

**UNITED STATES OF AMERICA
BEFORE THE 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 No. 13-CA-115933

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

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 399, AFL-CIO

Case No. 13-CB-115935

**BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE ON BEHALF OF RESPONDENTS OXFORD
ELECTRONICS, INC. d/b/a OXFORD AIRPORT TECHNICAL SERVICES AND
WORLDWIDE FLIGHT SERVICES, INC.**

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INTRODUCTION

Respondents Oxford Electronics, Inc., d/b/a Oxford Airport Technical Services (“Oxford”) and Worldwide Flight Services, Inc. (“WFS” or “Worldwide”) (collectively, “Oxford/WFS” or “Oxford/Worldwide”) submit this brief in support of their exceptions to the May 31, 2017 decision of Administrative Law Judge Kimberly Sorg-Graves (“ALJ”). Underlying the ALJ’s decision is the untenable determination that Oxford/WFS violated the National Labor Relations Act (“NLRA”) and now must pay potentially millions of dollars in damages, simply by complying in good-faith with the requirements of the Railway Labor Act, 45 U.S.C. §§151, *et seq.* (“RLA”) – a law WFS and its predecessors have been subject to for over 30 years. Such determination has no basis in law, and stands to threaten the labor stability of Oxford/WFS’ nationwide operations under the RLA and the operations of other RLA-governed employers throughout the country. Thus, the Board should correct the ALJ’s erroneous conclusions that, among other things, (1) the National Labor Relations Board (“NLRB”) has jurisdiction over this dispute, which properly is governed by the RLA, not the NLRA, (2) that Oxford/WFS is a successor with a duty to bargain with Charging Party International Union of Operating Engineers of Chicago, Local 399 (“CP” or “Local 399”) despite the longstanding *nationwide* bargaining history – certified by the National Mediation Board (“NMB”) – between WFS and the Transport Workers Union (“TWU”)¹, and (3) in utter disregard of the decision of the United States Supreme Court, in *NLRB v. Burns Int’l Security Services, Inc.*, 406 U.S. 272 (1972) (“*Burns*”), that by applying the nationwide collective bargaining agreement (“CBA”) between Worldwide and the TWU (“TWU CBA”) to the employees here at issue, Oxford/WFS lost the right to set initial terms and conditions, and now, almost four years later, is obligated to

¹ TWU and its Local 504 are referred interchangeably herein as “TWU.”

make whole the subject employees by paying them the difference between what they were being paid by the predecessor employer, and what they were paid under the RLA-based TWU CBA. As detailed below, the ALJ arrived at these results by ignoring critical facts and disregarding applicable law. **To be clear, there has never been a case at the NMB or the NLRB where, as here, an issue of NLRA/RLA jurisdiction issue arose in the context of a currently certified representative under the RLA, with a nationwide CBA, and a historical nationwide bargaining relationship.** The decision of the ALJ, which all but ignores this context, is flawed throughout; the Amended Complaint is without merit and now must be dismissed in its entirety.

STATEMENT OF THE CASE

It is undisputed that for some 30 years prior to the events giving rise to this proceeding, WFS and its corporate predecessor, AMR Services, Inc. (“AMRS”) were parties to a series of *nationwide* CBAs with the TWU, entered into pursuant to the provisions of the RLA. It is likewise undisputed that in 1999 the NMB certified TWU as the nationwide representative of employees performing work of the kind here at issue. And, it is undisputed that the courts and the NMB repeatedly have confirmed the status of WFS as a carrier subject to the RLA. Remarkably, none of this was worthy of mention, let alone analysis, by the ALJ.

Likewise, although a reader would not know it from a review of the ALJ’s decision, over the years, Worldwide often has taken over work at new locations for its airline, airport and aviation customers. Whenever such work was of the type covered by its TWU CBA, it always automatically extended its TWU CBA to cover the new location. Failure to do so would have been a violation of TWU’s certifications under the RLA and the applicable TWU CBA.

In 2012, CICA Terminal Equipment Corporation (“CICA TEC”), the operator of Terminal 5, Chicago O’Hare International Airport’s international terminal (“T5”), published a

Request for Proposal (“RFP”) for a contract to perform, among other things, baggage system and jet bridge servicing and maintenance work at T5 (“Maintenance Agreement”). Since CICA TEC required that the work be performed with union labor, Oxford – with the full knowledge of CICA TEC – bid for and was awarded the contract on the basis of a subcontract to WFS, its parent (and admitted joint employer in this proceeding), which would then apply its TWU CBA at T5. Oxford/WFS immediately so advised the incumbent employees and, when asked, Local 399. When the CICA TEC contract finally became effective on July 1, 2013, as it had done numerous times in the past, and as fully consistent with its status as a carrier subject the RLA and its *nationwide* TWU CBA, WFS immediately extended its TWU CBA to the work at T5.

Despite the long and consistent history of WFS coverage under the RLA, the long and consistent history of *nationwide* representation of its employees by the TWU, and the long and consistent history of application of its TWU CBA to new work locations throughout the United States, the ALJ found that, by applying its TWU CBA to its work at T5, as required by the RLA, and thus declining to recognize and bargain with Local 399, WFS violated Sections 8(a)(1), (2), (3), and (5) of the NLRA, a statute which has **never** been applied to WFS. In so doing, the ALJ imposed NLRA jurisdiction in a case of first impression (claiming incorrectly that it was just like other wholly inapposite cases), imposed a successorship obligation in disregard of the factual context and plainly applicable Board precedent, and, making matters more Kafkaesque, in reliance on a theory first asserted by CP more than *two years after* the start of operations, held – in utter disregard of *Burns* and without any analysis – that by declining to recognize and bargain with CP, due its perceived obligation to deal with TWU, WFS somehow lost the right to set initial terms of employment, requiring that it retroactively pay the affected employees potentially millions of dollars based on a contract to which WFS never committed.

Nothing in the facts or the law support the decision of the ALJ. Accordingly, this case now must be dismissed, once and for all.

PROCEDURAL HISTORY

On March 4, 2013, Local 399 first filed an unfair labor practice charge (Case No. 13-CA-099518) against Oxford and CICA TEC, as alleged joint employers, alleging Oxford and CICA TEC violated Sections 8(a)(1), 8(a)(2) and 8(a)(5) of the Act by, among other things, refusing to recognize Local 399 as the bargaining representative of employees at T5. This charge was dismissed as untimely because Oxford/WFS had not yet begun operations (ALJ 3, fn. 2; GC Ex. 19).²

Although Oxford/WFS commenced operations on July 1, 2013, it was not until October 29, 2013, four months later, that Local 399 filed a new charge (Case No. 13-CA-115933), this time against Oxford and Worldwide, as joint employers, alleging Oxford/WFS violated Sections 8(a)(1), 8(a)(2) and 8(a)(5) of the Act by recognizing TWU and by refusing to recognize Local 399 as the exclusive representative of the T5 employees. (ALJ 2:37-3:3).

On December 17, 2013, the Region informed Oxford/WFS that it “decided to refer this case to the NMB for a determination on jurisdiction.” (RO Ex. 1). As described by the ALJ, “[o]n January 14, 2014, the NLRB referred Case 13-CA-115933 to the ... [NMB] for an advisory opinion as to whether the employment relationship at issue falls within the jurisdiction of the RLA.” (ALJ 3:4-6; emphasis added).

However, without explanation, before the NMB issued the jurisdictional determination which the NLRB had sought, on May 28, 2015, *the NLRB aborted its deferral to the NMB and*

² (“ALJ __”) refers to the May 31, 2017 decision of the ALJ. (“Tr. __”) refers to pages in the official transcript. (“GC Ex. __”), (“RO Ex. __”) and (“J Ex. __”) refer to General Counsel’s, Oxford/WFS’ and Joint Exhibits, respectively.

assumed jurisdiction over this dispute, commencing its investigation into the underlying merits. (RO Ex. 3; ALJ 3:6-8). The Board did not explain this decision to abort its request that the NMB, or to arrogate to itself this jurisdictional determination, all in stark contrast to the NLRB's decades-long history of deferring "close cases" of arguable RLA jurisdiction to the NMB, the agency historically best suited to make such a determination.

On August 27, 2015, some 20 months after the charge in Case No. 13-CA-115933 and some 26 months after Oxford/WFS began operations at T5, Local 399 filed an Amended Charge, alleging *for the first time* that Oxford/WFS implemented unilateral changes to the terms and conditions of employment without first bargaining with Local 399, in violation of Section 8(a)(5) of the Act; and, discriminated against employees "employed by Oxford and WFS, joint employers, at Terminal 5" by deducting TWU dues and restrained and coerced employees "by telling them that they had to join Local 504 in order to work for the joint employers," in violation of Section 8(a)(3) of the NLRA. (GC Ex. 1). By this amendment, CP, *for the first time* called into question the right of Oxford/WFS to set initial conditions, and, with it, raised the possibility of potential backpay.³

That belated effort was rejected when, on October 8, 2015, the Region dismissed the portion of the Amended Charge that alleged Oxford/WFS violated Section 8(a)(5) of the Act by "unilaterally set[ting] initial terms and conditions of employment upon assuming operations [as] the evidence was insufficient to establish that [Oxford/WFS] were 'perfectly clear' successors and did not have the right to unilaterally set initial terms and conditions of employment," a

³ The ALJ glosses over this delay by merely referring to "the charge and its subsequent amendments filed on August 27, November 18 and December 17, 2015" (ALJ 2:39-40). The November 18 and December 17, 2015 charges added, for the first time claims against Total Facility Maintenance, Inc. ("Total") and later Twin Staffing, Inc. ("Twin") as a joint employers with Oxford/WFS but added no new substantive allegations to the Amended Charge filed August 27. (GC Ex. 1).

finding confirmed by the ALJ (RO Ex. 4; ALJ 27:19-21).

However, again entirely without explanation, on November 20, 2015, the Board revoked its dismissal of the “allegations that [Oxford/WFS] were perfectly clear successors and did not have the right to set initial terms and conditions of employment upon assuming operations” (RO Ex. 5), apparently based a new theory advanced by CP, asserted for the first time almost 2 ½ years after Oxford/WFS commenced operations at T5, the “Advanced Stretchforming” theory, now adopted by the ALJ and discussed fully below (*see pp. 45-49, infra*).

On March 13, 2016,⁴ the Regional Director issued the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing which gave rise to this proceeding. Answers denying the material allegations and asserting the RLA jurisdictional defense were timely filed. (GC Ex. 1; ALJ 3:9-29). The hearing was held on January 17-19, 2017. The ALJ decision, issued May 31, 2017, found “all of the witnesses to be credible as there was little discrepancy amongst their testimony and nothing in their demeanor caused me to believe otherwise.” (ALJ 4, fn. 4). By order dated June 22, 2017, the time to file this appeal was extended to July 12, 2017.

STATEMENT OF THE FACTS IGNORED BY THE ALJ⁵

I. WFS, OXFORD and CICA TEC.

A. WFS’ History as an RLA Derivative Carrier and its Decades-Long Bargaining History with TWU.

1. American Airlines, AMRS and The Initial Relationship with TWU.

In or around 1984, American Airlines (“American”) created AMRS, an airline service company and subsidiary of American, to provide various airline-related services to American

⁴ The ALJ erroneously cites the date as July 25, 2015 (ALJ 3:9-11). It was not.

⁵ The ALJ Decision refers to facts as found by the ALJ, many of which are not subject to challenge in this appeal. However, the exceptions identify many facts in the record which are not mentioned or relied upon by the ALJ. This Statement of Facts will only briefly refer to the findings which Oxford/WFS does not challenge, but will focus on those facts which the ALJ ignored and which, we submit, are critical to a correct resolution of this dispute.

and other air carriers throughout the United States. (Tr. 581-582). Prior to AMRS' creation, American provided these services itself, and thus AMRS' employees performed work that previously had been performed by employees of American. (Tr. 582).

In 1984, AMRS recognized the TWU, pursuant to the terms of the RLA, as the exclusive and sole bargaining representative of AMRS' mechanic, ramp service, security technician and baggage repair technician classifications "working within the limits of the United States, its territories and possessions." (Tr. 594-595). In 1992, AMRS and TWU expanded the scope of TWU's representation to include employees in the United States in, among others, the field service technician classification. (Tr. 595). Between 1984 and 1996, AMRS and TWU negotiated four CBAs, each of which explicitly was entered into pursuant to the RLA and applied *nationwide* to employees in the above-listed classifications. (Tr. 596; RO Ex. 24). Work covered by the AMRS-TWU CBAs included work of the type performed by Oxford/WFS at Terminal 5. (Tr. 595).

