had been unwilling to join Local 504, they would not have been employed by Oxford. (Tr. 474-475.)

Local 399 never sought to renegotiate a Collective Bargaining Agreement with Total or Twin. (Tr. 345; 364.)

Neither Total nor Twin ever signed any Collective Bargaining Agreements with Local 399. (Tr. 100-101, 105-106; G.C. Exh. 2; C.P. Exh. 2.)

During the time Local 399 represented the encoders, Total applied the terms of the Local 399 Collective Bargaining Agreement. Since that time, Total and Twin have applied the terms of TWU Local 504's contract. (Tr. 180-181, 335.)

Counsel for the General Counsel, in his opening statement, acknowledged that by approximately June 2013, it was known that Total and Twin had retained the existing encoders. (Tr. 20.) Total and Twin, however, were not named as parties until Local 399 filed second and third amended charges on November 18, 2015, and December 7, 2015, respectively (G.C. Exh. 1), more than two years later. There is no evidence in the record that Total or Twin had any earlier knowledge of the alleged unfair labor practices or charges.

**D. Encoders.**

As of June 30, 2013, Total employed 14 encoders. (Tr. 195-196.) In August of 2013, some of the encoders started to work for Twin. (Tr. 196.) The encoders working under Lead Encoder, Christine Sobiees, were assigned to Twin. (Tr. 200.)

Encoders manually enter baggage tag information when, for whatever reason, the system itself does not pick up this information. (Tr. 81.)

When a passenger checks his or her luggage, the initial tagging of the luggage is done by the airline itself. (Tr. 186.) The bag is then dropped onto a large conveyer belt. The bags come down to the bag room on a conveyer belt and are divided among the recode stations. The encoders also have scanners. Half the luggage is supposed to be scanned electronically and the other half is to come to the encoders. If something happens to the system, or the system is down, all luggage

comes to the encoders. The encoders encode the luggage by hand, tag the bag, and the luggage goes on to the conveyer belt. (Tr. 187.)

The encoders work in the Terminal 5 “bag room.” The airline ticket counters are upstairs at Terminal 5; the bag room is on the middle floor and customs on the bottom floor. (Tr. 570.) Airline employees also work in the bag room. (Tr. 573.) The bag room is underground right off the airfield. The bag room is about 2 ½ city blocks long. It is where the airline luggage departure and arrivals end up.

The encoders are based at “recode” stations. There are eight such stations in the bag room, four on each side. A recode station is like a computer. The encoder keys in flight numbers and the airline carrier and sends the bags down the conveyer belt, which drops them off on the sort piers, so different airlines receive their passengers’ luggage. An encoder is assigned to each of the recode stations. (Tr. 185.)

When the encoder puts the flight information at the recode station, he or she pushes the “send button” which drops the luggage off at the various different sort piers. There are 30 sort piers in Terminal 5. Airline employees work the sort piers. Encoders do not. (Tr. 188.)

After airline employees take arriving luggage off airplanes and bring it to the terminals, the luggage ends up in the bag room. The luggage goes through the system and ends up with the encoders. (Tr. 226.) Once the bags go through the conveyer system and the sort piers, employees of the airlines are responsible for taking the bags and taking them to the airplane. (Tr. 233.)

Thus, the baggage handling process involves airline employees at the beginning of the process, the encoders in the middle and airline employees at the end. (Tr. 240-241.) Airline duty managers work in the bag room on a daily basis. (Tr. 515.) Handling baggage has historically

been done by airline employees. (Tr. 582.) Indeed, air carrier employees currently perform some baggage handling functions, as noted above.

**E. Robert Jensen.**

CICA TEC was involved in having Robert Jensen be responsible for operations at Terminal 5. (Tr. 456, 460.) CICA TEC was also involved in the hire of George Farmer. (Tr. 460.) Total's and Twin's encoders report to Jensen, who is Oxford's Facility Manager. (Tr. 200, 202, 291, 293.) Jensen has limited authority over encoders. Jensen has access to the seating chart and break schedules that the lead encoder creates. (Tr. 202-203.) Jensen can authorize overtime for encoders and does so. (Tr. 204; 552.) Jensen can recommend discipline or termination of an encoder. (Tr. 207.)

Jensen has authority to request Twin or Total to remove encoders from the CICA TEC contract. (Tr. 295-296.)

Both Total and Twin have leads assigned to Terminal 5. If there are employee complaints, Jensen would try to resolve them through Total's or Twin's lead. (Tr. 315.)

Dessie "Rita" Martin is a lead and makes out the work schedules for encoders. (Tr. 309.) Jensen does not have to approve the schedule and he does not play any role in deciding which encoders work which station. (Tr. 309.) Jensen does not assign work to the encoders. (Tr. 304.)

If an encoder calls off sick, the call comes to dispatch which will contact the lead for Total or Twin. (Tr. 309.) If an encoder goes home sick, or there is a problem, he or she is to call the lead. (Tr. 310.) Jensen plays no role in setting the starting time for the shifts. (Tr. 310.) Neither WFS nor Oxford pays the encoders. (Tr. 310.)

Jensen does not typically play a role in hiring encoders or interviewing. (Tr. 310.) He plays no role in setting pay rates or benefits to the encoders. (Tr. 310.) Jensen does not have

responsibility for obtaining the necessary security badges for the encoders. (Tr. 310.) Jensen has never been asked to give a performance review to any encoder. (Tr. 311.) Jensen has not recommended any encoder be promoted, given a pay increase, or given any sort of commendation. (Tr. 311.) Jensen plays no role in setting employment policies for Total or Twin. (Tr. 312.) Jensen played no role in preparing Total's or Twin's employment manuals. (Tr. 311.) Jensen has no regular meetings with anybody from Total or Twin. (Tr. 311.)

