

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

PRIMEFLIGHT AVIATION SERVICES, INC. )  
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 )  
 Employer, )  
 ) NLRB CASE NO.: 29-RC-198504  
 and )  
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 )  
 SERVICE EMPLOYEES INTERNATIONAL )  
 UNION, LOCAL 32BJ )  
 )  
 )  
 Petitioner )  
 \_\_\_\_\_ )

**EMPLOYER’S REQUEST FOR REVIEW OF DECISION AND  
DIRECTION OF ELECTION AND BRIEF IN SUPPORT**

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In accordance with Section 102.67(c) of the National Labor Relation Board's Rules and Regulations, PrimeFlight Aviation Services, Inc. ("Employer" or "PrimeFlight") hereby submits this Request for Review of the Regional Director for Region 29's Decision and Direction of Election ("DDE") dated July 5, 2017 rejecting PrimeFlight's position that it is a derivative carrier subject to the jurisdiction of the National Mediation Board ("NMB") pursuant to the Railway Labor Act ("RLA").<sup>1</sup> Moreover, the Regional Director rejected PrimeFlight's reasonable, alternative position that the matter should, at the very least, be referred to the NMB, the agency with expertise in determining derivative carrier status.

**I. STATEMENT OF POSITION**

This matter arose out of a petition filed by the Service Employees International Union, Local 32BJ ("Petitioner" or "Union") on May 10, 2017 seeking to represent all full-time and regular part-time employees employed by PrimeFlight at LaGuardia Airport in New York City, ("LaGuardia"), excluding all supervisors, managers, office clericals, and guards as defined by the National Labor Relations Act ("NLRA"). The only legal issue presented at the May 23, 2017 representation hearing is whether the Board has jurisdiction over PrimeFlight.

**A. The Regional Director Reached an Incorrect Result as to Jurisdiction.**

The Regional Director recognized in the DDE that in analyzing jurisdiction, a two-part test is applied to determine whether an employer who does not fly aircraft for the transportation of freight or passengers is nonetheless a carrier subject to the RLA: "first, [the NMB] ascertains

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<sup>1</sup> The Regional Director certified the result of the election in this matter on August 1, 2017, finally disposing of the matter in terms of Region 29's involvement. For convenience of review, the DDE, the record from the representation hearing, and the employer's exhibits from the representation hearing are attached as Exhibits A, B, and C, respectively. (*See* Exhibit A, July 5, 2017 Decision and Direction of Election, Case No. 29-RC-198504; Exhibit B, May 23, 2017 Hearing Transcript, Case No. 29-RC-198504; Exhibit C, Employer's Hearing Exhibits, Case No. 29-RC-198504.)

whether the nature of the work performed by the contractor is of a type traditionally performed by carriers; and second, it determines whether the employer is directly or indirectly owned or controlled by, or under common control with, a carrier. Both parts of the test must be satisfied for the NMB to assert jurisdiction. *See Menzies Aviation, Inc.*, 42 NMB 1, 4-5 (2014).” (DDE at 2.) As to the first part of the test, the parties stipulated that the work performed by PrimeFlight at LaGuardia is the type of work traditionally performed by employees of carriers. (DDE at 2). However, the Regional Director incorrectly found that the testimony and evidence PrimeFlight presented detailing the nature of carrier control exerted over PrimeFlight employees was insufficient to satisfy the second part of the test to establish jurisdiction under the RLA.

The control test focuses on the role that the carriers play in the company’s daily operations and its effect on the manner in which the employees perform their jobs. *See, e.g., Quality Aircraft Services*, 24 NMB 286, 291 (1997). The following factors are often considered in determining whether sufficient carrier control exists:

- (1) control over the manner in which the entity conducts its business;
- (2) access to the company’s operations and records;
- (3) role in hiring, firing and disciplining the company’s employees;
- (4) degree to which carriers supervise the entity’s employees and/or otherwise affect conditions of employment; and,
- (5) control over employee training.

*See Automobile Distribution of Buffalo Inc. and Complete Auto Network*, 37 NMB 372, 378 (2010); *Signature Flight Support of Nevada*, 30 NMB 392, 400 (2003). Importantly, it is not necessary for each of these factors to be presented for the control test to be met and thus for a

company to be found subject to the RLA. Indeed, in most – if not all – of the cases in which sufficient control has been found, at least some of these factors have not been present.

