

**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 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

Case 13-CB-115935

**INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 399, AFL-CIO**

**CHARGING PARTY'S BRIEF
IN OPPOSITION TO RESPONDENT EMPLOYERS' AND RESPONDENT UNION'S
EXCEPTIONS TO THE ALJ'S DECISION AND RECOMMENDED ORDER**

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I.

THE ALJ CORRECTLY DETERMINED THAT THE NLRB HAS JURISDICTION OVER THIS CASE

(Oxford/WFS Exceptions 1-55; Brief at 13-40)

(Twin/Total Exceptions 3, 14-22, 24-33, 42; Brief at 11-19)

(TWU Exceptions 3, 5-7, 9-19, 22, 26-27)

A. The Administrative Law Judge Applied The Correct Legal Standard

Respondents Oxford Electronics, Inc., d/b/a Oxford Airport Technical Services (“Oxford”) and Worldwide Flight Services, Inc., (“WFS”) (referred to jointly as “Oxford/WFS”) devote much of their brief to misapprehensions and mischaracterizations of the law. (Oxford/WFS brief at 14-23). Most fundamentally, it confuses jurisdiction – the power to hear a case – with the power to determine bargaining units and issue certifications of collective bargaining representatives. These are separate powers.

Black’s Law Dictionary defines jurisdiction as “a government’s general power to exercise authority over all persons and things within its territory” and “a court’s power to decide a case or issue a decree.” *Black’s Law Dictionary*, 707 (Garner, Ed. In Chief) (Thomson West) (Abridged Eighth Ed.) (1990). The National Labor Relations Board has jurisdiction over “employers” as defined in Section 2 of the National Labor Relations Act. The definition excludes any person subject to the Railway Labor Act, 45 U.S.C. *et seq.* The Railway Labor Act (“RLA”) has jurisdiction over certain “carriers.” The RLA defines “carrier” in relevant part, as *‘any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported*

by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such carrier' ...45 U.S.C. §151, First (emphasis added). It is the italicized language that provides the foundation for the two-part control test employed by the National Mediation Board ("NMB") in determining whether to exercise jurisdiction over entities that are not themselves "carriers" under the RLA.

Oxford/WFS' arguments about the historical recognition afforded the Transport Workers Union, Local 504 ("TWU") pursuant to a NMB certification do not raise a jurisdiction question. Those arguments would only be relevant – in a case where the NMB has jurisdiction – to questions involving the proper unit or the employees' legal collective bargaining representative. The Administrative Law Judge ("ALJ") implicitly recognized this distinction. In response to Respondent Employers'¹ contention that NLRB jurisdiction was precluded by NMB's certification of TWU as the bargaining representative of WFS' employees in crafts covering the work of the unit employees in this case, she wrote: "I agree that these cases² 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 I do not find the cases stand for the proposition that such certifications extend to employment situations *outside the jurisdiction of the RLA*." ALJ DRO³ at 17, lines 4-18 (emphasis added). The ALJ's assessment is spot-on.

The ALJ's analysis is supported by the NLRB's recent case involving a contractor's operation at the Orlando International Airport. *Aircraft Service Int., Inc.*, 365 NLRB No. 94 (June 9, 2017) (Chairman Miscimarra dissenting in part). In that case, the employer argued that previous NMB decisions finding appropriate nationwide units of its employees at other airports

¹ "Respondent Employers" and "Respondents" refer to all four employer respondents in this case.

² "These cases" refer to cases cited by Respondent Employers holding that the NMB has the exclusive authority to grant, withhold, or revoke the certification of a representative under the RLA.

³ "ALJ DRO" refers to the ALJ's Decision and Recommended Order.

were relevant to the jurisdictional issue before the NLRB. In rejecting this contention, the NLRB majority stated “No party contested the NMB’s jurisdiction in any of those cases, and the issue of unit appropriateness is addressed by the NMB (as by the NLRB) *only after the threshold requirement of jurisdiction has been met.*” 365 NLRB No. 94, slip op. at 1. (emphasis added).

The NMB implicitly recognizes the correctness of the NLRB majority’s reasoning. As the NLRB observed in *Aircraft Service Int.*, the NMB had consistently applied its two-part control test when required to determine whether it had jurisdiction over the employer’s operations at other facilities. Similarly, in a case involving WFS, Respondent herein, the NMB applied its traditional two-part control test to WFS’ operations at John F. Kennedy Airport, and made no mention of WFS’ nationwide craft units. *Worldwide Flight Services, Inc.*, 31 NMB 386 (2004).

The ALJ also is spot-on with her interpretation of *United Parcel Service*, 318 NLRB 778 (1995) cited by Oxford/WFS in support of its policy argument that the NLRB should decline jurisdiction in order to promote stability in bargaining relationships. Oxford/WFS Brief at 16-17. She stated: “Respondent Employers fail to recognize that the unit employees in the instant case had a 20-year collective bargaining history with IUOE Local 399 as their representative under the NLRA while performing the same work, in the same location, in the same manner, pursuant to a series of contracts between CICA TEC and predecessor contractors. 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.” ALJ RDO at 18, lines 18-24. As the ALJ implies, it is Respondents who are causing the instability, not Charging Party, or the NLRB. It should be noted that Oxford/WFS cites to no evidence that the continuity of Charging Party’s representation will endanger stability in operation of T-5’s baggage handling

operation. Oxford/WFS' argument is based on nothing more than broad policy concerns, and not the NMB's control test for determining jurisdictional status.