2. Worldwide and Subsequent NMB Representation Certifications.

In or around 1999, American Airlines sold AMRS to Castle Harlan, Inc., which subsequently changed the company's name to Worldwide. (RO Exs. 25, 26; Tr. 603). At that time, WFS voluntarily recognized TWU and assumed the terms of the 1996 AMRS-TWU CBA. *Id.* On June 30, 1999, TWU requested the NMB "investigate and determine who may represent for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof . . . [the] employees of [WFS]." (RO Exs. 25, 26). Following an investigation, on November 16, 1999, the NMB certified TWU "to represent for the purposes of the Railway Labor Act, as amended, the craft or class of Mechanics & Related Employees, employees of [WFS], its successors and assigns." (RO Ex. 26). That same day, the NMB also certified TWU to represent WFS' "Fleet

Service Employees” craft or class. As a prerequisite to these certifications, the NMB held that WFS is a “carrier” subject to the exclusive jurisdiction of the RLA; and, that WFS’ “mechanics and related employees” and “fleet service employees” are employees within the meaning of the RLA. (RO Exs. 26, 25).

Subsequent to these certifications, TWU has represented *all* WFS “mechanics and related employees” and “fleet service employees” in the United States, regardless of those employees’ particular work location. (Tr. 611). In 2000 and 2006, WFS and TWU negotiated *nationwide* CBAs which, consistent with the parties’ bargaining history, applied to covered employees throughout the country. (RO Ex. 27; J Ex. 1; Tr. 610-611).⁶ Each time WFS has begun performing services at a new location – something that has occurred on “numerous” occasions since 1999 – it has applied the terms of its TWU CBA to those employees at the new location. (Tr. 612-613). *There is not one instance where WFS began work at a new location and did not apply the TWU CBA to employees in the relevant job classifications.* (Tr. 613). The type of work performed at T5 has been performed under the TWU CBA at various locations, among them, Philadelphia, Pittsburgh, Miami, Los Angeles and Hawaii. (Tr. 415-417, 615).

3. The NMB and Courts Reaffirm WFS’ Status under the RLA.

In 2004, the NLRB requested an advisory opinion from the NMB regarding WFS’ status as a carrier under the RLA and, specifically, “whether Worldwide’s operations at its facility at Building 9, John F. Kennedy Airport (JFK) are subject to the RLA.” (GC Ex. 21). The NMB noted, “[a]s an initial matter,” that it already had exercised jurisdiction over WFS by issuing the November 19, 1999 certifications, and determined further that the “carriers exercise sufficient control over Worldwide employees in Building 9, JFK, to support a finding of RLA

⁶ The 2006 CBA is currently in effect. (J Ex. 1; Tr. 611).

jurisdiction.” (GC Ex. 21). The NLRB adopted the NMB’s position, and dismissed the petition for lack of jurisdiction, noting that “the Employer is engaged in interstate air common carriage so as to bring it within the jurisdiction of the NMB” *Worldwide Flight Services, Inc.*, 343 NLRB 5 (2004).⁷

4. Oxford’s Business Operations and Corporate Relationship with WFS.

Oxford provides operation and maintenance support for airport-related equipment (including baggage systems and jet bridges) to airlines, aviation authorities and airline consortiums throughout the United States. (Tr. 413-414). Oxford was acquired by WFS in 2000, and has operated as a wholly-owned subsidiary of WFS since that time. (Tr. 414). Since its acquisition in 2000, Oxford has, from time-to-time, subcontracted certain of its work to WFS. (Tr. 417). In each of these instances, WFS has applied the terms of its TWU CBA to those WFS employees performing the subcontracted work. (Tr. 417). By way of example, Oxford provides maintenance and repair services for the loading bridges at all five (5) Hawaii airports, and previously also provided maintenance and repair services for the airports’ baggage systems. (Tr. 416-417). For years, Oxford has subcontracted the work for these services in Hawaii to WFS, which directly employs the employees, always subject to the TWU CBA. (Tr. 416-417).

⁷ The next day, a federal District Court held that a dispute between WFS and TWU regarding WFS’ changes to its employee group health plan was a “minor” dispute under the RLA. *Air Transport Local 504, Transport Workers Union of America, AFL-CIO v. Worldwide Flight Services, Inc.*, 2004 U.S. Dist. LEXIS 19523 at *2 (E.D.N.Y. Sept. 29, 2004). The Court recognized that the dispute before it was subject to the RLA. Likewise, there were NMB and judicial determinations confirming that AMRS was subject to the jurisdiction of the RLA. *See, e.g., AMR Services Corp.*, 18 NMB 348 (1991); *NLRB v. Int’l Brotherhood of Teamsters*, 656 F. Supp. 1158 (E.D.N.Y. 1987) (dismissing an NLRB request for an injunction, as “AMR [is] subject to the Railway Labor Act” and rejecting the NLRB’s argument “that if there is ‘reasonable cause’ to believe he or she is correct in his view that the court should acquiesce in that view because “this case concerns not the board’s discretionary jurisdiction but a legal decision as to which of two statutory schemes applies.”); *AMR Services Corp v. Int’l Brotherhood of Teamsters, et al.*, 658 F. Supp. 259 (E.D.N.Y. 1987) (dismissing request for injunctive relief, as the parties were subject to the RLA); *AMR Services Corp. v. Int’l Brotherhood of Teamsters, et al.* 821 F.2d 162 (2d Cir. 1987) (upholding dismissal of request for injunctive relief, as parties were subject to the RLA).

5. CICA TEC.

As the ALJ correctly found, CICA TEC is a consortium of airlines, with a board of directors comprised of representatives of each of the airlines operating out of T5. (ALJ 5:14-25). Since around 1993, it has subcontracted to various employers the work of operating, maintaining, and repairing the baggage conveyor and sorting system and jet ways at T5. Prior to July 1, 2013, the employees performing that work were represented by CP under the NLRA, although there is no evidence that the NLRB ever certified CP. (ALJ 5:26-31; Tr. 39; GC Ex. 2).

II. OXFORD IS AWARDED THE CONTRACT TO PERFORM SERVICES AT T5.

A. CICA TEC Awards the Maintenance Agreement to Oxford Based on Oxford Subcontracting the CICA TEC Work to WFS.

As the ALJ found, in 2012, CICA TEC awarded Oxford the Maintenance Agreement to perform the above work at T5. (ALJ 7: 13-15). As the ALJ found, CICA TEC imposed “contractual requirements for a unionized workforce.” (ALJ 9: 13). At the time CICA TEC issued the RFP, the work was performed by employees of ABM Engineering Services, Inc. (“ABM”) under the terms of an ABM-Local 399 CBA. (ALJ 5:30-31; 31 fn. 7). Nevertheless, CICA TEC advised Oxford that while a union labor force was required, there was no requirement that the workers be represented by Local 399. (RO Ex. 10).

Consistent with its past practices, Oxford and WFS agreed that, if awarded the Maintenance Agreement, Oxford would subcontract the work to WFS and WFS would employ the individuals performing work on the contract pursuant to the terms of TWU CBA. (Tr. 428-429). On November 21, 2011, Oxford submitted its response to the RFP, using the applicable TWU wage rates to calculate the proposed labor costs. (RO Ex. 11; Tr. 432). CICA TEC was advised that Oxford planned to fulfill the requirement for a unionized work force by application

of the TWU CBA. (Tr. 444-449; RO Exs. 12, 13). “To meet the contractual requirements for a unionized work force, Oxford informed CICA TEC that it planned to subcontract the dispatcher and mechanic work to its parent company Worldwide [which] maintains a collective bargaining agreement with [the] TWU ... under the RLA and has a history of performing work at other airports with employees represented under the TWU contract.” (ALJ 9:13-18).⁸

B. Oxford/WFS’ Communications with Local 399 and the ABM Employees.

Throughout the bid process, CICA TEC consistently made clear its preference that Oxford/WFS hire the ABM employees who, in the view of CICA TEC, were well qualified to handle the work and operate and maintain the equipment. (Tr. 447-448). Accordingly, in October 2012⁹, shortly after being awarded the contract, representatives of Oxford and WFS met with incumbent ABM employees and informed them that:

Oxford had won the bid and had subcontracted the work to Worldwide, and ... expressed their interest in hiring the mechanics. They also told them that Worldwide employees are represented by TWU Local 399 [*sic*]. They explained that to be hired, the employees were required to complete employment applications, pass physicals and drug screening, and complete TWU Local 504’s membership and dues deduction authorization form Oxford/Worldwide had available copies of the TWU contract, an Assignment and Authorization for Checkoff and Union Dues form for TWU Local 504, health benefit premium information, and Worldwide applications.

(ALJ 9:38-10:6). At no point during these meetings (or any other time) did Oxford/WFS representatives inform the ABM employees that they would be required to work in a non-union work environment, nor did they threaten, or in any way indicate, that the ABM employees would not be hired because of their existing union affiliations. (Tr. 506-508).

⁸ As will be addressed further below (*see* pp. 14-20, *infra*), the ALJ erroneously concluded that the history of “perform[ing] work at numerous airports throughout the United States subject to the RLA ... is not relevant to the determination of whether RLA jurisdiction is appropriate in this case” or, for that matter, the determination of any issue in this case (ALJ 9, fn. 8, *see e.g.*, 25:39-40:2).

⁹ The ALJ erroneously identifies the date as October 2010. (ALJ 9:33).

On October 15, 2012, Local 399 Business Representative Roger McGinty telephoned Worldwide and requested to bargain with Oxford/WFS. (ALJ 10:7-8). Worldwide informed McGinty, both during this telephone call and in a subsequent e-mail, that the work at T5 would be performed by WFS employees, that WFS was a carrier subject to the jurisdiction of the RLA, that WFS was party to a CBA with the TWU which covered the work at T5, and that WFS would apply the terms of its *nationwide* TWU CBA to its future T5 employees. (Tr. 57; GC Ex. 4; ALJ 10:8-11).

III. OXFORD/WFS' WORK AT T5.

A. Commencement of Operations and Hiring of Former ABM Employees.

Oxford/WFS commenced operations at T5 on July 1, 2013. (ALJ 10:13-15). In advance of that date, all ABM employees who were interested in working for Oxford/WFS under the terms of the WFS-TWU CBA were interviewed and required to submit to pre-employment screening. (Tr. 508). As found by the ALJ, prior to the takeover on July 1, 2013, Oxford/WFS representatives met with the affected employees to encourage them to apply for positions and “[i]t is undisputed that during these meetings, Oxford/[WFS] representatives told the employees that their terms and conditions of employment would be subject to the terms of the TWU contract after the takeover.” (ALJ 10:16-20). Ultimately all 13 of the former ABM employees who applied were hired, as well as eight other employees (ALJ 10:21-24).

At all times since July 1, 2013, Oxford/WFS has “applied the terms of the TWU contract to these employees”, including the union security provisions of that CBA. (ALJ 10:27-31).

B. Overview of the Work Performed by Oxford/WFS Employees at T5.

Oxford/WFS has three job classifications at T5: Field Services Technicians/Technical Specialists, who repair and maintain CICA TEC’s jet bridge, baggage conveyor and belt-related

systems; Baggage System Operator/Helpers, who clear jams of the CICA TEC baggage systems and assist mechanics in repairs of the conveyor and belt-related systems; and Baggage System Operators/Dispatchers, who monitor the baggage systems for jams and triage reports of jet bridge or other mechanical issues from airline representatives, and then relay such issues to the Field Services Technicians/Technical Specialists. (ALJ 10:25-27; 6:13-35). Virtually all baggage system-related work is performed in the bag room, which is located within T5. (Tr. 127, 184-185; 515).¹⁰

C. CICA TEC’s Control over Oxford/WFS.

The ALJ’s conclusory determination that CICA TEC “has no greater control over Respondent Employers than is found in a typical subcontracting relationship” (ALJ 20:28-30) is contradicted by numerous facts in the record establishing that CICA TEC, on behalf of its airline members, has exercised and has the contractual right to exercise multiple forms of control over the functioning of Oxford/WFS at T5. We address the issue of control below (*see* pp. 27-40, *infra*).

ARGUMENT

I. SINCE THE BOARD LACKS JURISDICTION OVER THIS DISPUTE, THE ALJ ERRONEOUSLY DETERMINED THAT THIS DISPUTE IS GOVERNED BY THE NLRA RATHER THAN THE RLA.