In finding that the evidence of carrier control over PrimeFlight employees at LaGuardia was insufficient to establish RLA jurisdiction, the Regional Director ignored or misinterpreted critical stipulated facts developed on the record at the representation hearing. PrimeFlight respectfully requests the Board review the DDE and conclude that the NMB has jurisdiction over PrimeFlight, or alternatively that it refer this matter to the NMB for an advisory opinion regarding PrimeFlight's status as a derivative carrier under the RLA.

**B. The DDE Contradicts Findings of RLA Jurisdiction Over the Exact Same PrimeFlight Operation by the NMB and NLRB in 2007.**

As a threshold matter, it is critical to consider that merely ten years ago both the NMB and NLRB found *this specific* PrimeFlight operation to be under the jurisdiction of the RLA, not the NLRA. See *PrimeFlight Aviation Services*, 353 NLRB 467 (2008); *PrimeFlight Aviation Services*, 34 NMB 175 (2007). As shown below, the evidence adduced at the representation hearing demonstrates that during the time since the NMB and NLRB found PrimeFlight to be an RLA derivative carrier, PrimeFlight has moved *further* under the control of its airline clients.

**C. The Board Recently Referred Another PrimeFlight DDE to the NMB for Jurisdictional Analysis, on Substantially Identical Facts.**

Presented with a jurisdictional question identical to the one in this case, the Board recently addressed a Request for Review of a DDE involving PrimeFlight by referring it to the NMB for analysis of the RLA issues presented. In *PrimeFlight Aviation Services, Inc.*, 2-RC-186447, the Regional Director for Region 2 had determined that PrimeFlight's airline support operation in White Plains, New York was subject to the NLRA, despite overwhelming evidence that the White Plains operation met the two-part test for derivative carrier status under the RLA.

PrimeFlight filed a Request for Review of that DDE, which the Board reviewed in light of a pertinent decision from the District of Columbia Court of Appeals addressing a recent, unexplained shift in NMB and Board analysis of derivative carrier status. *See ABM Onsite Services-West v. NLRB*, 849 F.3d 1137 (D.C. Cir. 2017). The *ABM* Court criticized recent decisions by the Board and the NMB abrogating NMB jurisdiction over employers that clearly satisfied decades-old NMB doctrine making them derivative carriers under the RLA. In the wake of the *ABM* Court's conclusion that neither the Board nor the NMB had provided the required explanation for abandoning the NMB's prior doctrine, the Board deferred the PrimeFlight-White Plains DDE, along with two other derivative carrier matters, for NMB consideration.

In contrast to PrimeFlight's LaGuardia operation, the White Plains case did not involve prior decisions from the NMB and the Board finding RLA jurisdiction. Nevertheless, the Board still found that PrimeFlight's White Plains operation presented a significant question relating to jurisdiction requiring analysis by the NMB. In the instant case involving PrimeFlight's LaGuardia operation, the argument for RLA jurisdiction or, at a minimum, referral to the NMB, is much stronger because of the relatively recent precedent establishing RLA jurisdiction.

## **II. STATEMENT OF FACTS – 2007 AND 2017**

At LaGuardia, PrimeFlight operates ground handling and terminal services at numerous airports around the country, including Terminals B and C at LaGuardia. PrimeFlight provides passenger services including but not limited to baggage handling assistance, baggage service office, ticket verification, queue management, lobby functions, skycap services, and wheelchair assistance under contracts with American Airlines ("American"), Southwest Airlines ("Southwest"), Spirit Airlines ("Spirit"), JetBlue Airways ("JetBlue"), Frontier Airlines

(“Frontier”), Air Canada, and US Airways (collectively, “the Carriers”).<sup>2</sup> (Tr. 21; Exhs. E-1 – E-7.) Among other services, PrimeFlight operates the baggage service office (“BSO”) for American at LaGuardia in addition to “cabin appearance services,” aircraft guard services, priority parcel service, skycap, baggage handling, line queue, wheelchair assistance, shuttle bus operation, wayfinder (essentially an ambassador program), and courier services. (Tr. 24.)

PrimeFlight’s largest LaGuardia client is American, comprising 60% of PrimeFlight’s work there. (Tr. 24.) Employees are scheduled to provide services for a specific carrier, though they may be cross-utilized to service another carrier as needed. (Tr. 27.) Division Vice President Matthew Barry is responsible for overseeing the Employer’s operations at nine airports, including overseeing PrimeFlight’s operations and contracts to provide services to the Carriers at LaGuardia. (Tr. 19-20.) Juan Garcia is PrimeFlight’s Director of Operations, and Rodrigo Calipaqui is PrimeFlight’s Assistant Manager. (Tr. 115, 151.) All three testified to the extensive level of involvement in and influence over PrimeFlight’s operations enjoyed by the Carriers.