Finally, Oxford/WFS continues to mischaracterize the Court's holding in *ABM Onsite Services-West, Inc. v. NLRB*, 849 F.3d 1137 (D.C. Circuit 2017), when it states that the NLRB was required either to refer the matter of RLA jurisdiction to the NMB or request an explanation from NMB "why it no longer kept with its established past practice of referring matters to the NMB." Oxford/WFS Brief at 27. Oxford/WFS made the same argument to the ALJ which she correctly rejected. As the ALJ noted, what the Court found to be arbitrary and capricious was the NLRB's application of more recent NMB precedent emphasizing more meaningful control over personnel decisions to establish RLA jurisdiction when neither the NMB nor NLRB had explained the reason for departing from prior precedent applying the traditional six-factor test without such emphasis. ALJ DRO at 17, lines 26-33; 849 F.3d at 1146-47.

However, an explanation for deviating from the NMB's traditional six-factor test is unnecessary in this case. While the ALJ did find NLRA jurisdiction under the more recent traditional six-factor test placing emphasis on more meaningful control over personnel decisions to establish RLA jurisdiction, she also found that even without the emphasis on more meaningful control over personnel decisions, an analysis of the traditional six-factor test did not weigh in favor of RLA jurisdiction. ALJ DRO at 22, lines 15-22. For all the reasons cited in the ALJ's DRO, her decision should be adopted.

In the end, there is no requirement that the NLRB defer all jurisdictional issues to the NMB, or even seek an advisory opinion from it. *Spartan Aviation Ind., Inc.*, 337 NLRB 708 (2002). Indeed, the Board will not refer a case to the NMB that presents a jurisdictional claim in

a factual situation similar to one in which the NMB has previously declined jurisdiction. *Id.*, *Phoenix Systems & Technologies, Inc.*, 321 NLRB 1166 (1996).

B. Application Of The NMB's Traditional Factors Demonstrates That CICA TEC Does Not Exercise Sufficient Control Over Respondents To Confer Jurisdiction Under The RLA

It is plain that, when one applies the NMB's traditional factors to evaluate whether a carrier exercises sufficient control to warrant assertion of jurisdiction under the RLA, the ALJ correctly concluded that CICA TEC does not exert the requisite degree of control over Respondent Employers. Each factor will be examined in turn.

1. Respondents Employers' employees are held out as employees of Respondents, not CICA TEC

The evidence demonstrates that Respondent Employers' employees have been held out to the public as employees of Respondents, not CICA TEC. Thus, Oxford/WFS employees wear uniforms that bear the legend "Worldwide Flight Services." (Tr. 139, 277). Their identification badges bear the same legend. (*Id.*). Paychecks of Oxford/WFS employees bear the name "Worldwide Flight Services" on them. (Tr. 279).

The situation is the same for the Total and Twin employees. Their identification badges, uniforms, and paychecks all reflect the name of their respective companies. (Tr. 213-15).

No evidence suggests that Respondents' employees have been held out as employees of CICA TEC.

2. Respondent Oxford, not CICA TEC, has conducted employee training

CICA TEC has played no role in the training of Respondent Employers' employees. (Tr. 139, 212-13). Rather, Oxford/WFS has been primarily responsible for training of all employees. Thus, an Oxford employee named Bob Dibaro, also known as "Safety Bob," has conducted

safety training for all of Oxford/WFS'' employees. (Tr. 138-39, 212-13, 308). Dessie Martin, as a Total lead encoder, has provided job training to encoders. (Tr. 212).

There is no evidence that CICA TEC plays any role in the training of Respondent Employers' employees.

3. CICA TEC has played little role in personnel decisions

The evidence demonstrates that Oxford/WFS has exercised virtually total control over personnel decisions, including the hiring and discipline of Respondent Employers' employees. Upon entering its contract with CICA TEC, Oxford and WFS representatives, primarily through Jay Rossi and Robert Jensen, exercised sole responsibility for hiring the Oxford/WFS workforce. Jensen, along with Rossi and Cunningham, held meetings with the ABM employees, distributed and received job applications, and conducted interviews. (Tr. 121, 125-26, 158, 258, 263, 267-68, 470-71, 501-05). Jensen interviewed all the ABM employees. (Tr. 507-09). Applicants were required to meet Oxford/WFS job qualification requirements and pass a physical and drug test; if they didn't, they were not hired. (Tr. 472). Oxford/WFS determined the wages to be paid the Oxford/WFS employees for, after receiving complaints from ABM's mechanics about WFS' pay scale, Jensen informed them that WFS had raised the starting pay from \$21.00 to \$23.00 (or \$23.50) per hour. (Tr. 140-41, 267-68). Although there has been scarcely any discipline of Oxford/WFS employees, Jensen was the moving force behind the one reported incident which resulted in a Total or Twin employee receiving a disciplinary letter. (Tr. 297-98).

Oxford/WFS has failed to establish that CICA TEC exercises meaningful control over the hiring and direction of Oxford/WFS's employees. Thus, the mere fact that the CICA TEC/Oxford contract required CICA TEC's approval over hiring Robert Jensen as facilities, or operations, manager at T-5, does not establish requisite control where, as here, Oxford alone

selected⁴ and paid Jensen. *Bombardier Transit Systems Corporation*, 32 NMB 131, 147 (2005) (Port Authority’s approval of Bombardier’s General Manager did not constitute control over Bombardier). Moreover, like the General Manager in *Bombardier*, Jensen is responsible to CICA TEC in the same manner that Oxford/WFS is responsible to CICA TEC, *i.e.*, for performance of the terms of the contract. (*Id.*).