As detailed further below, the ALJ rejected application of the RLA to this dispute by a combination of ignoring the procedural history and factual context of this dispute, relying on wholly inapposite NMB and NLRB authority which has been questioned by the D.C. Circuit

¹⁰ To comply with the Maintenance Agreement requirement for the utilization of minority and women-owned businesses, Oxford subcontracted the encoding work under the Maintenance Agreement to Total and Twin. (Tr. 487; GC Ex. 12; J Ex. 4). Since on or about July 1, 2013, Twin and Total employed (and continue to employ) all of the encoders. (Tr. 328, 353). Prior to July 1, 2013, all encoders at T5 were employed by Total, through a subcontract agreement with ABM. (Tr. 123). The same encoders continued working for Total and Twin after July 1, 2013 as had worked for Total previously, subject to the terms of the TWU contract. (J Ex. 4; ALJ 10:32-11:13).

Court of Appeals, all topped off with circular reasoning. On the issue of RLA vs. NLRA jurisdiction, the ALJ is, we submit, simply wrong in each and every conclusion reached. Accordingly, since the Board lacks jurisdiction over this dispute, the case must be dismissed.

A. The RLA and The Historic Bargaining Relationship Between WFS and TWU under the RLA Requires Application of the RLA to this Dispute.

WFS and its corporate predecessor AMRS¹¹ have had a consistent and exclusive *nationwide* bargaining relationship under the RLA since 1984 – some 30 years before the instant dispute arose.¹² Throughout that period, the parties’ collective bargaining agreements referred explicitly to being entered into pursuant to the RLA (Tr. 596; RO Ex. 24; RO Ex. 27; J Ex. 1); explicitly referenced the *nationwide* scope of the relationship (Tr. 596; RO Ex. 24; RO Ex. 27; J Ex. 1); and, among other things, adopted the System Board of Adjustment procedure for the disposition of disputes arising under the CBAs, also as required by the RLA (45 U.S.C. § 204). Moreover, as noted, in 1999, shortly after WFS acquired AMRS, the relationship between WFS and TWU under the RLA was confirmed in certifications issued by the NMB, certifying that TWU represented the employees of WFS pursuant to the terms of the RLA (RO Exs. 25-26).¹³

Consistent with this historic background, and the requirements of the RLA, whenever work of the type covered by the NMB certifications and AMRS/WFS-TWU CBAs was acquired at new locations by AMRS/WFS, such work, and the employees performing the work, automatically were included within the scope of the certifications and the collective bargaining

¹¹ We refer herein to “AMRS/WFS” and the “AMRS/WFS-TWU CBAs” in connection with the continuum of the relationship between the companies and between the companies and the TWU since 1984.

¹² As earlier noted, other than a brief mention that WFS “has a long history of bargaining with TWU Local 504 under the jurisdiction of the RLA: (ALJ 18: 13-14), the ALJ decision is devoid of any mention of the factual background or authorities relied upon in this Section C.

¹³ As noted above (*see* pp. 6-9, *supra*), prior decisions by the courts, the NMB and even the NLRB have recognized the application of the RLA to WFS and its employees. *See also Worldwide Flight Services, Inc.*, 343 NLRB 5 (2004) (holding “WFS is engaged in interstate air common carriage so as to bring it within the jurisdiction of the NMB”); GC Ex. 21 (NMB advisory opinion determining that WFS is a carrier subject to RLA).

agreements with the TWU. (Tr. 612-613). Such automatic inclusion is both contemplated and required by the RLA, as “[i]mplicit in the issuance of a carrier-wide certification is the understanding that subsequent to certification the craft or class could expand or shrink. *Indeed, it would be contrary to one of the primary purposes of the Act, the promotion of labor-management stability, if representation elections among the new employees [of a recently-acquired operation] were conducted every time a carrier internally expanded.*” *National Railroad Passenger Corp.*, 13 NMB 412, 417 (1986) (emphasis added). Thus, failure to include such new locations would have been, at the very least, a violation of both the TWU agreements and the RLA itself. (Tr. 612-613).¹⁴ And, here, there is no dispute that the work at issue is traditional airline work which falls within the crafts or classes for which TWU was certified and the TWU CBA. (See ALJ 18:38-39: “I find and the parties do not dispute that work performed by the unit employees is work traditionally performed by airline employees”).¹⁵

¹⁴ Likewise, when AMRS/WFS lost locations to another bidder, TWU lost – and has never asserted – the right to represent the employees once no longer employed by AMRS/WFS. (Tr. 615).

¹⁵ The craft or class of Mechanics and Related Employees, including employees who are responsible for the repair and operation of equipment which support aviation activities, has existed under the RLA for decades. *See generally National Airlines, Inc.*, 1 NMB 423, 428-29 (1947) (identifying craft or class as including “B. Ground service personnel who perform work generally described as follows: ... maintenance of ground and ramp equipment; maintenance of buildings, hangars and related equipment... And C. Plant maintenance personnel—including employees who perform work consisting of repairs, alterations, additions to and maintenance of buildings, hangars and the repair, maintenance and operation of related equipment including automatic equipment.”); *see also United Airlines, Inc.*, 6 NMB 134 (1977). Employees, such as those here, who are involved in the maintenance and operation of baggage conveyors and jet bridges, fall squarely within the Mechanics and Related craft or class. *See, e.g., Global Aviation Services, LLC*, 38 NMB 2, 3 (maintenance on ground service equipment is work traditionally performed by airline industry employees). Likewise, employees involved in the movement of baggage (such as the Baggage System Operator/Helpers and Dispatchers, and the encoders employed by Total and Twin) fall within the Fleet Service craft or class. *See, e.g., In re Airline Industry Hearings*, 5 NMB 1 (1972) (identifying “Fleet Service” as employees performing duties which include “deliver and pick up baggage ... to and from ... baggage areas; ... sort baggage...; complete required paperwork directly associated with the movement of baggage....”); *USAir*, 15 NMB 369, 389 (1988); *John Menzies PLC*, 30 NMB 463, 466-468 (2003) (ground service mechanics and baggage coordinators responsible for ensuring baggage is being placed in the proper container in the baggage room perform work traditionally performed by airline employees); *ABM Onsite Servs.-West, Inc. v. NLRB*, 849 F.3d 1137, 1142 (D.C. Cir. 2017) (underlying dispute involved employees working on “airport’s baggage handling system” at Portland International Airport and noting that no party “disputes that ABM employees do work that is traditionally performed by employees of air carriers”).

Nationwide representation under the RLA, as has always been the case in the AMRS/WFS-TWU relationship, has always been a cornerstone of the RLA, which has consistently been construed to require that employees be represented in system-wide crafts or classes. *See, e.g., Gateway Frontline Services*, 42 NMB 146 (2015); *Aircraft Service Int’l Group*, 40 NMB 43 (2012); *Air Serv Corp.* 38 NMB 113 (2011). Likewise, the NMB has consistently adhered to the principle that crafts or classes not be splintered. *See, e.g., Illinois Central R.R.*, 38 NMB 206 (2011); *AirTran Airways, Inc.*, 28 NMB 603 (2001); *Ross Aviation*, 22 NMB 89 (1994) (creation of a separate craft or class smaller than the established craft or class “would be contrary to established precedent regarding the composition of the Mechanics and Related Employees craft or class and would cause fragmentation and instability”). Thus, there can be no dispute that the historic relationship between AMRS/WFS and TWU, at all times prior to the claims in this case, has been exclusively subject to, consistent with, and required by the RLA.

The NLRB itself has emphasized the importance of the stability of bargaining relationships as a factor in evaluating RLA/NLRA jurisdictional issues. Although the circumstances were reversed from those presented here (there, an employer claim of RLA coverage following many years of bargaining under the NLRA), the Board’s discussion in *United Parcel Service, Inc.*, 318 NLRB 778, 781 (1995), illustrates the importance of not disrupting an historical bargaining relationship:

The long-standing history of collective bargaining between the Respondent and the IBT under the NLRA is an important corollary factor justifying an exception to the general practice of referral to the NMB. None of the more than 100 cases referred by the Board to the NMB in the past has involved an entity which, after decades of collective bargaining in accord with the rights and procedures set forth in the NLRA, essentially sought to transfer to a different system of rights and procedures under the RLA. In considering an RLA jurisdictional claim in the context of a lengthy history of collective bargaining under the NLRA, we must be

mindful of our statutory obligation to assure industrial peace and to prevent interruptions to commerce by promoting stability in bargaining relationships. In this particular situation, this Board's concern for the potential disruptive impact on parties whose rights and procedures have been defined for many years by the NLRA outweighs the benefits of referring the jurisdictional issue to the NMB for initial determination under the RLA.

The AMRS/WFS-TWU historic relationship served – and serves – both the letter and spirit of the RLA. Section 2 of the RLA sets forth as the RLA's first general purpose “to avoid any interruption to commerce or to the operation of any carrier engaged therein...” (45 U.S.C. § 151a (1)).¹⁶ As explained in *ABM Onsite Servs.-West, Inc. v. NLRB* (“*ABM Onsite*”), the RLA was created out of concern over “labor strife in the railway and airline industries [which] could disrupt commerce nationwide.” 849 F.3d 1137, 1139 (citing *Tex. & New Orleans R.R. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 565 (1930) (“the major purpose in Congress in passing the Railway Labor Act was to provide a machinery to prevent strikes”)). As recently described in *Allied Aviation Serv. Co. v. NLRB*:

The distinction between coverage under the NLRA and the RLA is significant for employers and employees. Each Act protects employees' right to join together to improve working conditions and facilitates labor-management relations. But because of the central role in the national economy of smooth operation of the nation's rail and air carriers, the RLA places a higher priority than the NLRA on avoiding strikes or lockouts. To that end the RLA requires more extensive dispute-resolution efforts before either employer or employee can take unilateral action.

854 F.3d 55, 61 (D.C. Cir. 2017) (emphasis added).

Thus, to preserve labor relations harmony, the availability of strikes or other self-help by unions or carriers, with their potential impact on commerce and aviation operations, is sharply curtailed, being available only after the “almost interminable” collective bargaining processes

¹⁶ While the NLRA aims at maintaining the “free flow of commerce,” its stated purpose is less unequivocal. See Section 1 which focuses on the rights of employees to organize and the restoration of bargaining relationships between employers and employees. (49 U.S.C. § 151).

statutorily mandated by the RLA (including direct negotiations, mediation subject to supervision by the NMB, release from mediation by the NMB, a proffer of arbitration, a 30-day “cooling off period” and possible appointment of a Presidential Emergency Board) have been exhausted. *Detroit, Toledo & St. Louis R.C. v. UTU*, 396 U.S. 142, 149 (1969); *see also* 45 U.S.C. §§ 155 First, 156, 157, First, 158, 159 and 160. By contrast, there is no comparable restriction on strike activity under the NLRA. If 30 years of exclusive RLA jurisdiction is allowed to be scuttled, and with it the prospect of strikes without the need to exhaust the RLA statutory procedures uniquely designed to protect the travelling public, the first, and we, submit, most critical purpose underlying the RLA likely would become irrelevant. The potential consequences of such a seismic shift are readily illustrated here.

If, somehow, there was now a finding that that the historic *nationwide* AMRS/WFS-TWU bargaining relationship was subject to isolated erosion at the behest of local unions claiming successorship rights on a location-by-location basis, the risk of instability caused by potential interruption to operations and the flow of passengers and baggage would be enormous. As this case alone demonstrates, some *six million* passengers and their baggage transit T5 each year. Some 28 airlines are served at T5. If subject to the NLRA, rather than the RLA, the opportunity for disruption to the operation of these airlines and the travels of their passengers would arise whenever any local union (or the locally employed employees) was dissatisfied with their employer’s bargaining position at the location. It doesn’t take a great imagination to envision a circumstance where if CP was held to have bargaining rights under the NLRA at T5, it would insist on a bargaining agreement with terms and conditions far different than those terms and conditions in effect elsewhere in the WFS RLA-based *nationwide* system. If those terms and conditions were rejected by WFS, the local union and employees would be free to strike

immediately and trigger massive interruptions and disruptions. If, to avoid such disruptions, WFS somehow agreed to different terms and conditions at T5 than apply elsewhere in its *nationwide* system, the outlook for further local erosion elsewhere – and with it, further local disruption – can only but increase. With this, the first and primary purpose underlying the RLA – the avoidance of interruption to commerce and operations – is all but destroyed.

The ALJ dismissed these authorities and concerns by giving weight only to the collective bargaining history at T5 and substituting, without any supporting authority, pure speculation as to the how the NLRB *might* choose to handle future cases and the potential for disruption. Thus, in rejecting application of *United Parcel Service*, the ALJ concluded as follows:

In considering all the factors in this case, the stronger argument for promoting labor stability supports the NLRB declining to refer this jurisdictional dispute to the NMB for an opinion. This approach will not invite labor unrest in other locations where Respondent Worldwide already performs work governed by the RLA as Respondent Employers contend. If there is an established bargaining history at those locations under the RLA, the NLRB is likely, pursuant to its reasoning in *United Parcel Service*, to defer to the NMB to promote labor stability.