Any recitation of the facts gathered at the 2017 representation hearing must be further informed by the facts found by the NMB and the NLRB in 2007, because the record evidence in the instant case shows that PrimeFlight has a substantially better argument for RLA coverage in 2017 than it had in 2007, when both the NMB and the NLRB concluded that PrimeFlight was an RLA employer. As shown in the right-hand column of the chart below, the evidence in favor of RLA jurisdiction in the current matter far exceeds the evidence set forth in the NMB’s 2007 opinion addressing the same operation. That is, PrimeFlight’s current operation is *more* appropriate for RLA jurisdiction than the 2007 PrimeFlight operation found appropriate for RLA jurisdiction by both the NMB and the NLRB.

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<sup>2</sup> Hereinafter, citations to the record of the representation hearing are set forth as “Tr. [\_\_]” for transcript page numbers and “Exh. E-[\_\_]” for Respondent/Employer exhibits.

<b>Facts Showing Carrier Control (2007 NMB Decision)</b>	<b>Facts Showing Carrier Control (5/23/17 Hearing 29-CA-198504)</b>
<p><u>Unit Composition:</u> 400-employee unit of “skycaps, wheelchair employees, baggage handling employees, baggage service agents, priority parcel service agents, passenger service employees, and ticket verification employees.” 34 NMB at 177.</p>	<p><u>Unit Composition:</u> 650-employee unit consisting of skycaps, shuttle bus operators, baggage handlers, aircraft guards, claim agents, line queue agents, wheelchair agents, cabin cleaning agents, lavatory and water service agents, rug room agents, couriers. (Tr. 47.)</p>
<p><u>Carrier Influence on Wages:</u>  “[A]lthough the Carriers do not determine the employees’ wages, they do set specific per-hour prices for each service, which has a direct effect on the wage amount.” 34 NMB at 176.</p>	<p><u>Carrier Influence on Wages:</u> Labor costs are the largest part of PrimeFlight’s economic relationship with American. (Tr. 52.) Carrier contract rates directly influence PrimeFlight wage rates because of (a) direct reimbursement of hourly rates based on the wage to employees or (b) invoice payments to PrimeFlight based on required staffing for volume of work; e.g., American pays (a) an hourly rate based on the wage paid to the employee, (b) a per passenger rate, which drives the number of staff used, or (c) a per-bag charge for skycaps. (Tr. 49.)</p>
<p><u>Carrier Control over Training:</u></p> <ul style="list-style-type: none"> <li>● “PrimeFlight employees receive training by at least one of the following methods: (1) training directly by Carrier personnel; (2) training by a PrimeFlight trainer who has been trained by Carrier personnel; or (3) training pursuant to Carrier materials such as written guides, computer programs, or videotapes.”</li> <li>● “Carriers have [] training modules that</li> </ul>	<p><u>Carrier Control over Training:</u></p> <ul style="list-style-type: none"> <li>● PrimeFlight employees receive instruction and training from either Carrier personnel or PrimeFlight trainers who have been certified to train by the Carrier. (Tr. 60-61.) Carriers offer their own written and computer-based training modules, prepared by the individual Carrier and separate from PrimeFlight materials, which PrimeFlight employees are required to complete. (Tr. 59, 112.)</li> <li>● Training varies by job function, most PrimeFlight</li> </ul>