Similarly, Oxford’s hiring of George Farmer as supervisor does not establish that CICA TEC has exercised meaningful control over the hiring and direction of Oxford/WFS’s employees. While CICA TEC “highly recommended” that Oxford/WFS hire Farmer (Tr. 460), it was merely a request, not a requirement. (Tr. 551). Like Jensen, Oxford/WFS alone made the decision to hire Farmer. (Tr. 552). *Bombardier, supra*. Moreover, Farmer still had to meet Oxford/WFS’s qualification requirements; he had to apply, and subject himself to an interview, physical, and drug test. If he did not meet Oxford/WFS’s requirements, he would not have been hired. (Tr. 478-80, 551-52). Finally, it is not surprising that Oxford would hire Farmer based on his prior employment with ABM under its service agreement with CICA TEC at T-5. That prior employment and knowledge of the T-5 baggage system would be useful in Oxford/WFS’s performance of its services agreement with CICA TEC. *See, Airway Cleaners, LLC*, 41 NMB 262, 268 (2014) (Chairman Hoglander concurring; Member Geale concurring in part and dissenting in part). In *Airway Cleaners*, the NMB stated that evidence that the contractor accepted a recommendation of American Airlines and hired as its general manager a person with prior experience at American was “hardly evidence” of American exercising control over the contractor’s hiring given that prior employment with, and knowledge of, American would be

⁴ Jensen was an Oxford manager at O’Hare Airport’s Terminal 3 when Oxford selected him to be manager over T-5. (Tr. 480).

useful in a position overseeing a contract with American. The same rationale applies to Oxford/WFS's hiring of Farmer.

Finally, CICA TEC did not exercise any control over Oxford/WFS's hiring of the Unit employees. The evidence in this regard is even less compelling than the evidence concerning Farmer. CICA TEC simply communicated to Oxford that it "wanted" incumbent ABM employees to have the opportunity to come over and work for Oxford/WFS (Tr. 447-48). As with Farmer, this was a request, not a requirement. (Tr. 550). Moreover, given their experience with T-5's baggage-handling system, hiring of ABM's former employees is "hardly evidence" of CICA TEC's control. *See, Airway Cleaners, supra*. Besides, like Farmer, the Unit employees still had to apply, meet Oxford/WFS' qualification requirements, and pass a drug test and physical. If they did not do so, they would not be hired. (Tr. 472).

Additional evidence of CICA TEC's lack of control is found in the manner in which Oxford/WFS hired employees who had not worked for ABM. The record shows that Oxford/WFS independently hired eight (8) such employees after requiring them to submit an application, and undergo interviews, drug tests, and physicals. (Jt. Ex. 2, Tr. 476-77). There is absolutely no evidence that CICA TEC had any involvement in their hiring.

4. CICA TEC exercised only a small degree of control over Respondent Employers' employees

The evidence does not demonstrate that CICA TEC exercised meaningful control over Respondent Employers' employees. To begin with, Respondents' employees are supervised by Oxford supervisors Jensen and George Farmer. (Tr. 134, 149-50, 162, 274). Second, although there was some evidence that Ranttila occasionally asked employees to perform a certain assignment, it was so rare as not to be meaningful. For example, encoder Dessie Martin testified that only twice in twenty (20) years did Ranttila question her why bags were piling up, and ask

her to correct it. (237-39, 242-43). Although mechanic Pernell Miller testified that Ranttila did ask mechanics on occasion to do something (Tr. 162), the record does not disclose what type of requests Ranttila made, or how often he made them. Likely, it did not occur often, for Miller also testified that he and Ranttila rarely spoke, and their relationship was primarily limited to saying “hello.” (Tr. 167-68). On those few occasions when Ranttila did directly tell Miller to do something, Miller always checked with Jensen. (Tr. 162-64). This is scant evidence of CICA TEC control over Respondents’ employees.

5. Evidence concerning CICA TEC’s interactions with Respondents, and CICA TEC’s access to Respondents’ operations and records do not establish that CICA TEC exercised substantial control over the manner in which Respondents conducted their business⁵

Respondents’ evidence concerning CICA TEC’s interactions with Respondent Employers, and CICA TEC’s access to Respondents’ operations and records, do not establish that CICA TEC exercised substantial control over the manner in which Respondents conducted their business. Initially, Charging Party notes that the services agreement between CICA TEC and Oxford provides that Oxford is an “independent contractor with full and complete responsibility for all of its employees and representatives ...” (G.C. Ex. 12 at 5, §3.05.). Moreover, while the services agreement provides that CICA TEC may direct the removal of personnel (*id.*), there is no evidence that CICA TEC ever did so. Similarly, while the services agreement contemplated the designation of “Key Personnel” and placed restrictions on Oxford’s ability to replace Key Personnel, the services agreement did not identify any such personnel. (G.C. Ex. 12 at 6, §3.05.; Ex. D⁶).

⁵ Local 399 is combining under this section a discussion of two of the factors analyzed by the NMB: the manner in which the company conducts its business; and access to the company’s operations and records.

⁶ Section 3.05 of the services agreement specified that Key Personnel would be designated in Exhibit B. However, Key Personnel are addressed in Exhibit D.

Consistent with the services agreement's proclamation that Oxford was an independent contractor with full control, CICA TEC's interactions with Respondents fail to demonstrate that CICA TEC exercised substantial control over Respondents' operations. In the words of Robert Jensen, CICA TEC, through its duty managers, merely served as a "conduit" that observed the Respondents' operations in the bag room and shared information with the airlines concerning any mechanical issues. (Tr. 515-16; 555-56).

Consequently, the vast majority of the time, CICA TEC merely sought information from Respondents concerning operations, or pointed out matters that required attention. Ranttila normally did not issue orders to Oxford/WFS; he simply made inquiries to Jensen regarding bag room issues concerning a bridge or belt, or a noise in the bag room. (Tr. 516-17, 553-54). Likewise, Ranttila's successor, Shirley, brought issues to Jensen's attention. (Tr. 517). But the record overwhelmingly shows that when CICA TEC representatives informed Jensen of issues or problems, it was Jensen, not CICA TEC, who assigned personnel to investigate the issue, supervised the repair, if one were necessary, and disciplined the employees, if warranted. (Tr. 168-69, 553-55, 556-58, 559-60, 561-62, 567).