Jensen meets with the principals of Total or Twin perhaps once a year. (Tr. 314.) Jensen would work with Total's or Twin's lead to ask an employee to stay late or come in early. (Tr. 313-314.) Jensen does not have the authority to require an encoder to come in to work. (Tr. 313.)

Jensen and WFS provide a variety of reports to CICA TEC on an ongoing basis. (Tr. 522-523; R.O. 16, R.O. 17, R.O. 18, R.O. 19, R.O. 20, R.O. 21.)

**F. TWU Local 504.**

The TWU has had a contract with American Airlines since the late 1940's or early 1950's. (Tr. 580.)

American Airlines created a company called AMR Services. (Tr. 581.) This was in approximately 1984. (Tr. 582.) AMRS was a subsidiary of AMR. AMRS performed work that American Airlines had previously performed in some areas. In 1999, AMRS also provided services to other airlines. (Tr. 582.) AMR was sold to a group called Castle Harlan, Inc. which changed the business entity's name to Worldwide Flight Services. (Tr. 588, 598, 603.) TWU Local 504 had contracts with AMR Services Corporation. (Tr. 592-594.) Worldwide assumed the TWU Collective Bargaining Agreement. (Tr. 599, R.O. 24.)

Exhibit R.O. 27 is an accurate copy of the Collective Bargaining Agreement between Worldwide Flight Services and TWU Local 504. (Tr. 610.) This agreement remains in effect.

(Tr. 610-611.) The Collective Bargaining Agreement is applied uniformly around the country.

(Tr. 612-613.)

Near the end of October or mid-November 2015, Local 504 disclaimed interest in representing the encoders. (Tr. 246-247.) TWU Local 504 sent letters disclaiming interest in representing the encoders. (Tr. 334-335; G.C. Exh. 11.)

## **II. SPECIFICATION OF QUESTIONS INVOLVED**

Question 1. Does the NLRB have jurisdiction of this matter? Applicable exceptions: Exceptions 3-10, 13-54.

Question 2. Are Oxford/WFS joint employers with Total and Twin? Applicable exceptions: Exceptions 4, 23, 34-38, 44-45, 49-50.

Question 3. Is a single unit appropriate in this case? Applicable exceptions: Exceptions 5, 35-37, 40, 43.

Question 4. Were Respondent employers entitled to establish the initial terms and conditions of employment? Applicable exceptions: Exceptions 39, 46-50.

Question 5. Are the charges, and complaint against Total and Twin barred by the statute of limitations? Applicable exceptions: Exceptions 38-40.

Question 6. Did the ALJ appropriately allow Counsel for the General Counsel to orally move to amend the complaint during the hearing? Applicable exception: Exception 2.

## **III. ARGUMENT**

### **A. The NLRB lacks jurisdiction of this matter.**

In *ABM Onsite Services-West, Inc. v. N.L.R.B.*, 849 F.3d 1132 (D.C. Cir. 2017) (“*ABM Onsite*”), the court of appeals reminded that Congress had “expressly carved out” certain industries from coverage under the National Labor Relations Act (“NLRA” or “Act”) because they were

covered under the Railway Labor Act (“RLA”). The court observed that the major purpose of Congress in passing the RLA was to provide a machinery to prevent strikes; the RLA presents a “special scheme” for the railway and airline industries, premised on their unique role in serving the traveling and shipping public and interstate commerce.

As an appellate court noted in *Office and Professional Employees Int’l Union v. NLRB*, 981 F. 2d 76, 81 (2d Cir. 1992), “...we will decline to enforce an interpretation [of the NLRA] which is “fundamentally inconsistent with the structure of the Act” and which usurps “major policy decisions properly made by Congress” (citation omitted).” Congress carefully balanced the interests of employers, unions and the public in the RLA, determining that strikes and other labor strife would impair transportation and commerce. In contrast, the NLRA gives far greater freedom to unions to strike and urge boycotts of an employer. The ALJ’s decision that the RLA does not apply to the Respondent employers at T5 ignores the fact that Local 504 was certified to represent WFS’ employees on a nationwide basis. This creates a potential risk to international air transportation by both mechanics and those who process baggage. Work interruptions by either group can literally ground international air traffic from T5. The same problem would exist even if Oxford/WFS employees were found subject to the RLA but the employees of Total and Twin were not, since interruptions in baggage handling would still impair air travel from T5. This is plainly contrary to the will of Congress in enacting the RLA.

The facts in *ABM Onsite* are similar to those in this case. Certain airlines which fly in and out of the Portland International airport created the Portland Airlines Consortium to operate the airport’s baggage handling system. The Consortium retained ABM, an independent contractor, to run the system.

The issue presented to the court of appeals was whether ABM was a “carrier” under the RLA and thus, fell outside the NLRB’s jurisdiction. In the court’s view, the answer was a function of degree of control that the Consortium exercised over ABM. The court closely analyzed the underlying contract between the Consortium and ABM, as well as the practical involvement of the Consortium in a number of areas, including how ABM employees performed their jobs, how they are trained, what equipment they used, and how they dressed. The court pointed out that the contract allowed the Consortium to establish all standard operating procedures and provide operating manuals for ABM. The contract allowed the Consortium to “keep a close eye” on the performance of ABM and its employees; ABM was required to provide the Consortium with access to documents dealing with its operations, its compliance with nondiscrimination laws, its operations and maintenance safety plans and reports of on-the-job accidents.