<b>Facts Showing Carrier Control (2007 NMB Decision)</b>	<b>Facts Showing Carrier Control (5/23/17 Hearing 29-CA-198504)</b>
<p>each PrimeFlight employee is required to complete and training occurs on a yearly recurrent basis.”</p> <ul style="list-style-type: none"> <li>• “Carriers have access to all of PrimeFlight’s training records **** [and] can demand to see the training records for any PrimeFlight employee at any time. ***** Additionally, Carriers track PrimeFlight’s employee training electronically and alert PrimeFlight if any employee fails to meet the training deadlines.” 34 NMB at 179.</li> </ul>	<p>employees are required to take various types of training before they can do any work for the Carrier. (Tr. 122, 123; Exh. E-9.)</p> <ul style="list-style-type: none"> <li>• Carrier managers e-mail PrimeFlight managers with lists of employees who cannot work until they complete Carrier’s training on Carrier’s computer system. (Tr. 123-24, 132-33, 170-71; Exh. E-9, E-14, E-25.) Carriers send training requirements and lists of employees to PrimeFlight to ensure compliance with Carrier demands. (Tr. 125; Exh. E-10.) Carriers send lists of courses required for PrimeFlight employees. (Tr. 127, 130; Exh. E-11, E-13.)</li> </ul>
<p><u>Carrier Staffing Needs:</u></p> <ul style="list-style-type: none"> <li>• “[A]s staffing needs change, the Carriers determine staffing levels and communicate these needs to PrimeFlight via e-mail, weekly meetings, and phone calls. [Management] meets with American managers twice a week and with USAir managers once a week.”</li> <li>• “[T]he Carriers also determine specific assignments or transfers of PrimeFlight employees based on staffing needs.” 34 NMB at 180.</li> </ul>	<p><u>Carrier Staffing Needs:</u></p> <ul style="list-style-type: none"> <li>• PrimeFlight executives meet daily with each Carrier to discuss staffing. (Tr. 118-19, 121.) PrimeFlight managers work directly with Carrier managers on a daily basis to address operational issues including staffing needs. (Tr. 152-53.) Carrier managers also follow up on specific PrimeFlight staffing incidents that impact operations. (Tr. 167-68; Exh. E-23.)</li> <li>• Carrier contracts with PrimeFlight contain staffing reimbursement requirements, which directly determine how many employees PrimeFlight staffs for particular Carrier functions. (Tr. 50, 51, 57; Exhs. E-1 – E-7.)</li> <li>• Numerous examples showed that Carriers, for example Spirit and Southwest, communicate staffing needs to PrimeFlight management, who make</li> </ul>

<b>Facts Showing Carrier Control (2007 NMB Decision)</b>	<b>Facts Showing Carrier Control (5/23/17 Hearing 29-CA-198504)</b>
	<p>arrangements to fill staffing requirements of Carrier. (Tr. 151-52, 158-59, 169-70; Exh. E-16, E-19, E-24.)</p> <ul style="list-style-type: none"> <li>● JetBlue informs PrimeFlight of number of flights, and PrimeFlight staffs based on that number. (Tr. 57.)</li> <li>● Southwest sends daily schedules for topics of discussion, including staffing. (Tr. 161-62; Exh. E-20.) PrimeFlight managers have similar relationships with managers at each Carrier. (Tr. 153.)</li> <li>● Carriers make specific requests of PrimeFlight for special needs passengers, and PrimeFlight staffs wheelchair assistants based directly on Carrier demand. (Tr. 49-50, 94, 100.) 156-57; Exh. E-18.)</li> </ul>
<p><u>Carrier Control Over Terminations:</u> Specific evidence showed one case in which baggage handler improperly handled luggage. “American said they did not want this employee working for them [] PrimeFlight complied with American’s request.” 34 NMB at 180.</p>	<p><u>Carrier Control Over Terminations:</u> PrimeFlight terminated a Wayfinder employee based on American manager request for removal after serious customer service failure. (Tr. 115-16, Exh. E-8.) The Carrier contracts provide for Carriers to require PrimeFlight to remove employees at discretion of Carriers. (Exh. E-1, ¶ 5; E-2, ¶ 7.6; E-5, E-6 ¶ 8.)</p>
<p><u>Carrier Control Over Equipment:</u> “The Carriers provide the bulk of PrimeFlight’s equipment including computer equipment, radios, most wheelchairs and luggage carts, conveyor belts, and machines.” 34 NMB at 181.</p>	<p><u>Carrier Control Over Equipment:</u> Exhibit E-15 itemizes equipment provided to PrimeFlight by Carriers, which PrimeFlight’s Garcia described from personal knowledge. (Tr. 135-42; Exh. E-15.) American provides skycap equipment including “Computers, scales, podiums, all of the paper goods that are used, baggage claim checks, boarding passes, heavy tags, oversize tags ....” (Tr. 44.)</p>
<p><u>Carrier Control Over Physical Space:</u></p>	<p><u>Carrier Control Over Physical Space:</u> Exhibit E-15</p>