There are two good examples of the relationship between CICA TEC and Respondents. One involved a cleaning request Shirley made to Jensen. (Tr. 556-57). Jensen testified that upon receiving the request, he tried to accommodate Shirley. However, Jensen alone determined whether, based on his available manpower, he could accommodate the request and, if he could, when he could do so. It could be a week later. Even then, it was Jensen, not Shirley, who assigned personnel to perform the cleaning, supervised the work, and disciplined the employees, if warranted. (Tr. 557-58). Similarly, Jensen tried to accommodate Shirley's request concerning staffing of the ED room. (Tr. 517-18). Yet, it was Jensen who investigated whether the request

could be granted, and made the ultimate decision to change schedules. (Tr. 572). Jensen's candid explanation why he tries to accommodate CICA TEC requests, and takes seriously any comments CICA TEC makes – "They are my customer" – reflects nothing more than good business acumen. (Tr. 542). All businesses want to be responsive to the customer who pays them.

There is no merit to any contention that CICA TEC exerts constant control over Respondents' activities by instructing Oxford/WFS to direct its employees to perform certain tasks. Although Oxford counsel attempted to lead Jensen into testifying that this was a frequent occurrence, Jensen was only willing to agree that it happened "from time to time." (Tr. 516-17). Even then, when asked to provide examples of such direction, Jensen only recounted situations when Ranttila had made inquiries about a bridge, belt, or noise. (Tr. 517). Obviously, these are not directions. And no other examples were provided.

The T-5 procedural pamphlet does not demonstrate CICA TEC control over Respondents. (R.O. Ex. 15). It applies to all employees who enter T-5, such as ticket-counter employees and ground handlers, not just Respondents' employees, and does not contain any specialized instruction directing Respondents' employees how to perform their duties. (Tr. 552-53, 569-71).

CICA TEC's monthly meetings lend no support to Respondents' claim that CICA TEC exercises control over them. Certainly CICA TEC's monthly ground-handlers meeting lends no support. The ground-handlers are employees of the airlines or other contractors who fuel planes and load and unload baggage from them. (Tr. 569-70). These meetings are clearly of an informational nature only, as CICA TEC discusses on-going projects in the bag room, operational projects with the conveyer system and jet bridges, new projects going on outside the airfield, safety issues in and out of the bag room, and new equipment. (Tr. 539-40). And

although Jensen testified, in response to leading questions, that at some of these meetings CICA TEC requests “either Oxford or other contractors to take care of a particular project”, he offered no evidence what those projects were. (Tr. 540). Besides, he did not even establish that CICA TEC requested *Oxford* to work on a project; his quoted testimony permits the conclusion that CICA TEC asked only *other* contractors to work on a project.

The monthly managers meeting provides even less evidence of CICA TEC control. (Tr. 540-41). It involves all airlines at the airport, not just those at T-5, and it is no longer run by CICA TEC. Moreover, while there may occasionally be discussion regarding T-5 bag-room issues, there is absolutely no evidence what those discussions entailed. (*Id.*).

Finally, the weekly or biweekly meetings between CICA TEC and Oxford/WFS do little to establish CICA TEC control. (Tr. 541-42). At these meetings CICA TEC will provide a list of areas⁷ with which it is dissatisfied or areas where Oxford/WFS might show improvement. CICA TEC might also ask for an update on repairs that Oxford/WFS has been performing. (Tr. 542). The latter is informative only; recall that CICA TEC is the conduit that relays information to the airlines. The former merely involves CICA TEC evaluating the quality of its contractor’s work. This is a routine aspect of a contractor relationship. It is notable that Jensen did not testify that CICA TEC directed him *how* to resolve any issue with which it was dissatisfied. After all, the services agreement emphasized that Oxford was an independent contractor, with responsibility over its operations.

The reports Oxford/WFS submitted to CICA TEC provide little evidence of control. (R.O. Exs. 16, 17, 18, 19, 20, 21, 22). Three of them simply inform CICA TEC of routine bag room information. These include R.O. Ex. 17, which informs CICA TEC of the number of bags handled for each airline (Tr. 524-27); “Sort Pier Assignments” (R.O. Ex. 20) which identify the

⁷ No specific examples were provided.

sort pier assigned to each airline (Tr. 532-35); and the “T-5 Monthly Operation Report” (R.O. Ex. 22) which shows a breakdown of labor hours and staffing levels. (Tr. 543-46). The Sort Pier Assignments is of particularly little value, for Oxford/WFS no longer prepares the form, CICA TEC does. (Tr. 534).

The remaining reports only inform CICA TEC – after the fact - of any operational issues that Oxford/WFS had to address. Thus, the July 8, 2013 email from Jensen informed Ranttila, and CICA TEC, after the fact, of a torn belt. Jensen supervised the replacement of the belt, not CICA TEC. (R.O. Ex. Ex. 16; Tr. 522-23; 559-60). The “Dispatcher Shift Turnover Log” basically reports unusual activities, such as an accident, an employee called off, or a piece of equipment was out of service. (R.O. Ex. 18; Tr. 527-30). Jensen supervised the repair issues, investigated the problem and assigned personnel. (Tr. 561-62). The “Alarm Response Log” lists jams that occurred throughout the day on the conveyor system. (R.O. Ex. 19; Tr. 531-32). The mechanics clear the jams on their own without any supervision. (Tr. 564). Lastly, the “Bridge Call Log” identifies any problem that occurred on a jet bridge. (R.O. Ex. 21; Tr. 535-38). Either mechanics volunteer to perform needed repairs, or Jensen and George Farmer assign the required personnel and supervise the repairs. (Tr. 566-67). In summary, Oxford/WFS alone takes total responsibility for repair of CICA TEC’s equipment. Because it is CICA TEC’s equipment, and CICA TEC is the conduit for information to the airlines, Oxford/WFS provides information to CICA TEC so it can update the airlines about the reasons for any delays. (Tr. 530).