Further, the contract allowed the Consortium influence over ABM’s personnel decisions. ABM’s staffing plans had to be approved by the Consortium and the Consortium’s general manager had to approve overtime work by ABM employees. The Consortium had the right to approve any changes in ABM’s “key personnel” and to direct ABM to remove employees from the contract. The contract did not allow the Consortium to discipline ABM’s employees directly or require ABM to consult with a Consortium about discipline.

Finally, the contract specified the Consortium would provide ABM with certain equipment and office space. The contract dictated that ABM’s employees maintain certain appearance standards and wear uniforms that displayed the Consortium’s logo, rather than the logo of ABM.

The International Association of Machinists and Aerospace Workers won a representation election for luggage “Jammer technicians” and dispatchers. When ABM refused to bargain, the union filed an unfair labor practice charge. The NLRB granted summary judgment against ABM,

which then filed a petition for review with the District of Columbia Court of Appeals. The NLRB cross-applied for enforcement of its order.

Under the RLA, any company directly or indirectly owned or controlled by an airline is covered, provided that the company's employees do work that is traditionally performed by employees of air carriers. Because ABM was not owned by any carriers, the only question was whether it was controlled by them.

The court of appeals looked to earlier National Mediation Board ("NMB") decisions, which had developed a list of six factors to guide it in determining whether a company was controlled by an air carrier. These include (1) the extent of the carrier's control over the manner in which the company conducts its business, (2) the carrier's access to the company's operations and records (3) the carrier's role in the company's personnel decisions, (4) the degree of carrier supervision of the company's employees, (5) whether company employees are held out to the public as carrier employees, and (6) the extent of the carrier's control over employee training. The standard for satisfying this test was the *degree of influence* the carrier had over discharge, discipline, wages, working conditions and operations, rather than any *requirement* that the carrier actually hire, fire, set wages, hours, or working conditions of contractor employees.

The court of appeals found that the NLRB should have recognized that long standing NMB precedent compelled a finding of control in the case. Because the NLRB had previously followed such NMB precedents, its failure to do so was arbitrary and capricious absent a reasoned explanation for abandoning the NMB's traditional six-factor test. Thus, the NLRB was required to explain why such a change was appropriate, how its new test reasonably interpreted the RLA, and why the NLRB decided to determine for itself the appropriate test, rather than maintaining its past practice of referring such questions to the NMB and deferring to its formulation of a test for

RLA jurisdiction. Alternatively, the NLRB could have deferred the case to the NMB and asked that agency to explain its decision to change its historic test. The court granted ABM's petition for review and denied the NLRB's cross-application for enforcement, remanding for further proceedings, consistent with its opinion. The Board has referred cases to the NMB for its recommendation since *ABM Onsite* was decided. *Aircraft Service Int'l, Inc.*, 365 NLRB No. 94 (2017) fn. 2.

The ALJ asserted that the Respondent Employers' interpretation of ABM Onsite was "directly contradicted" by *Allied Aviation Service Co. v. N.L.R.B.*, 854 F.3d 55 (D.C Cir. 2017). Not so. There, the court distinguished *ABM Onsite* and noted that the Board rejected Allied's "belatedly – raised" claim of RLA jurisdiction because the record evidence did not establish the requisite carrier control. The court pointed out that Allied missed chances to build a record on the issue by failing to object to NLRB jurisdiction until after the factual record had been developed. In contrast, in the present case Respondents have continually asserted the Board lacked jurisdiction.

Indeed, in *Allied Aviation*, the court observed that when presented with a claim of RLA jurisdiction, the Board's stated practice is to (1) refer the parties to the NMB and dismiss the charge or petition in cases in which it is clear the employer is subject to the RLA, (2) to retain cases in which RLA jurisdiction is clearly lacking; and, (3) because the NMB has particular expertise in administering the RLA, to refer close cases of arguable RLA jurisdiction to the NMB for its advisory opinion before the NLRB itself decides the issue. *Allied Aviation* at 62. The present case presented at a minimum a close case of arguable RLA jurisdiction, as the Board itself recognized when it initially referred the matter to the NMB for its recommendation.

Much like the facts in *ABM Onsite*, CICA TEC is an air carrier consortium which has retained an independent contractor, Oxford Electronics, to perform services under the CICA TEC's M & O Agreement. Just like ABM, Oxford is not owned by air carriers so the question again becomes whether it is controlled by them. It is.

The M & O Agreement demonstrates such control by the airlines (CICA TEC) in numerous areas. (G.C. 12). As noted above, this agreement is expressly incorporated into Total's and Twin's services agreements.

In Article 2, "Specific Definitions," the M & O Agreement refers to a CICA TEC work plan, that being a schedule prepared by CICA TEC for the performance of services with respect to the CICA TEC equipment. The M & O Agreement defines "subcontractor" as being any person or entity with whom the contractor (Oxford) contracts to provide any part of the services.

Article 3 of the M & O Agreement at 3.03 sets forth the standard of performance for services under the agreement. It also provides that the contractor will require subcontractors to perform services in accordance with these standards. CICA TEC retains the right to replace or correct services performed by the contractor or subcontractors.