(ALJ 18: 22-28).

The ALJ offers no analysis, let alone authority, for this speculation as to how the Board may act to support labor stability in the future.¹⁷ Whatever the Board may do in the future, the ALJ ignored record evidence that it is and was TWU's position that its nationwide CBA with Worldwide extended to the work here at issue, just as it has at other new locations at which Worldwide acquired work over the years, and just as the RLA requires. *National Railroad Passenger Corp.*, 13 NMB at 417. Plainly, the NLRB is the wrong forum to make a jurisdictional determination which potentially disrupts the exclusive nationwide Worldwide-

¹⁷ Such position ignores the NMB's determination that automatic inclusion of newly-acquired locations in a nationwide class or craft is necessary to the promotion of labor-management stability. *National Railroad Passenger Corp.*, 13 NMB at 417.

TWU collective bargaining relationship which has existed for many years, with potential impact on the public interest of labor stability and protection of the travelling public.

Here too, the ALJ *utterly has trampled* on the fundamental purposes of the RLA – the avoidance of interruptions to commerce and the operations of carriers. And the ALJ *utterly has trampled* on the 30-year historic exclusive nationwide AMRS/Worldwide-TWU bargaining relationship under the RLA – a relationship which has been repeatedly recognized by the NMB, the courts and even the NLRB.

Incorrect resolution of the jurisdictional issues here presents wide-ranging dangers not only to the parties to this proceeding, but to the balance between the RLA and the NLRA – concerns which were wholly ignored by the ALJ. There has *never* been a determination from the NMB, the NLRB or the courts that AMRS/Worldwide has been subject in any respect to the NLRA. The NMB certifications, the 30-year uninterrupted history of coverage under the RLA, the 30-year history of TWU representation of all AMRS/Worldwide employees within *nationwide* crafts or classes, and the interests of maintaining stability in bargaining relationships, make the ALJ's conclusions here not only unsupportable, but potentially dangerous.

B. The ALJ Erred in Ruling that the Board Can Disregard, Indeed Overrule, the NMB's Representation Certification of TWU.

As set forth above, in 1999, the NMB certified the TWU as representative of mechanics and fleet service crafts of classes. (RO Ex. 26; RO Ex. 25). By these certification, WFS is – and, at all times relevant herein, was – required by law to bargain with TWU as the sole bargaining representative of WFS' employees *nationwide* in the aforesaid crafts or classes. 45 U.S.C. § 152, Ninth (“Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for purposes of this

chapter.”); *see generally*, *Virginian Ry. v. System Fed’n No. 40*, 300 U.S. 515, 548 (1937) (Section 2, Ninth of the RLA “imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other”). That the certifications were issued in 1999 is irrelevant – it is well-settled that NMB certifications remain in full force and effect until such time as the NMB issues a new certification or a dismissal of the previous certification. *See* NATIONAL MEDIATION BOARD REPRESENTATION MANUAL, 19.7 (2015); *United Airlines/Continental Airlines*, 41 NMB 251, 261 (2014) (referencing certifications issued in 2000 and 1982, and noting “participants are reminded that under Manual Section 19.7, existing certifications remain in effect until the [NMB] issues a new certification or dismissal.”); RAILWAY LABOR ACT (BNA), at 198 (2010) (“Once an employee organization has been certified, the certification remains in force until the NMB extinguishes the certification or certifies a different representative, or the representative surrenders the certification”) (citing *Russell v. National Mediation Board*, 714 F.2d 1332 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984)).¹⁸

This, we submit, is dispositive. The NLRB *cannot* revoke, overrule or otherwise contradict these certifications, as “pursuant to Section 2, Ninth [of the RLA], the [NMB] upon investigation has *exclusive* authority to grant, withhold and revoke representation certifications. Until such time as the [NMB] revokes a certification, therefore, that certification remains in effect.” *Missouri Pacific Railroad (Union Pacific)*, 15 NMB 95 (1988) (emphasis in original) (citing *Trans World Airlines/Ozark Airlines*, 14 NMB 218 (1987)); *see also Switchmen’s Union of North America v. National Mediation Board*, 320 U.S. 297, 304 (“The fact that the certificate

¹⁸ As discussed further below, the employees here at issue, mechanics and operators (including the encoders) responsible for, among other things, baggage system and jet bridge operations, are within the “Mechanics & Related Employees” or “Fleet Services Employees” crafts or classes, are subject to the NMB’s 1999 certifications, and are subject to the exclusive obligation of WFS to “treat with” TWU with regard to such employees.

of the National Mediation Board is conclusive is of course no ground for judicial review . . . the statutory mandate is that ‘the carrier shall treat with the representative so certified.’”); *Grand Trunk Western R.R. Co.*, 17 NMB 282, 293 (1990) (“Courts have interpreted the [RLA] as giving the Board *exclusive jurisdiction* over representation questions”) (emphasis added) (collecting cases).

WFS acted in strict conformity with its obligations to TWU under its RLA certifications, and its nationwide CBA. Yet, by so doing, the ALJ ruled that WFS violated the NLRA. (ALJ 30:18-51). But it is not for the NLRB to order WFS to cease treating with the TWU for employees for which it was certified as exclusive representative, as the RLA prohibits employers from withdrawing recognition from a certified representative for *any* reason, even if such withdrawal would be justified under the NLRA or limited to a group of employees at a particular location. *See Delta Air Lines, Inc./Northwest Airlines, Inc.*, 36 NMB 36, 50 (2009) (there are no circumstances under which an employer can lawfully withdraw recognition after the NMB has issued a representation certification). Compliance with the ALJ’s order, therefore, would require WFS to violate the RLA’s statutory requirement that WFS both apply the terms of its nationwide certification to all newly-acquired operations and “treat with the representative so certified.” 45 U.S.C. § 152, Ninth; *National Railroad Passenger Corp.*, 13 NMB at 417. The ALJ decision acknowledges that “these cases hold that the certification of a representative covers all of the employer’s employees in that craft who are within the jurisdiction of the RLA”, but rules, without explanation, and in a circular manner,¹⁹ that “I do not find the cases stand for the

¹⁹ The only authority cited by the ALJ, are *Menzies Aviation* and *Air Serv. Corp.*, both of which are cited for the proposition that “a finding of RLA jurisdiction with regard to an employer’s performance of one contract does not automatically extend RLA jurisdiction to the to the performance of similar work under another contract at another facility.” (ALJ 17:18-21). However, it is important to note that the NMB – not the NLRB – made these determinations not to extend previously-acknowledged coverage to these locations and, as noted above, neither of

proposition that such certifications extend to employment situations outside the jurisdiction of the RLA.” (ALJ 17:4-18; *see also* 17:21-23: “I find that [WFS’] bargaining obligation under the RLA in other employment relationships covering similar work is not determinative of the jurisdictional issue in this matter.”).

We respectfully disagree. This is not a case which can be decided without considering the entire factual context. The ALJ discounts as insignificant the fact that the Board saw this case as suitable for a jurisdictional determination by the NMB and then, without explanation, simply took the case back before the NMB could issue its opinion. Nothing in Board practice or authority makes the resolution of the issues here presented properly, let alone clearly, subject to NLRB determination. By ruling that this dispute is governed by the NLRA, and further ruling that it was proper for the NLRB to arrogate to itself this jurisdictional determination, the ALJ *utterly has trampled* on the certifications issued by the NMB, not to mention the sole and exclusive authority and responsibility of the NMB to “grant, withhold and revoke representation certifications. Until such time as the [NMB] revokes a certification, therefore, that certification remains in effect.” *Missouri Pacific Railroad (Union Pacific)*, 15 NMB 95 (1988). And, this is all the more true given the historic application of the RLA to the exclusive relationship between WFS (and its predecessor AMRS) and the TWU, detailed above.

C. The ALJ Erred in Concluding That This Case is Factually Similar to Other Cases Where the NMB Has Declined Jurisdiction and, Therefore, the NLRB Properly Can Make the RLA Jurisdictional Determination.

Perhaps in recognition of the NMB’s sole authority to grant, withhold and revoke representation certifications, the Regional Director initially referred this case to the NMB for an

those cases involved employers with RLA certifications, historical bargaining relationships under the RLA or more than 30 years of nationwide collective bargaining agreements (*see* pp. 14-20, *supra*).

advisory opinion, thus providing the NMB with the appropriate opportunity to determine for itself whether the previously-issued certification (which, it bears repeating, covers a *nationwide* class or craft of workers), somehow excluded the employees at T5. The Board subsequently revoked its deferral, without explanation. This case necessarily involves the scope of a certification under the RLA, the exclusive province of the NMB. And the NMB's exclusive authority over the scope of certifications it issued, is not diminished by the ALJ's faulty determination that "[t]he Board has declined to defer cases presenting jurisdictional claims in factual situations similar to those where the NMB previously declined jurisdiction." (ALJ 18:3-4; 18:33-34: "this case is factually similar to other cases where the NMB has declined to assert jurisdiction").²⁰

First, *none* of the cases cited by the ALJ support the contention that the NLRB can determine – or ever has determined – that a nationwide NMB certification does not apply to a specific location of workers. To the contrary, review of the NMB precedent on which the ALJ relies demonstrates that each and every case cited arose in the context of *unrepresented* employees at a non-union employer, not, as here, application of the RLA to a new location, in the face of existing NMB certification, a long exclusive nationwide collective bargaining history under the RLA, and some 30 plus years of nationwide CBAs under the RLA. *See Signature Flight Support of Nevada*, 30 NMB 392 (2003) (cited by ALJ at 15:7-8; NMB determination of RLA jurisdiction arising in context of unrepresented employees, despite employers "long history of collective bargaining under the National Labor Relations Act"); *Air Serv. Corp.*, 33 NMB 272 (2006) (cited by ALJ at 15:11-20, 16:2-7; NMB determination of RLA jurisdiction arising in

²⁰ Elsewhere, the ALJ found, without explanation, that "[f]ailure to continue to follow its precedent of finding jurisdiction *where the NMB's precedent is clear* that it would decline to assert jurisdiction under the RLA would leave employees and parties in a 'no-man's land' without a forum to address labor disputes." (ALJ 16: 41-44) (emphasis added).

context of unrepresented employees, with no previous NMB certification or jurisdictional determination); *Swissport USA, Inc.*, 35 NMB 190 (2008) (cited by ALJ at 15:21-, 22, 22:17-22; same); *Menzies Aviation, Inc.*, 42 NMB 1 (2014) (cited by ALJ at 15; NMB determination of no RLA jurisdiction arising in context of an unfair labor practice charge filed with NLRB regarding handbook policies applicable to unrepresented employees, with no previous NMB certification). As noted, there has never been a case at the NMB or the NLRB where, as here, the jurisdictional issue arose in the context of a currently certified representative under the RLA, with a nationwide CBA, and a historical nationwide bargaining relationship. Accordingly, the ALJ's finding that the jurisdictional decision here falls within the range of cases where "RLA jurisdiction is clearly lacking" is simply unsupported, and the NMB precedent on which she relies is wholly inapposite.

Even if the Board were to ignore the dispositive issue of the NMB certification, for decades the Board declined to assert jurisdiction over employers who claimed to be subject to the exclusive jurisdiction of the RLA unless and until it was "clear that the [NMB], the agency primarily vested with jurisdiction by the terms of the [RLA], has declined to assume jurisdiction over the operations here involved." *Pan American World Airways*, 115 NLRB 493 (1956). This is because, and as the NLRB itself has so recognized, "the NMB has *primary authority* to interpret the RLA." *ABM Onsite*, 849 F.3d at 1146 (citing to NLRB's statement at oral argument) (emphasis added).²¹ Thus, the NLRB's "practice is to refer cases of arguable or doubtful RLA jurisdiction to the NMB for an advisory opinion on the jurisdictional issue."

²¹ *ABM Onsite*, decided by the D.C. Circuit less than three months before the ALJ decision was issued, shines a bright and critical light on the NLRB's more recent actions in applying the NLRA in situations traditionally governed by the RLA and bypassing NMB jurisdictional determinations, particularly, as here, without explanation.

NATIONAL LABOR RELATIONS BOARD CASE HANDLING MANUAL, 11711.1, 11711.2 (2017).²² Of course, that is precisely what the NLRB initially did here, only later to revoke its referral without explanation.