Conclusion regarding control test

Since about 2013, in applying the control test, the NMB has placed primary emphasis on the extent of a carrier’s control over a contractor’s labor relations and personnel. *See, e.g., Bags, Inc.*, 40 NMB 165 (2013), *Aero Port Services, Inc.*, 40 NMB 139 (2013), *Airway Cleaners, LLC*,

41 NMB 262 (2014), *Menzies Aviation, Inc.* 42 NMB 1, 7 (2014). In each of those cases, the NMB declined to find RLA jurisdiction based primarily on its findings that the carrier did not exert significant control over the contractor's hiring, firing, and discipline of its employees. *Bags, Inc.*, 40 NMB at 170, *Aero Port Services, Inc.*, 40 NMB at 143, *Airway Cleaners, LLC*, 41 NMB at 269, *Menzies Aviation, Inc.* 42 NMB at 6-7.

Applying the foregoing test, it is plain that CICA TEC does not exert meaningful control over Respondents' labor relations so as to warrant a finding of RLA jurisdiction. As noted, the evidence demonstrates that Oxford/WFS has exercised virtually total control over personnel decisions, including the hiring and discipline of employees. This evidence, combined with evidence that Respondents conduct all training of employees, is solely responsible for their supervision and performance, and hold out the employees to the public as their own, compels a conclusion that Respondents are subject to jurisdiction under the RLA.

As the ALJ found (ALJ DRO at 22, lines 15-22), even if the labor relations/personnel factor should not be given special weight, the evidence still compels a conclusion that Respondents are subject to jurisdiction under the NLRA, not the RLA. Two cases predating 2013 are insightful. One is *Signature Flight Support*, 32 NMB 214 (2005), where the NMB found that Signature Flight Support ("Signature") and its White Plains employees were not subject to the RLA. In that case, the NMB found that Signature employees were engaged in customer service, shuttle service for passengers and crew, and baggage service functions, activities which NMB stated constituted duties traditionally performed by airline employees. 32 NMB at 224. However, NMB found that the airline (NetJets) did not exert sufficient control over Signature's operations to support a finding of RLA jurisdiction. (*Id.*). In doing so, NMB relied on evidence that Signature not only hired and disciplined its workforce, it also paid,

supervised, evaluated, rewarded, disciplined, trained, and promoted its workforce; authorized overtime; and required that employees wear Signature insignia on their uniforms and identification badges. 32 NMB at 225, 226. Such evidence exists in the instant case.

The other case is *Bombardier Transit Systems Corporation*, 32 NMB 131 (2005). In *Bombardier*, the NMB acknowledged that the contract between the carrier (Port Authority) and contractor (Bombardier) evinced some control over Bombardier's operation. This control included a requirement that Bombardier provide the Port Authority access to "all" information necessary to verify Bombardier's compliance with the terms of the contract, provide two types of monthly monitoring and management reports, and submit for the Port Authority's approval its selection of a General Manager who had overall supervisory responsibility for Bombardier's operation and maintenance services. 32 NMB at 139-40, 146-47.

Despite the forgoing, the NMB concluded that Bombardier was not subject to jurisdiction under the RLA. In reaching this conclusion, the NMB emphasized that Bombardier was the "ultimate employer" of the employees in question, since Bombardier was responsible for: recruiting, hiring, and employing all personnel; implementing procedures for drug testing, labor policies, and training; and all work related to operating and maintaining the transit system. (*Id.* at 146-47).

All the *Bombardier* factors are present in the present case, including the requirement that the carrier (CICA TEC) approve the contractor's (project) manager, Jensen. Accordingly, as in *Signature Flight Support*, and *Bombardier*, the Respondents' activities at T-5 are not subject to the RLA.

II.

THE BARGAINING UNIT ALLEGED IN THE COMPLAINT IS APPROPRIATE

(Oxford/WFS Exceptions 66-75; Brief at 40-44)

(Total/Twin Exceptions 5, 35-36, 44)

(TWU Exceptions 21, 23-24)

A finding of successorship requires a finding that the bargaining unit of the predecessor employer remains appropriate for the successor employer. *Banknote Corp. of America*, 315 NLRB 1041, 1043 (1994). It is the longstanding policy of the Board that “a mere change in ownership should not uproot bargaining units that have enjoyed a history of collective-bargaining unless the units no longer conform reasonably well to other standards of appropriateness”. *Id.*, quoting *Indianapolis Mack Sales & Service*, 288 NLRB 1123, fn. 5 (1988). “The Board places a heavy evidentiary burden on a party attempting to show that historical units are no longer appropriate.” *Id.* (citation and quotation omitted).

Respondents have not met their heavy burden. In denying the appropriateness of the Unit, Respondents merely rely on their contention that the Unit is part of the national bargaining unit employed by WFS and represented by TWU. Oxford/WFS Brief at 41-44. To the contrary, the evidence clearly shows that the Unit continues to remain appropriate. As the ALJ found, the Unit employees have continued to share after July 1, 2013, a community of interest. (ALJ DRO at 25, lines 24-38). The employees perform related duties in close proximity, in the bag room and/or control room (Tr. 149, 184-86) under the same supervision. (Tr. 133-34, 149-50). They work similar shifts, have contact⁸ with one another throughout the day related to repair issues (Tr. 511-12, 531, 535-36, 566-67), and mechanics occasionally interchange with encoders and help them when they are overloaded. (Tr. 205-06, 294). Finally, Unit employees are subject to

⁸ Dispatchers and mechanics, in particular, have constant contact regarding repair issues. (Tr. 531, 535-36, 566-67).

the same labor policies under the TWU-WFS collective bargaining agreement. Respondents do not assert that any changes have occurred which might render the Unit no longer appropriate. Accordingly, the Unit remains appropriate under the Act.