<b>Facts Showing Carrier Control (2007 NMB Decision)</b>	<b>Facts Showing Carrier Control (5/23/17 Hearing 29-CA-198504)</b>
<p>“The Carriers also provide training space for PrimeFlight employees, office space for PrimeFlight’s baggage service agents, and locker and break rooms for certain PrimeFlight employees at no cost to PrimeFlight.” 34 NMB at 181.</p>	<p>itemizes physical space provided to PrimeFlight by Carriers, which PrimeFlight’s Garcia described from personal knowledge. (Tr. 135-41; Exh. E-15.) Multiple Carriers provide all of PrimeFlight’s physical space including the main office (provided by American), other offices, employee locker rooms and time clock areas, employee breakrooms, and training rooms; space includes individual manager cubicles, (Tr. 25-26, 28-30, 119-20.) PrimeFlight does not own, lease, or pay for these areas. (Tr. 28, 29.)</p>
<p><u>Required Use of Carrier Uniforms:</u>  “PrimeFlight’s baggage service agents and priority parcel service employees wear Carrier uniforms ....” 34 NMB at 181.</p>	<p><u>Required Use of Carrier Uniforms:</u> “The employees that service the baggage service office for American Airlines and the [] priority parcel service operation for American are required to wear American Airlines logoed uniforms.” (Tr. 30.) Other PrimeFlight employees, called passenger service representatives, wore American uniforms until American took the work in-house in 2016. (Tr. 31-33.)</p>
<p><u>Carrier Control Over Contractor Uniforms:</u> “[O]ther PrimeFlight employees wear PrimeFlight uniforms bearing PrimeFlight logos .... The Carriers approve all uniforms.” 34 NMB at 181.</p>	<p><u>Carrier Control Over Contractor Uniforms:</u>  PrimeFlight employees other than BSO employees wear PrimeFlight uniforms. For wayfinders, those uniforms are “at the direction of the carrier as far as what the look is.” (Tr. 34.) American provides specific guidance requiring red blazers for some positions. (Tr. 34-35.)</p>
<p><u>Carrier Right to Inspect and Audit Contractor’s Records:</u>  <i>No evidence cited in opinion</i></p>	<p><u>Carrier Right to Inspect and Audit Contractor’s Records:</u> Carrier right to inspect and audit PrimeFlight’s records for “operational performance,</p>

Facts Showing Carrier Control (2007 NMB Decision)	Facts Showing Carrier Control (5/23/17 Hearing 29-CA-198504)
	to training, to finances.” (Tr. 55.) This Carrier right is “standard for all of our carrier business partners.” (Tr. 55.) ( <i>See, e.g.</i> , Exhs. E-1, “Specifications” ¶ A; E-2 at 13-14; E-4 Article 8; E-5 ¶ 15; Exh. E-6 ¶ 14.)
<u>Carrier Control Over Contractual Relationship/Negotiation of Terms of Relationship:</u> <i>No evidence cited in opinion</i>	<u>Carrier Control Over Contractual Relationship/Negotiation of Terms of Relationship:</u> Carriers have complete control over contractual relationship; Carriers draft contracts and present terms to PrimeFlight on “take-it-or-leave-it” basis. (Tr. 41.)
<u>Daily Meetings with Carrier Personnel:</u> <i>No evidence cited in opinion</i>	<u>Daily Meetings with Carrier Personnel:</u> Top PrimeFlight executives have separate meetings with each Carrier to discuss staffing levels, operations needs, safety, special projects. (Tr. 118-19, 121.) Meetings occur on daily basis. (Tr. 118, 121.) PrimeFlight managers give daily briefings to summarize operations for Carrier management, including Spirit and Southwest. (Tr. 155; Exh. E-17.)

### III. ARGUMENT

#### A. Applicable Law

The “control” analysis is multi-factored, and the NMB has not stated whether any one factor is more probative than the others. However it is clear that it is not necessary for all of these factors to be present for the control test to be met, and in most- if not all- of the cases in which control has been found, at least some factors have not been present. Moreover, it is the carrier’s right to exercise the indicia of control that is critical to the inquiry, even if that right has been exercised only occasionally – or not at all. As the Board noted recently in the joint employer

context, “the right to control is probative of an employment relationship – whether or not that right is exercised.” *BFI*, 362 NLRB No. 86 (2015) (emphasis added). Here, both the parties’ contracts and their actual practice demonstrates a level of control that far exceeds that which has been sufficient to find derivative carrier status.

Jurisdiction under the RLA has previously been sustained for employers whose operations are similar to PrimeFlight’s. In *Swissport USA, Inc.*, 353 NLRB No. 18 (2008), the Board found the company to be within the jurisdiction of NMB and dismissed the petition based on the following indicia of carrier control:

- dictated the type of training;
- mandated specific performance requirements;
- required regular briefings;
- had the right to request that the employer remove employees from the job; and,
- provided equipment and facilities.