Here, the ALJ erred in failing to comply with *Pan American World Airways* or the Board's own Case Handling Manual. To begin with, the ALJ's discussion of this issue ignores the NLRB's prior reversal of course in its referral to the NMB. Thus, other than a brief mention that NLRB sought an advisory opinion from the NMB and later withdrew its request (ALJ 3:4-8), the ALJ decision does not address this procedural history and the significance of the initial referral to the NMB. While the Board deferred initially to the NMB – which alone is evidence that the Board believed its jurisdiction over Oxford/WFS was, at minimum, arguable – the ALJ decision repeatedly states, without explanation, that the jurisdictional issue is and was clear, and therefore did not require an advisory opinion from the NMB. Of course, the Board's handling of this very dispute prior to withdrawing it from the NMB completely belies any such notion.

As *ABM Onsite* demonstrates, the NLRB was obligated to explain why it “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.” *ABM Onsite*, 849 F.3d at 1147. Of course, the procedural history here is even more inexplicable than in *ABM Onsite*. There, from the outset of the dispute, the NLRB made a record on the jurisdictional issue and then decided to reject RLA jurisdiction. Here, the NLRB initially sought

²² The ALJ described the Board's “stated practice” on jurisdictional decisions and deferral to the NMB as follows: “[t]he NLRB's stated practice is to refer the parties to the NMB and dismiss the charge or petition in cases in which RLA jurisdiction is clear; to retain cases where RLA jurisdiction is clearly lacking; and to refer close cases to the NMB for its advisory opinion before the NLRB decides the issue.” (ALJ 14:34-37, citing *Federal Express Corp.*, 317 NLRB 1155, 1156 & fn. 6 (1995)). See *Allied Aviation Serv. Co. v. NLRB*, 854 F. 3d 55, 62 (D.C. Cir. 2017) (noting that “because the NMB has particular expertise in administering the RLA, [the NLRB practice is] to refer close cases of arguable RLA jurisdiction to the NMB for its advisory opinion before the NLRB itself decides the issue.”).

an NMB jurisdictional opinion and, without explanation, reversed course, assuming the existence of NLRA jurisdiction—without a developed record, and without any guidance from the NMB. If, as found by the D. C. Circuit, the NLRB’s assumption of jurisdiction in *ABM Onsite* was “arbitrary and capricious,” 849 F.3d at 1147 (holding that the Board was required to either refer a matter of RLA jurisdiction to the NMB and ask for an explanation as to the NMB’s change in position regarding carrier status or to explain why it no longer kept with its established past practice of referring matters to the NMB), its actions here, in deferring to the NMB and then, without explanation, aborting that deferral and imposing NLRA jurisdiction without a shred of explanation, takes arbitrary and capricious to a whole new level.²³

In sum, this is case which, as first processed by the NLRB, required an advisory opinion from the NMB, both because of the existing NMB certification (which only the NMB can revoke) and because it is, to say the least, far from clear that WFS, which (together with its predecessors) has been subject to the RLA for over 30 years, now should be deemed subject to the NLRA and in violation of its proscriptions (with potentially millions of dollars of backpay liability), without a true and thoughtful analysis of the jurisdictional issues by the agency with primary authority for such decisions. There is not now, and has never been, any basis for the NLRB to make that determination in the factual context here.²⁴

²³ The ALJ rejected the application of *ABM On-Site*, finding that the only action of the NLRB which was arbitrary and capricious in the view of the D.C. Circuit was the departure from prior precedent on the standards for meeting RLA jurisdiction, finding the subsequent decision in *Allied Aviation*, 854 F.3d at 55 supported the right of the NLRB to assert jurisdiction without review by the NMB in light, among other things, of the “facts of that case.” (ALJ 17:24-42). Of course, even cursory review of the facts of *Allied Aviation* demonstrate that the employer produced no factual record evidence supporting any basis for its belated claim of RLA jurisdiction.

²⁴ The ALJ further finds, also without authority and analysis, that “the NLRB’s holding in *United Parcel Service* supports the NLRB deciding the jurisdictional dispute in this matter without first acquiring an NMB opinion” (ALJ 18:31-33). We addressed this further erroneous conclusion above (*see pp. 19-20, supra*).

D. Oxford/WFS Meets the NMB’s Function and Control Tests and is, Therefore, Subject to the Exclusive Jurisdiction of the RLA.

Even assuming the NLRB somehow has the statutory authority to overrule the NMB’s representation certifications and to discard the historic exclusive AMRS/Worldwide-TWU bargaining relationship and CBAs (which it does not), and properly can evaluate and apply the NMB’s tests for determining RLA coverage (which it also does not), the ALJ erred in the application of the NMB’s ever-shifting control test²⁵ and, for that reason as well, Worldwide is subject to the jurisdiction of the RLA.

1. The ALJ Erred in Emphasis on “Meaningful Control Over Personnel Decisions” Reflecting Control “Greater Than That Found in a Typical Subcontractor Relationship”

In applying NMB authority on the control standard, the ALJ purports to adopt the NMB’s “traditional” six-factors, as identified in *Air Serv. Corp.*, but adds that in evaluating those factors, it is proper to “plac[e] more emphasis on whether the carrier or carriers exercise “meaningful control over personnel decisions” and that “RLA jurisdiction will not be found when the elements of control are ‘no greater than that found in the typical subcontractor relationship.’” (ALJ 16:9-13) (citing *Allied Aviation*, 363 NLRB No, 173, enf’d 854 F.3d at 59).²⁶

The ALJ’s reliance on emphasis of these criteria disregards the recent holding in *ABM*

²⁵ As noted above, there is no dispute that the “function” part of the NMB’s two-prong test, that is whether the nature of the work performed is work traditionally performed by employees of air or rail carriers, here has been met (*see pp. 15, supra*).

²⁶ The decisions in *Allied Aviation* do not support the ALJ’s decision here. As with the other NMB cases discussed above (*see pp. 24-25, supra*), *Allied Aviation* arose in an unrepresented setting where the scope of the unit was not an issue. The NLRB decision long pre-dated the D.C. Circuit decision in *ABM Onsite* questioning rote application of modified NMB factors – factors never justified either by the NMB or the NLRB. Moreover, the appeal in *Allied Aviation* makes clear that the employer there utterly failed to produce *any* evidence of control, even under the pre-emphasis factors questioned in *ABM On-Site*. Of course, this is not surprising given the fact that the employer in *Allied Aviation* “belatedly” raised the issue of RLA jurisdiction and “missed chances to build a record on the [control] issue by failing to object to NLRB jurisdiction until after the factual record had been developed.” 854 F. 3d at 62. Here, by contrast, the issue of RLA jurisdiction was raised from day one (October 2012) when Worldwide advised Local 399 that it was subject to the RLA, and throughout this proceeding. And, as discussed below, there is an extensive record which supports control under the standard six-factor test.

Onsite, which calls into question the authority of the NLRB to apply NMB criteria where, as the D.C. Circuit noted, the NMB itself never explained “why it decided to replace the traditional approach with an analysis which emphasized carrier control of discipline and discharge...[noting] it was not enough for the NLRB simply to follow suit without an explanation of for why it, too, was leaving behind settled precedent.” *ABM Onsite*, 849 F.3d at 1146.²⁷ Neither the ALJ nor the Board can escape the D.C. Circuit’s holding by simply applying the NMB’s “new approach,” as “an agency cannot avoid its duty to explain a departure from its own precedent simply by pointing to another agency’s unexplained departure from precedent.” *Id.*

Given the conclusions of the D.C. Circuit, this clearly is neither the time, nor the case, where the NLRB should try to delve into the uncertainty of the applicable standards—uncertainty which needs to be resolved, at the first instance, solely by the NMB. Indeed, the Board has conceded this uncertainty must be resolved by the NMB (as opposed to the Board), where, following remand from the D.C. Circuit, and following issuance of the ALJ’s decision here, the Board has referred the pending *ABM Onsite* jurisdictional dispute to the NMB for determination. *Aircraft Service International, Inc.*, 365 NLRB No. 94, slip op. at fn. 2 (2017).

²⁷ There, the NLRB held that *ABM Onsite*, which provided dispatcher and “jammer technician” services to the Portland Airlines Consortium, was not a carrier subject to the exclusive jurisdiction of the RLA because “the record did not establish whether an employee’s removal from service would effectively result in the employee’s discharge” from the Company and because *ABM* “conducts its own investigations of [its] employees,” before imposing discipline. *Id.* In making this determination, the NLRB relied exclusively on several NMB recent decisions, all of which required “that air carriers exercise a substantial ‘degree of control over the firing[] and discipline of a company’s employees before [the NMB] would find that company subject to the RLA.” *Id.* at 1144 (citing *Huntleigh USA Corp.*, 40 NMB 130, 137 (2013); *Aero Port Servs., Inc.*, 40 NMB 139, 143 (2013)). Notably, the D.C. Circuit held that, applying the NMB’s traditional control test, *ABM Onsite* was subject to the jurisdiction of the RLA, not the NLRA. In doing so, the D.C. Circuit relied primarily on *ABM Onsite*’s contract with the Portland Airlines Consortium, which allowed the Consortium to, *inter alia*, establish standard operating procedures and operating manuals; monitor *ABM*’s internal records and maintenance safety plans; review and approve *ABM*’s staffing plans; approve overtime work; approve any changes in *ABM*’s “key personnel”; and, direct *ABM* to remove employees from the Consortium contract (though the Consortium is not permitted to discipline *ABM*’s employees directly, nor does it require *ABM* to consult with it about employee discipline matters); and also required the Consortium to provide *ABM* with certain equipment and office space at the airport. *Id.* at 1141.

2. **The ALJ Erred By Relying on Supposed Facts as Existed After the Assumption of Operations in July 2013**

Another remarkable aspect of the ALJ's failure meaningfully to address the jurisdictional issue is the purported analysis of "control" in which the ALJ relies on facts identified in the 3½ years since July 2013, rather than the facts as they existed in advance of the start of operations when Oxford/Worldwide, with the concurrence of CICA TEC, first decided that the TWU CBA covered the T5 work.²⁸

The record is undisputed that Oxford/WFS first assumed application of the RLA and the TWU CBA while responding to the CICA TEC RFP in 2011 and 2012. Oxford was awarded the contract by CICA TEC in the fall of 2012, at which time it promptly advised the incumbent employees that future employment would be subject to the nationwide TWU CBA. At the same time, Local 399 was advised that WFS and its employees were covered by the RLA, and that the work would be performed under its TWU CBA. The Maintenance Agreement was entered into in January 2013, well before the start of operations in July 2013. As even the ALJ acknowledged, "the Maintenance Agreement affords CICA TEC control over Respondent Employers" (ALJ 20:27-28; 7:14-9:12, quoting "pertinent provisions" reflecting CICA TEC control). Thus, at the time Oxford/Worldwide began applying the nationwide TWU CBA at T5, as had been done elsewhere throughout the United States for many years, there was simply no reason to question the application of the RLA and the TWU CBA to the work at T5. At the time the operative decisions were made and implemented, no one had a crystal ball to view how

²⁸ Thus, the ALJ concluded that "[a]lthough the Maintenance Agreement affords CICA TEC the control over Respondent Employers as discussed above, I find that the record evidence does not support a finding that CICA TEC *exercises* meaningful control over personnel decisions and *has* no greater control over Respondent Employers than is found in a typical subcontracting relationship." (ALJ 20:27-30) (emphasis added). Elsewhere, the ALJ confirms that the finding of lack of control, and with it the absence of RLA jurisdiction, is supported ostensibly by the fact that "[i]n the 3 ½ years between when Respondent Employers took over and the date of the hearing, CICA TEC *has never* utilized its authority to remove any personnel." (ALJ 21: 11-12) (emphasis added).

CICA TEC might, or might not, over the next 3 ½ years exercise “actual” control over the Oxford/Worldwide operations. Yet, the ALJ – in finding NLRB jurisdiction and imposing potentially millions of dollars in back pay liability – gives weight only to the facts ostensibly occurring over the following 3 ½ years, and rules that the facts as known at the time to be of no consequence. And the ALJ does so, apparently without recognition, of the conundrum²⁹ which this imposes on any entity with a history of exclusive RLA jurisdiction and a historical nationwide bargaining relationship under the RLA, which takes over work at a new location.

As previously noted, this is not a case where current representation rights of unrepresented employees are evaluated against a current factual context (*see pp. 14-20, supra*). The jurisdictional issues in this case arose years ago, at the time the decisions to continue representation under the RLA and apply the TWU CBA were made. By applying allegedly currently known facts to decisions made years ago, the ALJ further erred in rejecting the application of RLA jurisdiction to this case. And, as discussed immediately below, the ALJ even erred in applying the six-factor test, with or without emphasis on control over personnel decisions.

3. CICA TEC Exercises Direct and Indirect Control Over Oxford/WFS, Under Both the Historical and Current Standard, Sufficient to Support RLA Jurisdiction.