Section 3.04 describes the scope of services to be performed by the contractor.

Section 3.05 of the M & O Agreement gives CICA TEC the right to have its Executive Director remove any personnel (employees of the contractor) from the performance of services from any position for a material reason given in writing. The contractor is also required to assign and maintain during the term of the Agreement an adequate staff of competent personnel. The contractor commits to diligently seek to replace any departing "key personnel," but may not replace key personnel identified in Exhibit B, without the prior written consent of CICA TEC.

The M & O Agreement, at 3.06, requires the contractor to establish a project manager to act as a liason between the contractor and CICA TEC.

Section 3.07 of the M & O Agreement regulates the contractor's (and subcontractor's) payment of salaries to employees.

Section 3.08 imposes on the contractor obligations to comply with federal, state, and local nondiscrimination law. The contractor must execute and must cause subcontractors to execute, the "Equal Opportunity Certificate of Assurances." The M & O Agreement requires the contractor to take affirmative action and to submit relevant information and reports required by the federal or state government or CICA TEC. Similarly, the agreement requires the contractor to comply with the Chicago Human Rights Ordinance.

The contractor must incorporate certain nondiscrimination provisions into all agreements entered into with any suppliers of materials, services, or subcontractors. The contractor must award certain percentages of total compensation under the Agreement to Minority Business Enterprises and Women's Business Enterprises.

In 3.09 of the M & O Agreement, the parties agree that all documents, status studies and reports and instruments of service are the property of CICA TEC. The contractor is required to furnish to CICA TEC information, reports, and records relating to the performance of the services.

Article 4 provides that the contractor must indemnify CICA TEC and other parties and maintain certain levels of insurance.

Article 5, Section 5.01 of the M & O Agreement requires the contractor to attend job meetings, keep itself aware of any revisions to flight schedules and conform to any such revisions. This provision also reserves to CICA TEC the right, after a 10 calendar day notice to the contractor, to invoke the remedies available to CICA TEC under Section 8.02 of the Agreement.

Article 8 of the M & O Agreement sets forth events which constitute default by the contractor and provides remedies for such default. CICA TEC has the sole discretion to determine if the contractor is in default and may invoke several remedies in the event of default. Events that may constitute default, include the contractor failing to provide sufficient personnel resources and equipment or causing the services to be performed in an unsatisfactory manner.

Section 8.05 allows CICA TEC to suspend services upon fifteen days prior written notice, for a period of up to 90 days.

Section 9.09 of the M & O Agreement provides that the contractor will submit a list of pre-qualified subcontractors to CICA TEC for review and approval. CICA TEC retains the right to review and approve the form of the contractor's contract with any subcontractor. The contractor may not utilize the service of any entity that is barred from contracting with CICA TEC or the City of Chicago, pursuant to any law, ordinance, rule, or regulation.

Section 9.10 regulates the right of the contractor and any of its officials and employees, agents, and subcontractors to enter on to the project site.

Exhibit A to the M & O Agreement sets forth the scope of services and regulates how the contractor will provide services. Among other things, the contractor is required to perform daily inspections on all equipment or at the direction of the CICA TEC's Executive Director. The contractor, upon request of the Executive Director, will also provide staffing plans for review and approval. Any preventive maintenance work assigned and accomplished is to be reviewed by the Executive Director. The contractor is required to provide the Executive Director monthly reports of services performed, together with such interim reports as may be requested by the Executive Director. The contractor is required to develop and implement a spare parts inventory control

program to be reviewed and approved by the Executive Director and must provide monthly status reports.

The contractor is required to develop and implement an operations and maintenance safety plan, which is subject to review and approval of the Executive Director. The scope of services further requires the contractor to maintain cleanliness of the bag room, to maintain and replace fluorescent bulbs, to maintain and repair frayed or damaged battery charger cables and electrical conduit and to remove snow from inbound and outbound roadways.

Exhibit A provides that the contractor will perform such other tasks as directed by the Executive Director or designee.

Finally, Exhibit D to the Agreement requires the contractor to provide CICA TEC with competent, experienced key personnel on a full-time basis. Any changes in key personnel must be approved by the management committee of CICA TEC.

As noted, CICA TECs policies require training by airlines and ground agencies. CICA TEC personnel, including Ranttila and his successor, Joe Shirley, were and are at Terminal 5 on a regular basis and direct employees regarding their work. (Tr. 136, 138, 162-164, 239-40, 514-518.)

There can be no question that CICA TEC pervasively controls Oxford, and therefore indirectly, Total and Twin. Admittedly, Total and Twin do not hold their employees out as CICA TEC employees, but the other five factors in the NMB test are met on the facts of this case. Thus, the NLRB lacks jurisdiction of this case, which should be summarily dismissed for this reason alone.

**B. Oxford/WFS, Total and Twin are not joint employers.**

The ALJ incorrectly found that Oxford/WFS, Total and Twin were joint employers. This is a purely legal determination based on facts which are not substantially in dispute and the ALJ's decision is therefore entitled to no deference.