For the reasons cited by the ALJ (ALJ DRO at 25, lines 39-44 to ALJ DRO at 26, lines 1-24), there is no merit to Oxford/WFS' contention that the historical unit is no longer appropriate in view of WFS' historical nationwide unit with TWU. As the ALJ stated, a single-facility unit is presumptively appropriate, and Respondents failed to meet their heavy burden to rebut such a presumption. (*Id.* at 26, lines 21-24).

III.

THE ALJ CORRECTLY DETERMINED THAT RESPONDENTS WERE NOT FREE TO SET INITIAL TERMS AND CONDITIONS OF EMPLOYMENT

(Oxford/WFS Exceptions 76-77; Brief at 44-49)

(Total/Twin Exception 39; Brief at 28-29)

A successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor. *NLRB v. Burns International Security Services*, 406 U.S. 272, 294-95 (1972) There is an exception to this general rule. Thus, where it is perfectly clear that the new employer plans to retain all of the employees in the unit, it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. (*Id.*). Although counsel for the General Counsel does not contend that Oxford/WFS constitutes a perfectly clear successor under *Burns*, he does contend that under *Advanced Stretchforming, International, Inc.*, 323 NLRB 529 (1997), Oxford/WFS forfeited its right to establish initial terms and conditions of employment by telling employees that it would not recognize and bargain with their collective bargaining representative, Local 399.

As the ALJ found, Oxford/WFS violated Section 8(a)(1) and (2) of the Act by telling employees that they must join TWU or be terminated. (ALJ DRO at 10, lines 27-31; ALJ DRO at 28-29). The ALJ further found that this violation, along with Oxford/WFS' refusal to bargain with Local 399, deprived Oxford/WFS of its right to establish initial terms and conditions of employment. (ALJ DRO at 27-28). In doing so, the ALJ relied on *Advanced Stretchforming*.

In *Advanced Stretchforming*, respondent's predecessor terminated all of its employees on November 30 and, that same day, the successor-respondent told employees that it would hire a majority of them but there would be no union. The next day, December 1, respondent hired 8 of its predecessor's employees but none from any other source, and informed the employees that they would be working under new terms and conditions of employment. The ALJ found that respondent violated Section 8(a)(1) of the Act by telling employees there would be no union. However, he found that respondent was a *Burns* successor that did not forfeit its right to establish initial terms and conditions of employment.

The Board reversed. Relying on what it described as a "well-established exception to the right of a *Burns* successor to set initial terms and conditions of employment," the Board held that respondent's unlawful statement that there would be no union deprived it of its right to establish initial terms and conditions of employment. *Advanced Stretchforming, International, Inc.* 323 NLRB at 530. In doing so, the Board stated:

The fundamental premise for the forfeiture doctrine is that it would be contrary to statutory policy to confer *Burns* rights on an employer that has not conducted itself like a lawful *Burns* successor because it has unlawfully blocked the process by which the obligations and rights of such a successor are incurred. In other words, the *Burns* right to set initial terms and conditions of employment must be understood in the context of a successor employer that will recognize *the affected unit employees' collective-bargaining representative* and enter into good-faith negotiations with that union about those terms and conditions.

* * *

A statement to employees that there will be no union at the successor employer's facility blatantly coerces employees in the exercise of their Section 7 right to bargain collectively *through a representative of their own choosing* and constitutes a facially unlawful condition of employment. Nothing in *Burns* suggests that an employer may impose such an unlawful condition and still retain the unilateral right to determine other legitimate initial terms and conditions of employment. A statement that there will be no union serves the same end as a refusal to hire employees from the predecessor's unionized work force. It block[s] the process by which the obligations and rights of such a successor are incurred.

323 NLRB at 530-31 (emphasis added) (citations and quotations omitted). The Board has followed *Advanced Stretchforming* in *JAG Healthcare, Inc. d/b/a Galion Pointe, LLC*, 359 NLRB 1 (2013), *C & B Flooring Associates, LLC*, 349 NLRB 692 (2007) (Member Battista concurring in part), and *Eldorado, Inc.*, 335 NLRB 952 (2001).

The Board should apply the reasoning of *Advanced Stretchforming* to the instant case and find that, by refusing to bargain with Local 399, the Unit employees' collective bargaining representative, and unlawfully requiring employees, as a condition of employment, to become members of TWU, Oxford/WFS forfeited its right to establish initial terms and conditions of employment. Oxford/WFS's requirement that employees must join TWU, like the requirement in *Advanced Stretchforming*, "coerces employees in the exercise of their Section 7 right to bargain collectively through a representative of their own choosing and constitutes a facially unlawful condition of employment." While Oxford/WFS's requirement did not render its employees without union representation, it certainly interfered with their Section 7 right to bargain collectively through a representative of their own choosing. As the Board stated in *Advanced Stretchforming*, "(n)othing in *Burns* suggests that an employer may impose such an unlawful condition and still retain the unilateral right to determine other legitimate initial terms and conditions of employment." Therefore, the Board should find that Oxford/WFS was not privileged to unilaterally establish new terms and conditions of employment when it assumed

operations July 1, 2013. Instead, it was required to bargain with Local 399, the Unit employees' collective bargaining representative.

Respondents' arguments to the contrary are unavailing. While Oxford/WFS complains of the timing of the *Advanced Stretchforming* assertion, it fails to cite to any precedent in support of its complaints. It was sufficient that Respondents were placed on notice in November, 2015, months prior to commencement of hearing. Oxford/WFS Brief at 45. As a result, no due process violation occurred.