Generally, to determine whether a carrier³⁰ exerts control over an employer, the NMB

²⁹ We call it a “conundrum” because presumably, as of the time it began operations, the ALJ would have had Oxford/Worldwide anticipate that CICA TEC would not exercise sufficient control in the years to come, and on that basis disregard the TWU certifications, disregard the RLA obligation to deal exclusively with TWU, and disregard the historical nationwide bargaining relationship, all so that they would commence bargaining with another union (here Local 399) and by so doing avoid the draconian consequences imposed here. Of course, if Oxford/Worldwide had done so, it would have risked claims by TWU of violation of the RLA and its CBA. And, of course, at the time of the critical events here, developments over the following 3 ½ years could be known to no one.

³⁰ That CICA TEC is a consortium of carriers, and not an individual carrier itself, is irrelevant, a fact confirmed by the ALJ. (ALJ 18-22, referring to CICA TEC as a “consortium of carriers” and analyzing its control over Oxford/WFS).

focuses on the carrier's role in the employer's daily operations and its effect on the manner in which employees perform their jobs. *See, e.g., Bradley Pacific Aviation, Inc., 34 NMB 119 (2007); Evergreen Aviation Ground Logistics Enters., 25 NMB 460, 460 (1998).* To determine carrier control under its "traditional" two-prong test, the NMB examines:

(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.

ABM Onsite, 849 F.3d at 1142 (citing *Air Serv Corp.*, 33 NMB 282, 285 (2006)); *see also, generally Service Master Aviation Servs.*, 24 NMB 181, 183 (1997). Traditionally, it has not been an "all or nothing" analysis, nor has failure to meet one of the six identified factors been dispositive if the balance of the evidence demonstrates carrier control. Ultimately, "[t]he 'standard for satisfying' this test [i]s 'the *degree of influence* that a carrier had over discharge, discipline, wages, working conditions and operations,' as opposed to any kind of requirement 'that a carrier hire, fire, set wages, hours and working conditions of contractor employees;'" *ABM Onsite*, 849 F.3d at 1142 (citing *Air Serv Corp.*, 33 NMB at 285)).

a. CICA TEC Exerts Control Through Contract.

The NMB historically considered a contractor's service agreement with its carrier customer(s) as the primary evidence of a carrier's influence over the above-cited factors. *See, e.g., Swissport USA, Inc.*, 35 NMB 190, 196 (2008) (relying on the service agreements between Swissport and its carrier customers as evidence that the carriers "dictate nearly all aspects of Swissport's operations"); *Aviation Safeguards*, 27 NMB 581, 585 (2000) (finding sufficient carrier control where "[b]oth contracts give the carriers substantial control over the conduct and

performance of AVSA employees.”). In those cases where carriers exerted substantial control through *contract*, the NMB found sufficient control to warrant RLA jurisdiction without necessarily requiring evidence of additional day-to-day control. For example, the NMB found substantial carrier control and exercised jurisdiction over contractors based *solely* on contractual provisions when (as here):

The contract with [Carrier] states that [Contractor]’s services must be provided in compliance with the Carriers’ requirements. The contract says that [Contractor] must tailor its provision of services to meet any new requirements of Carriers. [Contractor] employees do not wear the Carriers’ uniforms, but they must wear uniforms agreed to by the Carriers. [Contractor] employees’ general standards of performance, conduct and appearance are set by the Carriers. While [Contractor] supervises the employees, the Carriers reserve the right to demand removal of any employee, but [Contractor] employees are not Carrier employees. Finally, [Contractor] records maintained in connection with the contract, and records on cost reimbursed and charge paid, are subject to Carrier inspection and copying.

Aviation Safeguards, 27 NMB at 585. A similar finding of carrier control is warranted here, as CICA TEC exerts as much – if not more – control through its contract with Oxford than the carriers did in *Aviation Safeguards*.

Here, CICA TEC’s Maintenance Agreement, which CICA TEC drafted, controls virtually every aspect of Oxford’s work at Terminal 5 (and, by extension, the operations of Oxford’s subcontractors, WFS, Total and Twin). (GC Ex. 12; Tr. 454). While the ALJ acknowledges that the contract provides CICA TEC with a level of control over Oxford/WFS (ALJ 20:9-26; *see also* 7:18-9:12 for a recitation of “pertinent provisions” as found by the ALJ), she inexplicably ignores numerous other forms of contractual control, including, but not limited to, the fact that the Maintenance Agreement sets forth what tasks Oxford employees must complete and how quickly they must complete them; requires Oxford to comply with CICA TEC’s existing

requirements as well as any subsequently-established requirements; establishes Oxford's employees hours of work and general standards of performance; requires CICA TEC's Executive Director to review all preventative maintenance work performed by employees of Oxford and its subcontractors, and, if the Executive Director determines such work is not performed to CICA TEC's standards, requires Oxford to repeat the Services at its own expense; requires Oxford to "act in the best interest of CICA TEC"; and, allows CICA TEC to audit Oxford/WFS' records. (GC Ex. 12).³¹

More alarming than the ALJ's failure to acknowledge the above-referenced contractual provisions, however, was her unsupported determination that "[s]pecific language in the contract clearly evidences CICA TEC's intention to divest itself of control of Respondent Employers personnel matters." (ALJ 20:30-32). Such a finding is wholly contradicted by the Maintenance Agreement itself, in which CICA TEC: *reserves the right to remove any employee of Oxford or its subcontractors*, for material reason given in writing; prohibits Oxford and its subcontractors from replacing "Key Personnel" without CICA TEC's prior written consent; requires Oxford and its subcontractors to employ an individual "acceptable to CICA TEC" who is responsible for "conveying decisions on behalf of [Oxford] to CICA TEC"; directs how often Oxford and its subcontractors must pay employees; and, provides CICA TEC's Executive Director with the express "authority to manage, monitor and coordinate the performance of" Oxford and its subcontractors.³² (GC Ex. 12).

³¹ In addition, Oxford and its subcontractors staffing plans are subject to CICA TEC's review and approval; and, Oxford must attend "job meetings [and] keep itself aware of any revisions to flight schedules, and conform to any such revisions." (GC Ex. 12).

³² This, it should be noted, is wholly contrary to the ALJ's unsupported conclusion that "[t]he Maintenance Agreement does not provide for direct supervision of unit employees" (ALJ 12:6-7).

In other words, the Maintenance Agreement controls *who* at T5 can perform services for CICA TEC; *what* services they perform; *when* they perform those services; and, *how* they perform those services, all of which warrant a finding of control sufficient for RLA jurisdiction. Moreover, when determining whether a carrier exerts sufficient contractual control to support a finding of RLA jurisdiction, the NMB has relied upon whether the carrier has broad rights to cancel its contract without cause and with little notice. *Milepost Indus.*, 27 NMB 362, 367 (2000). Here, CICA TEC can unilaterally cancel the CICA TEC Contract for any reason, with sixty (60) days' notice to Oxford. (GC Ex. 12, ¶8.02). As conceded by the ALJ, Oxford does not have any similar contractual right. (ALJ 20:22-23).

b. CICA TEC Exerts Extra-Contractual Control.

When considering factors beyond the terms of the carrier contract, the NMB historically examined, *inter alia*, the carrier's role in personnel decisions; the carrier's access to the employer's operations; the degree to which the carrier directly oversees and supervises the employees; the degree to which the carrier affects other conditions of employment (including scheduling, procedures and instructions, and quality and performance standards); and, whether the employer must notify the carrier of complaints or irregularities. *See, e.g., Air Serv Corp.*, 33 NMB at 272; *Service Master Aviation Servs*, 24 NMB at 183; *Service Master Aviation Servs*, 24 NMB 186, 188-189 (1997); *North American Aviation*, 28 NMB 155, 159 (2001); *Milepost Indus.*, 27 NMB at 367; *Aeroground, Inc.*, 28 NMB 510, 510 (2001). Each of these extra-contractual factors warrants a finding of RLA jurisdiction.

i. CICA TEC Controls Oxford/WFS' Personnel Decisions.

The ALJ's decision both ignores and misstates critical aspects of the record in an attempt to support her misguided finding that CICA TEC does not exercise "meaningful control over

[Oxford/WFS'] personnel decisions and has no greater control over Respondent Employers than is found in a typical subcontracting relationship.” (ALJ 20:28-30). In actuality, CICA TEC retains significant control over Oxford/WFS' staffing and personnel-related decisions (as evidenced by the contractual provisions detailed above) and repeatedly has exercised such control. By way of example, Oxford could not hire its Operations Manager without CICA TEC's prior approval; thus, CICA TEC's Executive Director and Management Committee demanded to first review Jensen's resume and qualifications to determine whether Jensen was acceptable for the role. (Tr. 456; RO Ex. 14). While the ALJ states that Oxford submitted Jensen's resume “to CICA TEC for approval with no response” (ALJ 21:3), the record is clear that: (1) CICA TEC ultimately approved Jensen's assignment; and, (2) absent such approval, Oxford could not have assigned Jensen to the position. (Tr. 460). Further, Oxford cannot replace Jensen without CICA TEC's prior, written consent. (GC Ex. 12, ¶3.05). CICA TEC also was directly involved in Oxford's decision to hire George Farmer, an Oxford Supervisor at T5 who previously had been employed by ABM, having advised Oxford that “it would be in be in [Oxford's] best interest to hire George Farmer.” (Tr. 543, 569).

Further – and contradictory to the ALJ's unsupported finding that “[a]s for the unit employees, CICA TEC retains no control over their hiring process” (ALJ 21:6-7) – the record establishes that CICA TEC played a role in the decisions by Oxford/WFS to offer positions to the incumbent ABM employees, having made it clear that “they didn't want to see the ... incumbent's personnel lose their positions.” (Tr. 447). Accordingly, Oxford/WFS understood that CICA TEC “expected” the Company to provide opportunities to existing ABM personnel to work for Oxford/CICA TEC, and complied with such expectations. (Tr. 448).

Beyond exercising control in connection with these hiring-related decisions, CICA TEC

exerts control over Oxford/WFS' general staffing activities, as Oxford/WFS must provide monthly staffing updates to CICA TEC's Executive Director, and must, upon CICA TEC's request, provide staffing plans for CICA TEC's review and approval. (ALJ 20:12-13).³³ Moreover, Jensen recently changed a number of employees' work schedules after CICA TEC demanded greater supervision over the weekend staff. (ALJ 12:31-33).

Finally, Oxford/WFS must, upon CICA TEC's written request, "remove any personnel from the performance of Services...." (GC Ex. 12, ¶3.05). Though CICA TEC never has had occasion to request that Oxford/WFS terminate an employee from working at T5, the workforce is relatively small, is composed of many experienced employees, and appears well-managed by Oxford/WFS. (J Ex. 4). That it hasn't exercised this right is of no consequence here, where it clearly has the contractual right to do so.

ii. CICA TEC Controls Oxford/WFS' Day-to-Day Operations.

Oxford/WFS' operations are managed, monitored and coordinated by CICA TEC. In addition to the contractual provisions set forth above,³⁴ Oxford provides CICA TEC and CICA TEC's individual airline members with ongoing updates about equipment status and its work on maintenance or repair projects. (Tr. Ex. 522-524; RO Ex. 16). Jensen is in virtually daily discussions with both CICA TEC representatives and airline representatives regarding operational issues. (Tr. 518-522). Moreover, Oxford representatives attend monthly meetings

³³ The ALJ's notation that "the staffing plan submitted by Respondent Employers has part of the bid process has not been followed" is a red herring. (ALJ 21:41-42). Oxford/WFS has submitted monthly staffing plans to CICA TEC since the inception of its contract. (RO Ex. 22).

³⁴ i.e., the fact that the Maintenance Agreement sets forth precise performance requirements (GC Ex. 12, ¶3.02); that CICA TEC monitors Oxford's performance and compliance with such requirements through a series of required daily reports (including, the Dispatcher Shift Turnover log that summarizes any incidents or accidents and identifies whether any employees have called out of work or worked overtime (RO Ex. 18); the Daily Production Report (RO Ex. 17); the Alarm Response Log (RO Ex. 19); and, the Bridge Call Log (RO Ex. 21; GC Ex. 12, ¶3.09)) (Tr. 520; RO Ex. 9; RO Ex. 15; ALJ 20:13-18); and, that CICA TEC has the right to audit these records at any time (GC Ex. 12, ¶3.09).

with CICA TEC and airline representatives to discuss performance and to review various safety issues and initiatives. (Tr. 539-541).

CICA TEC also controls *how* Oxford/WFS employees work, as CICA TEC owns the conveyor system and jet bridges on which Oxford/WFS employees work, provides Oxford with office space in T5, and provides virtually all of the tools and equipment used by Oxford/WFS employees, including a forklift and scissor lift. (ALJ 19:27-30). In addition, at CICA TEC's request, the company logo on employee uniforms were changed. (Tr. 160-162).

iii. CICA TEC Directs and Supervises Oxford/WFS Employees.