**(1) *Browning-Ferris* is wrongly decided.**

The Board's decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015) is wrongly decided and abandons decades of precedent. The case is presently before the District of Columbia Circuit Court for review. *Browning-Ferris* (i) ignores the longstanding rule that joint employment does not exist absent the exercise of substantial direct and immediate control by the putative joint employer, (ii) improperly holds that "indirect" or "reserved" control are sufficient standing alone to establish joint-employer status under the common law, and (iii) interprets the concepts of "indirect" and "reserved" control to include notions of economic influence which the Board is prohibited from considering under the distinctive history of the NLRA.<sup>1</sup>

Under the Board's previous joint employer standard, in effect for over thirty years, joint employer status only existed where two separate entities shared or codetermined those matters governing the essential terms and conditions of employment. *See TLI, Inc.*, 271 NLRB 789 (1984), *Laerco Transp.*, 269 NLRB 324 (1984). The level of control asserted by the potential joint employer had to be "direct and immediate" as to employment actions such as hiring, firing,

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<sup>1</sup> In *Retro Environmental, Inc./Green Jobworks, LLC*, the Board reiterated many of its flawed control concepts, holding that a putative joint employer need only have sufficient "reserved" control. 364 NLRB No. 70 at \*3 (2016). The Board also erred in finding the following facts probative: conditions consistent with reducing premises liability ("safety training"); certifications compliant with government standards ("EPA AHERA certification"); that the contractor may "consult" with the client; that the client had the unexercised right to "request" a worker's removal; that the client "tracks employees' hours;" that the client "dictate[s] the number of workers to be supplied" [*i.e.*, controls costs in a cost-plus arrangement]; and that the client "ensure[s] prior to performance" that the workers supplied are adequately trained and qualified." *Id.* at \*3-4, n.7.

discipline, supervision, and direction. *See, e.g., Airborne Freight Co.*, 338 NLRB 597 (2002). Such control over the encoders employed by Total and Twin is missing.

Initially, the Board's conclusions in *Browning-Ferris* are precluded by the Taft-Hartley Act's repudiation of *NLRB v. Hearst Publications*, 322 U.S. 111 (1944). Taft-Hartley showed Congress' intent that an employment relationship under the NLRA be based on a substantial amount of direct and immediate control. The Board's contrary determination in *Browning-Ferris* revived *Hearst's* rejected "economic realities" approach. It advanced "indirect" and "reserved" control concepts not based on a specific contractual right to displace the contractor and directly control its employees, but on the client's presumed economic influence over a business with actual, discretionary, day-to-day control over its agents.

Additionally, the Board's *Browning-Ferris* test ignores the control factors that distinguish employment from a contractor arrangement — such as the need to find direct and immediate control, the need for "pervasive" control, and control over the putative employees, rather than mere economic impact upon the contractor.

Under *Browning-Ferris* the Board may deem companies joint employers if they merely affect the means or manner of employees' work and terms of employment through an intermediary. This broad and fuzzy standard creates substantial uncertainty and risk as what business relationships will be considered joint employment relationships.

Notably, the Board suggests that a company may be a joint employer if it merely retains the contractual right to set a term or condition of employment. Similarly, the Board indicates that a user firm that sets broad job parameters through intermediaries and checks that suppliers comply might be labeled a joint employer.

Finally, the Board's test is contrary to the NLRA's actual structure and Congress' vision of collective bargaining. The Board cannot define "joint employment" in a way that is inconsistent with the scope of the "employer" definition in the Act's secondary boycott protections. Nor can it require bargaining where a client does not co-control at least wages and hours — the core mandatory subjects explicitly referenced in the Act.

**(2) The Taft-Hartley Act precludes the *Browning-Ferris* test.**

The *Browning-Ferris* joint-employer test is fatally flawed under Taft-Hartley. Not only does it require no direct and proximate control, the Board's theories of "reserved" and "indirect" control are really no different than the economic considerations Congress forbade the Board to consider in Taft-Hartley. The Board now impermissibly proposes that a client's alleged economic influence upon a contractor — an independent business with actual, discretionary, day-to-day control over its employees — is tantamount to dispositive control over those employees.

Courts have found that (i) policing a service agreement to ensure the client gets the benefit of its bargain; (ii) cost-control initiatives; (iii) assessment of whether the contractor's agents are satisfying customer service goals or agreed-upon performance criteria; and (iv) working conditions shaped by the market or third-party requirements, are not probative of employer status. *See FedEx Home Delivery v. N.L.R.B.*, 563 F.3d 492, 501 (D.C. Cir. 2009); *N. Am. Van Lines, Inc. v. N.L.R.B.*, 896 F.2d 596, 598-599 (D.C. Cir. 1989); *Local 777 v. N.L.R.B.*, 603 F.2d 862 at 873, 891, 899, 904 (D.C. Cir. 1979.)

The right to scrutinize the qualifications and assess the performance of a contractor or subcontractor's employees or agents simply gives the customer the ability to evaluate a service arrangement, which the Courts have found immaterial. *See, e.g., N. Am. Van Lines and Aurora Packing, Co.*, 904 F.2d 73, 75 (D.C. Cir. 1990).

The Courts have held that they “will draw no inference of employment status from ‘merely the economic controls which many corporations are able to exercise over independent contractors with whom they contract.’”<sup>2</sup> *N. Am. Van Lines, Inc.* at 599 (citations omitted). That is consistent with Taft-Hartley’s rejection of Hearst’s conclusion that “economic facts” can give meaning to an employment relationship under the NLRA.

The Board’s *Browning-Ferris* concept of “indirect” control similarly is irrelevant to a joint-employer finding under the NLRA if it is grounded in claimed economic influence, e.g., the generalized ability to cancel the service agreement sometime in the future, rather than a mandatory directive resulting from enforcing particular contract terms. *Id. See also Local 777* at 908 (finding *Hearst* “economic facts” approach equivalent to responding to “business realities”).