Respondents' reliance on *Burns International Security Services*, 406 U.S. 272, 294-95 (1972) is also unavailing. Charging Party acknowledges that the facts in this case are similar to those in *Burns*. However, *Burns* is distinguishable, for in *Burns* no issue was raised as to whether Burns lost the right to establish initial terms and conditions of employment through its unlawful action of informing Wackenhut's former employees that, in order to work for Burns, they must become members of the American Federation of Guards, with whom Burns had a collective bargaining relationship.⁹ The only issues before the Court were "whether Burns refused to bargain with a union representing a majority of employees in an appropriate unit and whether the National Labor Relations Board could order Burns to observe the terms of a collective-bargaining contract signed by the union and Wackenhut that Burns had not voluntarily assumed." 406 U.S. 272, 274. Thus, the Court did not address whether Burns, by providing unlawful assistance to the American Federation of Guards, forfeited its right to set initial terms and conditions of employment. Instead, the forfeiture doctrine arose subsequent to the Court's *Burns* decision. See, *Advanced Stretchforming*, 323 NLRB at 530.

⁹ The NLRB found that by requiring Wackenhut's former employees to become members of the American Federation of Guards, Burns violated Section 8(a) (1) and (2) of the Act. 182 NLRB 348 (1970).

Finally, Respondents' lack of union animus is of no moment. As the Board noted in *Advanced Stretchforming*, respondent therein had not unlawfully discriminated in its hiring practices. *Id.* However, the Board emphasized that, “*at the time of successorship*,” respondent did not – by declaring there would be no union for its predecessor’s employees whom it hired – conduct itself like a lawful *Burns* successor. *Id.* (emphasis in original). The Board’s reasoning applies here, where Respondents, at the time of successorship, unlawfully recognized TWU and required its predecessor’s employees to become members of TWU. Had Respondents complied with their lawful obligations, and recognized Charging Party as the collective bargaining representative of its workforce, it would not have forfeited its right to set initial terms and conditions of employment, and would not face what it terms a “draconian” remedy.

IV.

THE ALJ CORRECTLY FOUND THAT RESPONDENTS ARE JOINT EMPLOYERS

(Oxford/WFS Exceptions 56-65)

(Total/Twin Exceptions 4, 23, 34, 37, 44-45; Brief at 20-28)

(TWU Exception 20)

Under the standard for “joint employer status” as set out by the Supreme Court, the question of “joint employer” status is a factual one and requires an examination into whether an employer who is claimed to be a “joint employer” “possesses sufficient control over the work of the employees to qualify as a “joint employer” with [the actual employer].” *Boire v. Greyhound Corp.*, 376 U.S. 473, 481, 84 S.Ct. 894, 898-899 (1964). In *Browning-Ferris Industries of Calif., Inc.*, 362 NLRB No. 186 (2015), the NLRB announced the return to its traditional test for determining joint employer status of two or more entities. Under that traditional test, the Board may find that two or more entities are joint employers of a single work force if “they are both

employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment.” 362 NLRB No. 186, slip op. at 15. In evaluating the allocation and exercise of control in the workplace, the Board stated its intent to consider the various ways in which joint employers may “share” control over terms and conditions of employment or “codetermine” them. (*Id.*). Among the terms and conditions to be considered are: hiring; firing; discipline; supervision and direction; wages; dictating the number of workers to be supplied; controlling scheduling and overtime; assigning work, and determining the manner and method of work performance. (*Id.*).

It is undisputed that Oxford and WFS are joint employers. They admit the relationship in their answer. (G.C. Ex. 1(m)¶6(c), G.C. Ex. 1(o), ¶6(c)).

The evidence overwhelmingly establishes, either under the standards set forth in *Browning-Ferris*, or in *TLI, Inc.*, 271 NLRB 798 (1984), *enfd. mem.* 772 F.2d 894 (3d Cir. 1985), that Oxford/WFS is a joint employer of the encoders along with Total and Twin. Neither Total nor Twin employs any supervisors at the T-5 work site. (Tr. 202). Consequently, all encoders report to Jensen, an Oxford supervisor. (Tr. 202, 293). Jensen exercises control over encoders’ work by requiring them to stay over after their shift and transferring them to different work stations. (Tr. 205-06, 294, 312-13). Although Jensen himself does not train the encoders, another Oxford employee, Bob Dibaró, provides safety training to the encoders. (Tr. 212-13, 308).

Significantly, Jensen exercises control over encoders’ pay. He authorizes encoders to work, and receive, overtime pay. (Tr. 318-19, 562). He also provided a number of encoders with more vacation than that allotted under the TWU-CBA. (Tr. 221-22).

Jensen not only possesses the authority to discipline encoders, he has exercised that authority. He has the authority to remove an encoder from the CICA TEC service contract. (Tr. 301-02). And he has counseled encoders regarding their work problems, and effectively recommended that an encoder be disciplined for poor work performance. (Tr. 207, 297-301).

But the most telling evidence demonstrating Oxford/WFS' control over the terms and conditions of the encoders employed by Total and Twin is the fact that Oxford/WFS required that Total and Twin adopt, without engaging in their own negotiations with TWU, the WFS/TWU collective bargaining agreement. (Tr. 329-33, 353-55; G.C. Exs. 15, 16). In doing so, Oxford/TWU exerted total control over the wages, benefits, and labor policies applied to Total's and Twin's encoders. Thus, even under NLRB law prior to *Browning-Ferris*, Total/Twin would constitute joint employers. *See, e.g., Aldworth Company, Inc.*, 338 NLRB 137, 139-40, n.20 (2002) (joint employer status based on Dunkin Donuts manager's involvement in oversight of day-to-day operations, requests for earned time off, and employee discipline); *Gourmet Award Foods Northeast*, 336 NLRB 872, 873 (2001) (joint employer status where respondent assigned work, provided day-to-day control through its own supervisors, determined employees' hours, work schedules, and overtime, established labor relations policies, and had the authority to discipline employees for poor performance or rule violations); *Computer Associates Int., Inc.*, 332 NLRB 1166, 1168-69 (2000) (joint employer status based in part on day-to-supervision in absence of putative employer, and authorization of overtime). The Board historically has been especially apt, long before *Browning-Ferris*, to find a joint employer relationship where, as here, the nominal employer has no presence at the work site and whose only contact with employees is to provide a paycheck. *D & S Leasing, Inc.*, 299 NLRB 658, 671 (1990).