Finding that the above indicia were sufficient evidence of carrier control to establish NMB jurisdiction, the Board relied upon the opinion of the NMB, which provided an advisory opinion reaching the same conclusion. 35 NMB No. 55 (2008).

Another very instructive case is *Air Serv Corp.*, 33 NMB 272 (2006), where the NMB found that Air Serv, a non-carrier owned business, fell within its jurisdiction. The NMB cited the following facts as determinative of carrier control: the carrier’s flight schedules affected the work schedules of Air Serv employees; the carrier provided equipment used by Air Serv; the carrier provided many of the supplies used to clean its aircraft; the carrier had access to Air Serv’s records regarding personnel and training in order to perform periodic security and safety

audits; and the carrier had an extensive set of regulations and standards which governed training and servicing and other aspects of performance under the agreement.

Another case that provides compelling support is *AvEx Flight Support*, 30 NMB 355 (2003). In *AvEx*, the contractor provided document screening, wheelchair and other services to carriers at TF Green LaGuardia in Rhode Island. The NMB found jurisdiction, relying on the following: (1) the contract permitted the carrier to conduct audits, observe the contractor's work in progress, inspect its equipment; (2) the carrier could audit records; (3) carrier flight schedules determined staffing and scheduling; (4) the carriers provided office space; (5) carriers were able to make complaints about employee performance and could request reassignment; and (6) uniforms had to be approved by the carriers (although they were clearly *AvEx* uniforms). *Id.* At 362. The NMB found jurisdiction in spite of the fact that "AvEx hires, determines hours of work, makes work assignments, provides training on AvEx policies and procedures, keeps personnel records, and provides uniforms for its employees." *Id.* at 358-59.

**B. Analysis of the Factors**

The evidence of carrier control over PrimeFlight and its employees is virtually indistinguishable from that in the foregoing cases where jurisdiction was established under the RLA. The evidence presented by PrimeFlight clearly establishes the presence of each of the following factors: PrimeFlight's airline carrier clients (1) exercise direct contractual and executive control over PrimeFlight employee schedules and hours; (2) dictate the training and records that PrimeFlight must maintain, and have access to those records; (3) have control over PrimeFlight personnel decisions; (4) provide the equipment that PrimeFlight uses at LaGuardia; and, (5) exert control over service provided by PrimeFlight.

**1. Airline Carriers Control PrimeFlight Employee Hours.**

PrimeFlight’s work hours are dictated by the contract hours allotted as well as by the flight schedules and daily wheelchair needs communicated to it by PrimeFlight’s carrier clients. In particular, American Airlines and JetBlue communicate service or staffing deficiencies to PrimeFlight and provide instructions about the need to rectify such concerns. Additionally, both carriers can demand PrimeFlight meet specific needs during busy travel times or to accommodate the airlines’ varying schedules.

With far less decisive facts in *Air Serv, supra*, the NMB found that it retained jurisdiction, in part, because the carrier’s flight schedules affected the work schedules of Air Serv employees. Specifically, the NMB found persuasive in that the service agreement provided stated that Air Serv would

perform the services during the hours designated by United and will, in any event, perform the Services, where possible, in such a manner as to avoid inconvenience to United and its personnel and interference with United’s operations.

33 NMB No. 272, 277

The evidence of control over PrimeFlight in this case greatly exceeds the contractual language relied on in *Air Serv*.

**2. The Airline Carriers Control Records that PrimeFlight Must Maintain and Have Access to Those Records.**

The airline carriers’ control over the type of training to be provided and their access to PrimeFlight training records are significant indicia of the requisite control to establish NMB jurisdiction – that control is “standard” for PrimeFlight’s carrier clients. On similar facts, the NMB in *Air Serv Corp* found such access evidence of significant control.

### **3. Control over Equipment and Facilities**

Ownership of facilities and equipment utilized by the entity's employees is also relevant in determining whether a carrier has control over the entity's employees for purposes of jurisdiction under the RLA. In this case, American Airlines provides PrimeFlight's "Computers, scales, podiums, all of the paper goods that are used, baggage claim checks, boarding passes, heavy tags, oversize tags ...." (Tr. 44.) Further, for PrimeFlight's cleaning services for aircraft, American provides "supplies for aircraft cleaning and provisioning such as paper towels, toilet paper, plastic gloves, chemicals that we use to clean the aircraft." (Tr. 135.) Indeed, the hearing testimony provided a detailed explanation of the listing of materials and supplies provided to PrimeFlight by the airline carriers. (*See* Exh. E-15.)