Isolated incidents of a customer’s “requesting” but not requiring that a contractor reassign or discharge an employee are also not probative. *See N. Am. Van Lines, Inc.* at 598; *Aurora Packing Co.* at 76.

Courts also have held that “employer efforts to ensure the worker’s compliance with government regulations, even when those efforts restrict the means and manner of performance, do not weigh in favor of employee status.” *N. Am. Van Lines, Inc.* at 599.

By creating a new joint-employer standard which does not meaningfully create a safe harbor for traditional third-party arrangements, the Board’s *Browning-Ferris* test is contrary to the Act’s basic structure. Its essentially formless approach, gives insufficient acknowledgment to the contours of joint-employer alternatives developed by the courts. Parties desiring a contractor relationship can have no confidence that they have crafted one which is lawful.

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<sup>2</sup> In *International Chem. Workers Local 483 v. N.L.R.B.*, 561 F.2d 253, 256 (D.C. Cir. 1977), the Court agreed with the Board that an at-will, cost-plus arrangement policed for efficiency is not probative of a joint-employer relationship.

**(3) The *Browning-Ferris* test is inconsistent with other aspects of the NLRA.**

The Board's test also is invalid because it substantially broadens those employers subject to strikes, picketing or coercive pressure in contravention of Taft-Hartley's secondary boycott prohibitions. Structurally, the Board cannot define "joint employment" in a way that is inconsistent with the scope of the "employer" definition used elsewhere in the NLRA.

Joint employer status carries consequences that extend beyond collective bargaining obligations. For example, Section 8(b)(4)(ii)(B) of the NLRA prohibits labor unions from striking and picketing neutral employers, but permits strikes and pickets against the primary employer with whom the union has a dispute. *Int'l Longshoremen's Ass'n, AFL-CIO v. NLRB*, 613 F.2d 890, 900-902 (D.C. Cir. 1979). A company labeled a "joint employer" may now face strikes or boycotts that would otherwise be banned as secondary economic coercion. *See Teamsters Local 688 (Fair Mercantile)*, 211 N.L.R.B. 496, 496-497 (1974) (union's picketing of joint employer not an unfair labor practice).

**(4) The *Browning-Ferris* test is contrary to the common law definition of employment.**

The NLRA requires a company to bargain collectively only with its "employee" representatives. 29 U.S.C. § 158(a)(5). The Act requires the Board and the courts to look to common-law agency principles when determining whether to classify a worker as an employee. *FedEx Home Delivery* at 495-96; *see also NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968).

Under the common law, "control is the principal guidepost" in determining whether there is an employer-employee relationship. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003). As the Courts have explained, the applicable common-law test is "a right-to-control." *N. Am. Van Lines* at 599. That "test requires an evaluation of all the surrounding

circumstances.” *Id.* “[T]he extent of the actual supervision exercised by a putative employer over the ‘means and manner’ of the workers’ performance is the most important element to be considered in determining whether or not one is dealing with independent contractors or employees.” *Id.* (quoting *Local 777, Democratic Union Org. Comm., Seafarers Int’l Union v. NLRB*, 603 F.2d 862, 873 (D.C. Cir. 1978)).

Thus, in determining whether an entity is a joint employer, courts look to the common law and examine whether the putative employer exerts a “substantial degree of control over the manner and means” of the putative employees’ performance. *Int’l Chem. Workers Union Local 483 v. NLRB*, 561 F.2d 253, 256 (D.C. Cir. 1977); see also *Clinton’s Ditch Coop. Co. v. NLRB*, 778 F.2d 132, 138 (2d Cir. 1985) (analyzing whether there was “sufficient evidence of immediate control over the employees”).

A company does not exert the requisite “substantial,” “immediate control” when it sets eligibility criteria for suppliers to provide services. As an initial matter, that is so because setting the parameters and standards for a supplier to meet in rendering services does not establish an employment relationship, *Int’l Chem. Workers* at 256, and setting supplier eligibility criteria is one step further removed from setting the parameters and standards of the job eligible suppliers may perform.

Setting and enforcing basic job parameters and standards is “fully compatible with the relationship between a company and an independent contractor.” *N. Am. Van Lines* at 599. In *North American Van Lines*, for example, a trucking company exerted global oversight over drivers with whom it contracted to deliver a third party’s products. It developed a detailed system of incentives and penalties to encourage higher productivity, and it communicated with drivers regarding perceived faults in their performance. *Id.* at 602-03.

Such oversight and standard-setting is commonplace in a supplier contracting relationship and is not the type of control that can support a finding of joint employment. *See Int'l Chem. Workers* at 256 (finding no joint employment relationship under NLRA when user firm conducted daily head count of supplier's employees, monitored the results of their work, and supervised their work for a short period of time).

For the reasons set forth above, *Browning-Ferris* is wrongly decided.

**C. Oxford/WFS are not joint employers with Twin or Total.**

Oxford/WFS are not joint employers with Twin or Total. The relevant facts are as follows: Encoders interaction with Oxford/WFS managers are limited primarily to Jensen, and Jensen's control over the encoders is limited. Both Twin and Total employ "Lead Encoders," who are responsible for establishing the encoders' work schedule and seating assignments. (Tr. 202-203; 309). Though Jensen has access to the work schedule and seating assignments, he does not approve the schedule, nor does he determine or influence which encoders are assigned to which work station. (Tr. 309). Encoders contact their Leads – not Jensen – to call out sick, or to request to go home early. (Tr. 310). Jensen cannot ask an encoder to come in early or to work an additional shift, though Jensen can ask another encoder to stay late to cover the sick employee's shift. (Tr. 204-205, 313).