CICA TEC representatives continuously direct and supervise Oxford/WFS employees. Ranttila visited Terminal 5 frequently during his tenure as Executive Director, and his replacement, Joe Shirley, is at T5 on a daily basis. (Tr. 239, 514, 516). Both regularly directed Oxford/WFS employees to complete specific tasks, such as painting a block stop or changing a belt. (Tr. 515-516). Pernell Miller, a current WFS mechanic, described Ranttila and Shirley as the “overseer of the bag room in the jet bridge, all the equipment that we work on” and testified that Ranttila would “come to employees directly and ask them to do something.” (Tr. 136, 138, 162-164).³⁵ Dessie Miller, an encoder for Twin, testified to seeing Ranttila on a daily or near-daily basis, and testified that Ranttila would question Miller as to why “some bags are piling up” and ask her “to correct it”, directions with which Miller always complied (Tr. 239-240).

In addition to these direct interactions with staff, Ranttila and Shirley exercised control through Jensen, by demanding that Jensen assign employees to complete a particular assignment, or by requiring Jensen to assign more employees to work on a particular jet bridge. (Tr. 515-

³⁵ Miller denied initially that employees received instructions or directions from Ranttila. After being shown a copy of the confidential witness affidavit Miller submitted during the Board's investigation into the underlying unfair labor practice charge, Miller confirmed that Ranttila did, indeed, ask employees to do certain things.

518). Jensen characterized Shirley's oversight of Oxford/WFS as "micromanag[ing]," citing specifically given Shirley's demand that Oxford/WFS employees perform more cleaning tasks throughout the bag room. (Tr. 517).³⁶

c. Given the Above, the ALJ Erred in Finding That CICA TEC Did Not Exert Sufficient Control Over Oxford/WFS

In sum, and as factually detailed above, CICA TEC: (1) plays an active role in Oxford/WFS' daily operations (*see, e.g., Trux Transportation*, 28 NMB 518, 523 (2001)); (2) provides instructions to Oxford/WFS employees on various facets of their activities (*see, e.g., id. at 524; North American Aviation*, 28 NMB at 159); (3) directs work being done by Oxford/WFS employees (*see, e.g., Trux Transportation*, 28 NMB at 525); *AVGR International Business, Inc.*, 27 NMB 232, 235 (2000)); (4) effectively supervises Oxford/WFS employees (*see, e.g., Aeroground*, 28 NMB at 514; *North American Aviation*, 28 NMB at 161); (5) meets regularly with Oxford/WFS management over service and related issues (*see, e.g., North American Aviation*, 28 NMB at 161); (6) establishes policies and procedures Oxford/WFS employees must follow (*see, e.g., North American Aviation*, 28 NMB at 159); (7) has access to Oxford/WFS employees' work areas (*see, e.g., Argenbright Security Inc.*, 29 NMB 340, 344 (2002)); (8) provides Oxford with office space and provides much of the equipment used by Oxford/WFS employees (*see, e.g., Air Serv Corp.*, 33 NMB at 285); and, (9) has *authority* to exercise control over Oxford/WFS' hiring and discharge-related decisions (*see, e.g., Signature Flight Support*, 32 NMB 30, 33 (2004)).

³⁶ The ALJ interpreted Jensen's "tone" when testifying about these incidents as evidence that Jensen "was not used to such interference with his autonomy but had complied to please his customer." (ALJ 32: 35-39). This interpretation is unsupported by Jensen's actual testimony, wherein – as noted above – he characterized Shirley as "micromanag[ing] my operation". (Tr. 517).

Nevertheless, the ALJ all but ignored these precedential factors, choosing instead to apply “the more recent NMB precedent requiring a carrier to have more ‘meaningful control over personnel decisions’ in order for RLA jurisdiction to be established”. (ALJ 19, fn.13). As noted above, the ALJ erred in applying this “emphasis,” given the D.C. Circuit’s recent decision in *ABM Onsite*. Regardless, even if the Board, despite *ABM Onsite*, was free to apply the more recent NMB articulations of its standard for satisfying the control aspect of the NMB’s jurisdictional test,³⁷ which it is not, as detailed above (*see pp. 26-28, supra*), Oxford/WFS has demonstrated that CICA TEC is closely involved in the daily operations and major personnel decisions at T5.³⁸ Thus, on this ground as well, the instant case should be dismissed for lack of jurisdiction under the NLRA.

II. ASSUMING ARGUENDO THE NLRA APPLIES, ONCE OXFORD/WORDWIDE BEGAN OPERATIONS IN JULY 2013, THE LOCAL 399 BARGAINING UNIT CEASED TO BE AN APPROPRIATE UNIT AND, THEREFORE, THE ALJ ERRED IN CONCLUDING THAT WFS WAS A SUCCESSOR WITH A DUTY TO RECOGNIZE AND BARGAIN WITH LOCAL 399.³⁹

As the ALJ correctly recounted, “under Burns and its progeny,” the well-established

³⁷ As we have argued elsewhere, any attempt to apply the NMB’s standards should only be made by the NMB, not the NLRB, where, as here, the potential for erosion, if not destruction, of historic RLA bargaining relationships, not to mention interference with long-standing NMB certifications and avoidance of interruptions to commerce, is inevitable.

³⁸ By way of illustration, the facts here establish that CICA TEC exerts far more control over Oxford/WFS than the carrier in *Airway Cleaners, LLC*, 41 NMB 262 (2014), a case heavily relied upon by the ALJ. (ALJ 19:18-46). There the NMB declined to assert jurisdiction where the only evidence of control over hiring was that Airway Cleaners hired one manager based on the carrier’s recommendation, but chose not to hire several other individuals the carrier recommended. *Id.* at 268. By contrast, here, Oxford/WFS was required to obtain – and actually obtained – CICA TEC’s approval to hire/assign Jensen to T5, and offered employment to *every* individual, including unit employees, recommended for hire by CICA TEC. *See pp. 35-36, supra*. Further, the contract in *Airway Cleaners, LLC* was silent as to the carrier’s ability to remove or discipline the employer’s employees – a far cry from the Maintenance Agreement, which provides CICA TEC right to remove any employee of Oxford or its subcontractors from any position in T5 upon material reason. *Id.* at 265-266, *cf.* GC Ex. 12, ¶3.05. And, perhaps, most critically, CICA TEC has the power to enforce its decisions, having the unilateral right to terminate the CICA TEC contract without cause on very short notice. (GC Ex. 12, ¶8.03).

³⁹ The arguments that follow are without prejudice to the position of Oxford/WFS that the NLRB lacks jurisdiction to proceed with this matter.

standard for determining successorship obligations requires: “(1) there is a substantial continuity of operations after the takeover; (2) a majority of the successor’s employees at the facility it acquired from the predecessor were former predecessor employees; and (3) a majority of the new employer’s work force in an [sic] unit remains appropriate for collective bargaining under the successor’s operations.” (ALJ 24: 23-27, citing *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 43 (1987). The ALJ found, and Oxford/WFS has never challenged, the existence of continuity of operations or that a majority of their employees at T5 were former predecessor employees. (ALJ 24:30- 25:11). However, they did and do, strenuously challenge the ALJ’s determination that the T5 unit remained appropriate for collective bargaining under *the successor’s* operations.

To meet this standard, there must be a finding that the Local 399 bargaining unit as it existed pre-July 1, 2013 continued to be an appropriate unit *after* Oxford/WFS began operations. *See Banknote Corp.*, 315 NLRB 1041, 1043 (1994) (“Critical to a finding of successorship is that the bargaining unit of the predecessor employer remains appropriate for the successor employer.”); *Border Steel Rolling Mills, Inc.*, 204 NLRB 314 (1974) (successorship requires proof that “the predecessor’s bargaining unit remained intact under the successor and continued to be an appropriate unit . . . after the transfer . . .”). While a predecessor’s unit is considered presumptively appropriate, the presumption is not irrefutable and does not apply if the unit has “been rendered obsolete by industry shifts or [other] developments.” *Banknote Corp. of Am. v. NLRB*, 84 F.3d 637, 648 (2d Cir. 1996), *enf’d.* 315 NLRB 1041 (1994).

Here, even assuming the ABM-Local 399 unit at some time was appropriate (an assumption only since it appears to have been solely the product of a voluntary recognition and never NLRB certification) (Tr. 39; GC Ex. 2), such unit no longer was appropriate on and after July 1, 2013 in light of WFS’ historic *nationwide* bargaining relationship with TWU. The NLRB

long has held that “[g]enerally, if there is evidence that the parties have included two or more plants in a single collective-bargaining agreement, the bargaining history becomes controlling, and the *only* appropriate unit becomes the one consisting of all employees covered under the agreement.” *Arrow Uniform Rental*, 300 NLRB 246, 248 (1990) (emphasis added) (citing *Gibbs & Cox*, 280 NLRB 953, 954 (1986)). Thus, absent compelling circumstances, “[t]he existence of a multilocation bargaining history precludes severing the employees of any given location from the overall multiplant unit”. *Id.* (citing *Anheuser-Busch, Inc.*, 246 NLRB 29, 32 (1979); *see also Standard Brands*, 75 NLRB 394, 399 (1947) (where there exists a “long, continued bargaining history among employees at [multiple locations] on the basis of a [multi-location] unit, a unit limited to employees of one such [location] is not appropriate for purposes of collective bargaining”). Notably, the Board does *not* consider a party’s desire to alter a historical multi-location unit; a showing of interest for a single-facility unit; a varied bargaining history; or, differences in degree among the employees’ community of interest (including geographical separation, local autonomy and limited interaction) to be “‘compelling circumstances’ that would warrant disturbing the parties’ historical, multiplant unit.” *Met Electrical Testing Company, Inc.*, 331 NLRB 872, 872 (2000).

The reasoning behind the NLRB’s reluctance to disrupt multi-location bargaining units is simple – the Board cannot and should not sacrifice those employees who have gained collective rights and labor stability through decades of multi-location bargaining for the benefit of a particular group or faction:

Stability acquired through the experience of such collective bargaining relations cannot be lightly sacrificed to the desire of a craft or miscellaneous group of employees who subsequently seek separate bargaining rights against the will of other employees, who, through long comprehensive bargaining on a broad scale,

have gained substantial rights in their common employment. In view of this long bargaining history, and the interests accruing to the company's employees therefrom, we are of the opinion that to attempt to carve out from the established unit a bargaining group of such employees as the Machinists claims to represent would not insure to employees as a whole the rights guaranteed under the Act.

Spokane United Railways, 60 NLRB 14, 20 (1945). Put another way, the NLRB cannot place the interests of the Local 399, and perhaps a small number of employees at T5 who it represented previously, above the interests of the thousands of WFS employees *nationwide* – and their long-certified representative, TWU. That the historic AMRS/WFS-TWU relationship has been approved and sanctioned by both the NMB and the courts for decades, makes this conclusion all the more certain.

Although not addressing any of these authorities, the ALJ concluded that she was “unconvinced” that “the NMB’s certification of TWU Local 504 as the bargaining representative of WFS’ employees performing the same or similar jobs at other airports requires the employees in the instant case to be part of that unit without first finding, which I do not find, that RLA jurisdiction is appropriate in this case.” (ALJ 25:42-26:2). Yet the ALJ offers no explanation for why the scope of the unit should be conflated with the issue of jurisdiction. Plainly the case law above requires consideration of the successor’s multi-plant unit. The ALJ’s refusal to even address this issue is error.

Instead, the ALJ relies on a presumption of the appropriateness of a single-facility unit and community of interest factors which have been identified as a basis for rebutting the presumption, to wit; “(1) central control over daily operations and labor relations, including the extent of local autonomy, (2) similarity of skills, functions and working conditions, (3) degree of employee interchange, (4) distance between locations, and (5) bargaining history, if any.” (ALJ

26:10-14). And, in applying these criteria, she rejects as irrelevant, but without explanation, TWU's 30 year nationwide bargaining history (choosing instead to consider only Local 399's single-facility unit). She does so despite the requirement that the analysis is to be on the appropriateness of the unit to the *successor*. And, making matters worse, the ALJ asserts, contrary to the record, that, other than evidence of payroll/HR services provided by WFS, Respondents "presented no evidence to support factors 1 through 4." (ALJ 26: 15-18). This, again, is simply wrong, as the ALJ chooses to disregard undisputed record evidence.⁴⁰

In sum, then, the ALJ erred in finding that the T5 unit, in the circumstances of this case, remained appropriate once Oxford/Worldwide – with its nationwide unit at multiple airports – began operations. Accordingly, even if NLRA jurisdiction applied here, which it does not, the ALJ erred in imposing a successorship obligation on Oxford/Worldwide.