The hearing exhibits also itemize physical space provided to PrimeFlight by the airline carriers. (Tr. 135-41; Exh. E-15.) Multiple carriers provide all of PrimeFlight's physical space including its main office, other personnel offices and manager cubicles, employee locker rooms and time clock areas, employee breakrooms, and training rooms; space includes individual manager cubicles, (Tr. 25-26, 28-30, 119-20.) PrimeFlight does not own, lease, or pay for these areas. (Tr. 28, 29.)

### **4. The Airline Carriers Control PrimeFlight Personnel Decisions.**

PrimeFlight's service contracts with its carrier clients provide for the carriers to require PrimeFlight to remove employees at the clients' discretion. (*See* Exh. E-1, ¶ 5; E-2, ¶ 7.6; E-5, E-6 ¶ 8.) That control is not illusory, as PrimeFlight cited at least one instance where it terminated the employment of one of its staff based on American Airlines manager request for removal after serious customer service failure. (Tr. 115-16, Exh. E-8.)

**C. The *ABM* Case Demonstrates How the NMB and the Board Must Revisit Their Recent Departures from the Established Doctrine That Would Plainly Result in RLA Jurisdiction in the Instant Case.**

The *ABM* decision by the District of Columbia Circuit Court of Appeals, cited above, thoroughly explains the serious problems with the recent shift of derivative carrier jurisdiction from the NMB to the Board. That shift not only contravenes the intent of the RLA, but does so with no rational explanation by either agency of the encroachment on traditional NMB jurisdiction. *See ABM Onsite Services-West, Inc. v. National Labor Relations Board*, 849 F. 3d 1137 (D.C. Cir. 2017). In analyzing the historical basis of the RLA and its relationship to national commerce, the *ABM* Court’s opinion offers an excellent perspective on the rationale for having airline carrier subcontractors subject to RLA jurisdiction, as well as a critical touchstone for the NLRB to re-evaluate its encroachment on the NMB’s area of expertise.

*ABM* involved an airline contractor providing baggage handling services to airlines at Portland International Airport. The NLRB had subjected the contractor to NLRA jurisdiction despite the contractor’s obvious satisfaction of the traditional NMB standard for RLA jurisdiction, specifically carrier control of the contractor’s operations. *See ABM*, 849 F. 3d 1140-41, 1144 (“Under [the traditional] test, *ABM* would plainly fall under the control of air carriers.”). The *ABM* Court began its analysis by reiterating the essential purpose of the RLA: to protect “the traveling and shipping public in interstate commerce” by avoiding the disruption of airlines and railways by labor disputes. *ABM*, 849 F. 3d at 1139. For that reason, the *ABM* court further noted that the U.S. Supreme Court once observed that “the major purpose of Congress in passing the Railway Labor Act was to provide a machinery to prevent strikes.” *Id.* (quoting *Tex. & New Orleans R.R. v. Bhd. Of Ry. & S.S. Clerks*, 281 U.S. 548, 565 (1930)). The RLA restricts

the right of employees subject to it to engage in work stoppages, in order to “keep transportation moving.”<sup>3</sup> ABM, 849 F. 3d at 1140.

For this reason, the NMB historically took a broad view of its jurisdiction and that of the RLA over contractors such as PrimeFlight. The NMB adopted its current two-part test for coverage of airline contractors in the early 1980s. At the time, the NMB explained it had “undertaken an extensive evaluation of its jurisdictional standards” and that “[r]ecent jurisdictional determinations of this Board have been made in light of changing corporate relationships and increasing use of contractors to perform work integral to rail and air transportation.” *Bhd. Ry. Carmen*, 8 NMB 58, 61 (Oct. 15, 1980). A modicum of carrier control over the contractor sufficed to confer jurisdiction, because any significant interrelation of operations between airline and contractor exposes the airline to the disruption of a strike by the contractor’s employees.