Jensen does not hire or interview encoders, nor does he assign work to encoders. (Tr. 304, 310). He does not review encoders' performance, nor does he recommend encoders for promotion, pay increases or commendation. (Tr. 311-312). He does not have regular meetings with Total or Twin employees, and meets with the principals of Total and Twin once or twice per year. (Tr. 314). While there was one occasion in which Jensen asked Twin to discipline an employee, he did so at the direction of Ranttila, and his role in the discipline was largely that of conduit between

Twin and CICA TEC. (Tr. 296-297). Oxford/WFS does not set employment policies for Total or Twin, and did not play a role in preparing Total's or Twin's employment manuals. (Tr. 311-312). Oxford/WFS does not provide encoders with security badges or uniforms. (Tr. 310).

Even under the Board's decision in *Browning-Ferris Indus*, counsel for the General Counsel must show that Oxford/WFS "possess[] sufficient control over [Twin's and Total's] employees' essential terms and conditions of employment to permit meaningful bargaining." *Id.* While control may be direct, indirect or, in some circumstances, reserved, it must still be present.

Here, Oxford/WFS did not possess direct or indirect control over Twin's and Total's essential terms and conditions of employment. The Board in *Browning-Ferris* found a joint employer relationship where the contractor (Browning-Ferris) exerted significant control over its subcontractor's employees (Leadpoint Business Services, Inc.) through a variety of contractual provisions, all of which affected Leadpoint's ability to hire, discipline, discharge and compensate its own employees and thus, according to the Board, warranted a finding of a joint employment. Specifically, the Board relied on, among other things, provisions in the parties' service agreement that required Leadpoint applicants to pass a drug test; required Leadpoint applicants to meet Browning-Ferris' own standard selection procedures; and, prohibited Leadpoint from hiring workers Browning-Ferris deemed ineligible for rehire (all of which evidenced control over hiring) along with a contract provision giving Browning-Ferris the "unqualified right" to discontinue the use of any Leadpoint worker (control over firing and discipline) and a provision restricting Leadpoint from paying employees more than Browning-Ferris paid its employees who performed the same work (control over wages).

No such control exists here. With the exception of its contractual pay requirements, Oxford/WFS' contracts with Twin and Total do not include any provisions that affect, in any

manner, Twin's and Total's ability to hire, discipline or discharge their employees. Absent evidence of such control, a finding of joint employer status is unwarranted.

**D. Even if Oxford/WFS is a joint employer with Twin or Total, Oxford/WFS was entitled to set its initial terms and conditions of employment.**

Assuming Oxford/WFS is a joint employer of Twin or Total (which they are not), the employers were still entitled to set the initial terms and conditions of the Twin and Total employees. See *N.L.R.B. v. Burns Security Services*, 406 U.S. 272 (1972). The ALJ found the Respondent Employers were *Burns* successors.

**E. Total and Twin did not violate the Act in setting initial terms of employment.**

Counsel for the General Counsel has not alleged that Oxford/WFS or Twin or Total made anti-union comments to Twin or Total employees, or otherwise threatened that Twin and Total would operate "non-Union" after Oxford/WFS' acquisition of the CICA TEC contract. Indeed, to the contrary, at all relevant times, it was contemplated that Total and Twin, just like Oxford/WFS would operate under a TWU CBA. Thus, and for the same reasons as set forth above, Oxford/WFS did not forfeit its right to set initial terms and conditions of employment in connection with the encoder work performed by Twin and Total.

At the hearing in this matter, counsel for the General Counsel indicated that he was not relying on the "perfectly clear successor" theory (Tr. 397), but rather argued that Respondents violated the Act under *Advanced Stretch Forming International, Inc.*, 323 N.L.R.B. No. 84 (1997). *Burns* allows a successor employer to set initial terms and conditions of employment, so there was no occasion to apply *Advanced Stretch Forming*. In any event, *Advanced Stretch Forming* is factually distinguishable. In that case, the judge found, as affirmed by the Board, that the employer violated Section 8(a)(1) of the NLRA by telling employees of the predecessor employer that there would be *no union*. In contrast, in this case, all the evidence establishes that both Oxford, Total,

and Twin told employees that there *would* be a union, TWU Local 504. Accordingly, there was no violation arising from setting initial terms of employment under *Advanced Stretch Forming*.

**F. The allegations against Total and Twin are barred by the statute of limitations.**

The purpose of the statute of limitations contained in the NLRA, 29 USC 160(b), is to give parties a fair opportunity to prepare defenses and to bar stale claims. *N.L.R.B. v. McCready & Sons, Inc.*, 482 F.2d 872, 875 (6<sup>th</sup> Cir. 1973). In the present case, it is clear that Local 399 had actual knowledge shortly after Oxford won the CICA TEC bid that encoders would be working for Total and Twin. This much was conceded by Counsel for the General Counsel in his opening statement. Yet, nearly two years went by before Total and Twin were named as Respondents in amended charges.

As argued by the Respondents, Total and Twin are not joint employers with Oxford/ WFS. Therefore, the cases cited by the ALJ, finding that timely service of a charge on one joint employer makes service timely on another employer are inapposite. Even if the Respondents were joint employers, it is inequitable and a violation of Total's and Twin's right to due process to find service on Oxford/WFS made service on Total or Twin timely.