III. IN THE UNLIKELY EVENTS THE NLRA APPLIES AND OXFORD/WFS BECAME A SUCCESSOR, THE ALJ ERRED IN CONCLUDING THAT IT WAS NOT PRIVILEGED TO SET ITS INITIAL TERMS AND CONDITIONS OF EMPLOYMENT.

Without a shred of discussion or a shred of analysis of authority, let alone identification of a single case arising in even remotely comparable circumstances, the ALJ imposed potentially millions of dollars of back pay in direct conflict with the Supreme Court ruling in *Burns*. If, despite all of the foregoing, the Board should find that the NLRA rather than the RLA governs this dispute, and that, despite the 30 plus year nationwide bargaining relationship with TWU, the appropriate unit here is the single T5 location, the Board nevertheless must find that

⁴⁰ Without belaboring it, there is ample evidence of central control over labor relations (factor 1) evidenced by, among other things, the fact that WFS labor relations staff at its Dallas HQ (Cunningham) dealt with the Local 399 demand to bargain and participated in the October 2012 employee meeting. Likewise, there is undisputed evidence of "similarity of skills, functions, and working conditions" since, as the ALJ recognizes in another context, the work at T5 was the same as work done at other airports by WFS employees under the TWU CBA (ALJ 10:24-26).

Oxford/Worldwide had the *absolute right to set initial conditions by applying the TWU CBA*, and reject the ALJ's utterly inexplicable ruling to the contrary.

A. Oxford/Worldwide is a Lawful Burns Successor.

Even if, somehow, the Board were to conclude that it has jurisdiction (which it does not) and that Oxford/WFS was a successor to ABM (which it was not), it is beyond cavil that a successor employer is entitled to set initial terms and conditions of employment, regardless of whether such terms differ from those of its predecessor. *See, e.g., Burns*, 406 U.S. 272. Indeed, this so-called “*Burns* right” is so firmly entrenched in federal labor law that exceptions exist *only* where a successor makes it “perfectly clear” that it “will retain its predecessor’s workforce and operate on substantially the same terms as the predecessor” *or* otherwise discriminatorily refuses to hire union employees in an attempt to avoid its successorship obligations. *See, e.g., Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1008 (D.C. Cir. 1998). There is no dispute that the first, “perfectly clear successor”, exception is here inapplicable. (ALJ 27:19-22). The second exception also does not apply, as there is no allegation that Oxford/Worldwide discriminatorily refused to hire ABM employees (to the contrary, it hired all 13 incumbent employees who applied for jobs) (ALJ 10:21-22). Thus, the second exception is inapplicable and Oxford/WFS was free to set its initial terms and conditions of employment.

B. The Line of Cases Which Includes Advanced Stretchforming Does Not Require, Nor Justify, Expansion of the Narrow Exceptions to an Employer’s Burns Rights Here.

Relying on a theory first raised by Charging Party in November 2015 – more than two (2) years after Oxford/WFS began operations at T5 – without further explanation, the ALJ, citing *Advanced Stretchforming*, 323 NLRB 529 (1997), ruled that that by declining to recognize and

bargain with Local 399, and by applying the terms of the TWU CBA,⁴¹ Oxford/Worldwide forfeited the right to set initial terms and conditions of employment, and is liable for paying its T5 employees the difference between the pay and benefits under the ABM-Local 399 CBA as compared to the WFS-TWU CBA. Not only is this claim untimely, it is simply wrong. *Advanced Stretchforming* stands for the limited proposition that a successor forfeits its *Burns* rights if, prior to hiring a predecessor's employees, it informs those employees that "there will be no union presence going forward," as such comment serves "the same end as a refusal to hire employees from the predecessor's unionized workforce." *Id.* at 530; *see also JAG Healthcare*, 361 NLRB No. 135, slip op. at 2 (2013) (no *Burns* rights where employer told employees there would be "no union" at the facility). Put another way, the Board held that telling potential employees they will not be represented by a union is equivalent to not hiring those employees in order to avoid successorship, as such comments "discourage union-represented employees from seeking employment with the successor and in this way abet the successor's effort to avoid having to recognize and bargain with the union." *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 297 (7th Cir. 2001); *see also Eldorado, Inc.*, 335 NLRB 952, 958 (2001) ("when a successor employer 'tells applicants that the company will be nonunion before it hires its employees, the employer indicates to the applicants that it intends to discriminate against [the predecessor's] employees to ensure its nonunion status.") (citing *Kessel Food Markets*, 287 NLRB 246, 427 (1987), *enfd.*, 868 F.2d 881 (6th Cir. 1989)).

Here, there is no finding, nor can there be, that Oxford/Worldwide informed the ABM employees that they would be unrepresented if they worked for Oxford/Worldwide, or

⁴¹ While the ALJ recites elsewhere that the TWU contract was applied in its entirety (see ALJ 10:27-28), in denying the right to set initial conditions, she relies on a truncated description of what was done: "they required unit employees to sign, as a condition of employment, dues authorization forms allowing Respondent Employers to deduct membership dues from their pay and remitted those dues to TWU Local 504." (ALJ 28: 18-21).

otherwise indicated that there would be “no union” after the acquisition of the work. Rather, the ALJ found precisely the opposite—that it told the ABM employees that they would be required to work under the terms of the WFS-TWU CBA. (ALJ 9-10:39-6). It did not, as contemplated by the *Advanced Stretchforming* line of cases, “indicate[] to the applicants that it intend[ed] to discriminate against the seller’s employees to ensure its non-union status.” *Kessel*, 287 NLRB at 427. To the contrary, Oxford/WFS encouraged union participation in TWU, consistent with the historic WFS/TWU relationship and its well-founded understanding that it was subject to the exclusive jurisdiction of the RLA. Oxford/WFS never indicated a shred of non-union animus; accordingly, *Advanced Stretchforming* has no bearing on the outcome of this case and, certainly, does not support the draconian relief which the ALJ has imposed.⁴²

And, making matters worse, the ALJ applied the *Advanced Stretchforming* exception here – to our knowledge, for the first time ever and apparently without any perceived need to explain why – to a situation where the “successor” applied the terms of another CBA which it believed covered the work. As discussed below, she did so without even mentioning *Burns* which, absolutely justifies Respondent Employers’ right to set initial conditions here.

C. The ALJ Utterly Ignored the Clear Teaching of *Burns*.

Advanced Stretchforming does not preclude – nor has it ever been interpreted to preclude – a successor employer from setting initial terms and conditions of employment solely because

⁴² As further discussed below (*see pp. 49-50, infra*), we describe this as “draconian” for multiple reasons. First, the possibility of this alleged relief was not articulated by CP or the Region until *November 2015*—more than two years after the start of operations at T5. The notion that Oxford/Worldwide should first be subjected to potentially enormous retroactive liability, based on a theory which was never earlier asserted is, to say the least draconian. Likewise, it is “draconian” where, as here, from day one – October 15, 2012 – when Local 399 and Worldwide spoke and corresponded, Worldwide made clear its understanding that it was obligated to apply its TWU CBA since it was subject to the RLA. For more than three years thereafter, while this dispute was wending its way through the NLRB (and abortively through the NMB), neither CP nor the Region ever gave the slightest indication that anything beyond a prospective duty to bargain was at issue. Adding a potential liability of millions of dollars, on a theory which has never been applied in these circumstances and without any analysis by the ALJ, is the essence of “draconian.”

the successor (lawfully or otherwise) required a predecessor's employees to join a different, existing bargaining unit. Nonetheless, the ALJ's decision imposes forfeiture of a successor's right to set initial conditions if the employer engages in *any* unlawful conduct during the successorship process.

This position ignores the facts underlying the Supreme Court's decision in *Burns*, which are almost on all fours with the facts here. As here, Burns was awarded a service contract performed previously by a company with a unionized workforce. Burns hired a majority of the predecessor's employees and, upon hire:

supplied them with membership cards of the American Federation of Guards (AFG), another union with which Burns had collective-bargaining contracts at other locations, and informed them that they had to become AFG members to work for Burns, that they would not receive uniforms otherwise, and that Burns 'could not live with' the existing contract between [the predecessor] and [its] union.

406 U.S. at 276.

Initially, the Board held that Burns unlawfully recognized the AFG in violation of Sections 8(a)(1) and 8(a)(2), and thus violated Sections 8(a)(5) and 8(a)(1) by refusing to bargain with the predecessor's incumbent union. The Board ordered Burns to observe the collective bargaining agreement entered into by the predecessor and its incumbent union. While the Supreme Court agreed that Burns' conduct violated the Act, it disagreed that such violations bound Burns to "the substantive terms of the collective-bargaining contract the [incumbent] union had negotiated with [the predecessor] and to which Burns had in no way agreed." *Id.* 281-282.

The facts here are identical to those in *Burns*.⁴³ Thus, even if the Board concludes that Oxford/Worldwide unlawfully recognized TWU, unlawfully informed the ABM employees that they would have to join TWU and unlawfully required former ABM employees to sign TWU authorization cards, Oxford/Worldwide still had the right to set its own initial terms and conditions of employment and had no obligation to apply terms “to which [it] had in no way agreed.” By holding otherwise, remarkably without even mentioning *Burns*, the ALJ stripped Oxford/Worldwide of the right to set initial conditions in circumstances virtually identical to those which arose in *Burns*. In otherwise, the ALJ ignored binding Supreme Court precedent and found that *Burns* itself was not entitled to its *Burns*’ rights. The Board should not –indeed, cannot – follow suit.

D. Any Imposition of Make Whole Relief is Impermissibly Punitive.⁴⁴

Under the Act’s remedial scheme, Board-ordered relief must be remedial, not punitive, in nature. *Iron Workers Local 377*, 326 NLRB 375, 376 (1998) (citing *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961)). In addition, the Board has a duty to tailor its remedies to a case’s specific circumstances and “ensure that its remedies are congruent with the [relevant] facts.” *Diamond Walnut Growers, Inc.*, 340 NLRB 1129, 1132 (2003).

Here, imposition of the relief ordered by the ALJ was impermissibly punitive and out of line with the circumstances of this case. Oxford/WFS did not, as in *Advanced Stretchforming* and other failure to bargain cases imposing make whole relief, threaten to discriminate against ABM’s employees or otherwise embark on a deliberate scheme to avoid bargaining with Local

⁴³ Of course, the only difference is that, unlike *Burns*, Worldwide had an NMB-certified, decades-long national bargaining relationship with TWU and a craft or class certification by the NMB, and thus was required by the RLA (and had a reason to believe it was required by the RLA) to mandate the T5 thus employees to join TWU. See *National Railroad Passenger Corp.*, 13 NMB at 417.

⁴⁴ This argument was presented to, but wholly ignored by the ALJ.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

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;

Case 13-CA-115933

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

and

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-115935

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 399, AFL-CIO

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July, 2017, I served a true copy of **BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE ON BEHALF OF RESPONDENTS OXFORD ELECTRONICS, INC. d/b/a**

OXFORD AIRPOT TECHNICAL SERVICES AND WORLDWIDE FLIGHT SERVICES, INC. *via* the National Labor Relations Board's electronic filing service and via electronic mail on:

J. Edward Castillo
Counsel for General Counsel
National Labor Relations Board – Region 13
Dirksen Federal Building
219 South Dearborn Street, St. 808
Chicago, IL 60604-1443
(edward.castillo@nrlb.gov)

Dane Strickoff, Local President
Transport Workers Union of America,
Local 504
153-33 Rockaway Blvd.
Jamaica, NY 11434-3635
(local504@hotmail.com)

Michael R. Lied, Esq.
Howard & Howard PLLC
211 Fulton St., Ste. 600
Peoria, IL 61602-1350
(mlied@howardandhoward.com)

Local 399 International Union of Operating
Engineers
2260 S. Grove Street
Chicago, IL 60616
(vcolvett@iuoe399.com)

Martin P. Barr
Carmell, Charone, Windmer, Moss &
Barr, Ltd.
One East Wacker Drive, Suite 3300
Chicago, IL 60601
(mbarr@carmellcharone.com)

David Glanstein, Attorney
Glanstein LLP
437 Madison Avenue, 35th Fl.
New York, NY 10022
(david@glansteinllp.com)

Jimmie Daniels, CEO
Total Facility Maintenance, Inc.
615 Wheat Lane, Suite C
Wood Dale, IL 60191-1165
(jdaniels@totalfacilitymaintenance.com)

Taunesha Carpenter, President
Twin Staffing, Inc.
10001 W. Roosevelt Road, Suite 307
Westchester, IL 60154-2662
(taunesha@twincleaningprofessionals.com)