V.

**THE ALJ PROPERLY FOUND THAT CHARGING PARTY MADE
A VALID REQUEST TO BARGAIN UPON ALL PARTIES**

(Total/Twin Exception 37)

“The Board and the Courts have repeatedly held that a valid request to bargain need not be made in any particular form, or in *haec verba*, so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment.” *Specialty Envelope Co.*, 321 NLRB 828, 829-30 (1996) (finding demand to bargain in union’s requests for information and for a meeting to reestablish the labor agreement provisions); *see, also, Stanford Realty Associates, Inc.*, 306 NLRB 1061, 1066 (1992); *Yolo Transport*, 286 NLRB 1087, fn.2 (1987) (finding a demand to bargain in union’s letter stating that union represented a majority of employees, and requesting that employer “upgrade these employees to Union Standards”); *Marysville Travelodge*, 233 NLRB 527, 532-33 (1977) (finding request to bargain by informing employer that union had signed applications from a majority of employees, that employees were complaining about working conditions, wages and hours, and wanted to be represented by the union) (1977); *Al Landers Dump Truck, Inc.*, 192 NLRB 207, 208 (1971) (finding a demand to bargain in union’s letter requesting a date “to continue in good faith our Collective Bargaining Agreement Negotiation as stipulated by the National Labor Relations Act”).

Here, the evidence shows that Local 399 made a premature bargaining demand that continued until approximately July 1, 2013 by which time Oxford/WFS had hired a full complement of employees, a majority of whom were ABM’s bargaining unit employees. On October 15, 2012, Local 399 representative McGinty telephoned Cunningham, an Assistant Vice-President for WFS, identified himself as a representative of Local 399, and told him that

Local 399 currently represented the employees at T-5. (Tr. 55). McGinty expressed a desire that Local 399 continue to represent the unit employees, by telling Cunningham that the Union wanted to sit down and negotiate or bargain a new collective bargaining agreement with Oxford/WFS. (Tr. 55-56). McGinty's testimony is unrebutted, for Cunningham did not testify. Indeed, it is plain that Cunningham understood that Local 399, through McGinty, had requested recognition and bargaining, for he sent McGinty an email later that same day explaining why Oxford/WFS would not recognize Local 399: WFS had a national contract with TWU covering all locations in the United States where WFS operated. (G.C. Ex. 4). Oxford/WFS concedes that Local 399 made a valid bargaining demand, for it has not excepted to the ALJ's finding on this issue. (ALJ DRO at 26, lines 30-42).

Applying the foregoing Board precedent, it is clear that McGinty's statements indicated "a desire to negotiate and bargain on behalf of the employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment." *Specialty Envelope Co.*, 321 NLRB 828, 829-30. In addition, the Union's ULP charge filed March 4, 2013 alleging a refusal to bargain against Oxford constituted a renewed, and valid, demand for bargaining. (G.C. Exs. 5, 19). *Metro Toyota*, 318 NLRB 168, 177 (1995); *Stanford Realty Assoc., Inc.*, 306 NLRB 1061, 1066, fn.17 (1992); *Sterling Processing Corp.*, 291 NLRB 208, 217 (1988). This demand was, like the October, 2012 demand, premature. (R.O. Exs. 7, 8). However, where a demand to bargain is made prematurely, it is of a continuing nature, and remains operative when the employer employs a representative complement of employees. (ALJ DRO at 26, lines 37-42); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 52-53; 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987); *Sterling Processing Corp.*, 291 NLRB at 217. As a result, the Union's demands to bargain of October 15, 2012, and March 4, 2013, were still operative July 1, 2013 when

Oxford/WFS assumed the baggage handling contract and hired a representative complement of employees to manage the contract. Moreover, as the ALJ found with respect to the limitations issue, each joint employer is responsible for the conduct of the other. (ALJ DRO at 27, n.19) (citing *Mar Del Plata Condo.*, 282 NLRB 1012, n.3 (1987)(quoting *Ref-Chem Co.*, 169 NLRB 376, 380 (1968), enf. den. on other grounds 418 F.2d 127 (5th Cir. 1969)). Thus, inasmuch as a valid bargaining demand was undeniably made upon Oxford/WFS, a valid demand was also made on its joint employer, Total/Twin.

VI.

THE ALJ CORRECTLY FOUND THAT THE CHARGE WAS TIMELY FILED WITH RESPECT TO RESPONDENT TOTAL/TWIN

(Total/Twin exceptions 38, 40; Brief at 29-31)

(TWU Exception 28)

For the reasons cited by the ALJ, because of their joint employer status, the charge timely filed on Oxford/WFS is also timely filed with respect to Total/Twin. (ALJ DRO at 27, n.19).

CONCLUSION

For all the foregoing reasons, Charging Party respectfully requests that the Board deny Respondents' exceptions, and adopt the ALJ's DRO, as modified in accordance with the exceptions filed by Charging Party, and the cross-exceptions filed by counsel for the General Counsel.

Respectfully submitted,

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Dated: July 26, 2017

CERTIFICATE OF SERVICE

I, Martin P. Barr, an attorney, certify that on the 26th day of July 2017, I served a true copy of **CHARGING PARTY’S BRIEF IN OPPOSITION TO RESPONDENT EMPLOYERS’ AND RESPONDENT UNION’S EXCEPTIONS TO THE ALJ’S DECISION AND RECOMMENDED ORDER** by filing with the National Labor Relations Board’s electronic filing service and by emailing copies to the following:

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