The ALJ ordered joint and several liability among all the Respondents for back pay, lost benefits, fund contributions, and tax consequences, plus interest. Nevertheless, there is no evidence that anyone connected with Total or Twin was *ever* told that unfair labor practice charges were pending relating to their entering into a relationship with TWU Local 504. Their first knowledge came from the second and third amended charges, filed in late 2015. This delay far exceeded the six month statute of limitations and exposed both Total and Twin to potentially significant financial liability. Had Total and Twin possessed earlier knowledge, they might have

been able to take steps to avoid liability all together, or at least drastically limit the financial exposure, for example, by abandoning work at Terminal 5.

Contrary to the ALJ's finding, the Board should apply the basic reasoning of *EMI Music*, 311 N.L.R.B. 997 (1993) *enfd. sub nom. EMI Music Inc. v. N.L.R.B.*, 23 F. 3d 399 (4th Cir. 1994) (table). There, the Board stated:

General Counsel must first show (1) the two employers are joint employers of a group of employees, and (2) that one of them has, with unlawful motivation, discharged or taken other discriminatory action against an employee or employees in the jointly managed work force. The burden then shifts to the employer who seeks to escape liability for its joint employer's unlawfully motivated action to show that it neither knew, nor should have known of the reason for the other employer's action or that, if it knew, it took all measure within its power to resist the unlawful action.

As pointed out above, the ALJ's conclusion that Oxford/WFS are joint employers with the employees of Total and Twin is incorrect as a matter of law. Even were this assumed to be correct and that Counsel for the General Counsel established the two elements necessary to create joint liability, there is no evidence on the record that Total or Twin knew or should have known that recognizing Local 504 and applying the Local 504 Agreement was unlawful. Indeed, the only evidence established that Total and Twin had no choice—this was a requirement if the two companies wanted to work with Oxford/WFS.

As the court of appeals noted in *Parsippany Hotel Management Company v. N.L.R.B.*, 99 F.3d 413, 419 (D.C. Cir. 1996) mid-hearing amendments to unfair labor practice charges raise not only Section 10(b) concerns but also due process issues. The concerns underlying a due process claim are far different from those underlying Section 10(b). The purpose of Section 10(b) is to

prevent the issue by the Board of complaints upon charges based upon stale unfair labor practices. The Due Process Clause, by contrast, serves to secure the individual from the arbitrary exercise of the powers of government by requiring the government to follow appropriate procedures.

Under the circumstances, it is fundamentally unfair and a violation of due process not to apply the statute of limitations on the facts of this case.

**G. The ALJ erred in allowing an amendment to the Consolidated Complaint.**

This case was tried on three consecutive days. At the end of his case, Counsel for the General Counsel moved to amend the Consolidated Complaint to add an allegation that Total and Twin by their supervisors or agents gave assistance and support to Respondent-Union (Local 504) by conditioning employment on employees signing membership cards and dues checkoff authorizations for Respondent-Union. (Tr. 367-368) The amendment was allowed over counsel's objection. (Tr. 408-411) In the Decision, the ALJ indicated the amendment was allowed based upon employee testimony that supervisors or agents Total and Twin told them that they must sign Local 504 membership cards and dues checkoff authorizations as a condition of employment. Decision, page 3, fn. 3. There are several problems with this conclusion. First, the only employee's testimony was that of Dessie Martin, who testified that "Kelly" and Tracey Ann Coakley, of Total, spoke to her telling her she had to sign a "form" from Local 504 (Tr. 216 - 217). Obviously, Total and Twin were hard pressed to challenge the unanticipated testimony that "Kelly" and "Tracey Ann Coakley" were supervisors or agents of Total, since the amendment had not yet been proposed. Indeed, the ALJ made this assumption based on little more than speculation. Decision, page 10, fn. 10, citing to Tr. p. 298—when asked the position of *Faye Ann Coakley* the witness answered "I believe supervisor".

There is no evidence in the record whatever that any supervisor or agent of Twin made such a demand. Other than Martin's conclusory testimony, there is no evidence that "Tracy Ann Coakley" was an agent or supervisor of Total. Additionally, as a matter of timing, Total and Twin had no reason to anticipate that the allegation allowed in the Amended Complaint would need to be addressed until the middle of the hearing, after Counsel for the General Counsel's witnesses had been excused.

At the hearing Counsel for the General Counsel asserted that both Total and Twin had stipulated to the substance to the proposed amendment pointing to joint exhibit 4. The ALJ did not rely on the stipulations. In any event it is noteworthy that each stipulation provides "by entering into these stipulations Respondent-Total [Twin] does not waive any defense it has raised to the Amended Complaint".

For the reasons above, the amendment to the Complaint was time barred by the statute of limitations.

Moreover, under the circumstances of this case, the eleventh hour amendment to the Amended Complaint, even if considered to be within the statute of limitations (which it was not), deprived Total and Twin of the due process.

#### **IV. CONCLUSION**

For the reasons set forth above, the Board should dismiss the Amended Complaint against Total and Twin and vacate the ALJ's conclusions of law and proposed remedies.

Respectfully submitted,

TOTAL FACILITY MAINTENANCE, INC. and  
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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing was served upon the parties of record via the National Labor Relations Board's electronic filing service on July 11, 2017.

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