The NMB abruptly diverged from this nearly three-decade course beginning in 2012. The NMB now declines RLA jurisdiction in all cases in which a contractor has only an allegedly “typical subcontracting relationship” with an air carrier. *See e.g., Airway Cleaners, LLC*, 41 NMB 262, 268 (Sept. 11, 2014) (stating a “carrier must exercise ‘meaningful control over personnel decisions,’” and not exercise only “the type of control found in any contract for services” to establish RLA jurisdiction). The result for thousands of airline contractors is that the NMB has changed its position to reduce its jurisdiction and that of the RLA over airline contractors, with a corresponding expansion of jurisdiction by the NLRB to extend the reach of

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<sup>3</sup> It is no surprise, therefore, that unions strongly prefer NLRA jurisdiction; union power is built on the power to disrupt employer operations. In terms of the impact on transportation and commerce, a union strike at a contractor such as PrimeFlight is no different than a strike on the carrier itself. When the contractor’s baggage handlers and wheelchair escorts walk off the job, the effect on passengers is no different than it would be if the baggage handlers and wheelchair escorts were employed by the carrier itself: the processing of baggage and passengers is effectively shut down until replacements are retained or the contractor bows to the union’s demands in order to end the strike.

the NLRA – changes the *ABM* court found literally inexplicable. The *ABM* court first examined the common-sense process by which the NLRB and the NMB had sorted out jurisdictional questions for many years:

Whether a company is controlled by a carrier [] is often unclear. Thus, “the NLRB and the NMB have, in the absence of any statute addressing the point, jointly developed their own method for determining their mutual jurisdictional question of whether the NLRA or the RLA governs” in any given case. The NLRB frequently refers the jurisdictional question to the NMB for an advisory opinion and then defers to the NMB’s view, based on the NMB’s expertise in administering the RLA. The NLRB follows this accepted practice when a party raises a colorable claim that the NLRB lacks jurisdiction.

*ABM*, 849 F. 3d at 1140 (citations omitted).

The *ABM* court then analyzed the “clear departure from precedent” embarked upon by the NMB in 2013, when that agency changed its model for analyzing carrier control over contractors. *Id.* at 1144. Following decades of affirmative carrier control decisions where the carrier had no direct input into disciplinary matters involving contractor employees, “the NMB in 2013 began requiring that air carriers exercise a substantial “degree of control over the firing [ ] and discipline of a company’s employees” before it would find that company subject to the RLA.” *Id.* (citation omitted).

Ultimately the *ABM* court found that the NMB’s change in analysis and the resulting change at the NLRB had created a glaring alteration of the legal landscape without any policy or analytical basis: “These cases and commentary from members of both boards demonstrate ... the NMB will not find control for RLA purposes if the contractor is ultimately allowed ‘to determine the appropriate discipline’ for its own employees. That rule is impossible to square with cases from just a few years earlier.” *See ABM* 849 F. 3d at 1145.

Based on the NMB’s abrupt change to its jurisdictional principles and the NLRB’s adoption of the change, both unexplained, the *ABM* court held that the NLRB had “violated [a]

cardinal rule here by applying a new test to determine whether the RLA applies, without explaining its reasons for doing so.” *Id.* at 1142. “It is well-settled that the NLRB—like any other agency—cannot “turn[ ] its back on its own precedent and policy without reasoned explanation.” *Id.* at 1146 (quoting *Dupuy v. NLRB*, 806 F. 3d 556, 563 (D.C. Cir. 2015)). While the NLRB had a longstanding practice of following the NMB’s jurisdictional model, the *ABM* court ruled that the NLRB could not simply follow a substantial change to that model where the NMB provided no explanation. To do so would equate to the NLRB’s making such a change:

Because the NLRB follows the NMB’s lead in interpreting and applying the RLA, the question becomes how to treat an unacknowledged and unexplained deviation from precedent by the NLRB that is precipitated by a likewise unacknowledged and unexplained deviation from precedent by the NMB. We hold that, under such circumstances, the NLRB is not free to simply adopt the NMB’s new approach without offering a reasoned explanation for that shift. Indeed, 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.* at 1146-47. In light of the *ABM* Court’s carefully enunciated analysis, the Board should either return to the defensible pre-2013 standard for derivative carrier control, which mandates that PrimeFlight’s LaGuardia operation is subject to the RLA; or alternatively, defer this matter to the NMB for the analysis and explanation required under *ABM*.

### **CONCLUSION**

In light of the foregoing, the Regional Director’s finding that the “level of control over [PrimeFlight] is no greater than the typical level of control for a subcontractor” is clearly inconsistent with the facts in the case. Accordingly the Board should grant review of the Regional Director’s decision and find that the RLA governs PrimeFlight and the NLRB does not have jurisdiction in this matter. In the alternative, the Board should refer the matter to the NMB for an advisory opinion.

For those reasons outlined above, the Employer respectfully requests that this Request for Review be granted.

Respectfully submitted,

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