

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

<b>PRIMEFLIGHT AVIATION SERVICES, INC,</b>	)	
	)	
<b>Employer,</b>	)	
	)	<b>Case No. 29-RC-198504</b>
<b>and</b>	)	
	)	
<b>SERVICE EMPLOYEES INTERNATIONAL</b>	)	
<b>UNION, LOCAL 32BJ,</b>	)	
	)	
<b>Petitioner.</b>	)	

**PETITIONER SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 32BJ'S  
BRIEF IN OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL  
DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

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## I. Summary

The Decision and Direction of Election (“DDE”) correctly concluded that the LaGuardia (“LGA”) operations of PrimeFlight Aviation Services (the “Employer” or “PrimeFlight”) fall within NLRA jurisdiction. The Employer’s argument that the DDE relied upon an incorrect legal standard is meritless. Employer Brief (ER BR.) at 16-19. A contractor performing air transportation services is under the RLA only if it is “directly or indirectly owned or controlled by or under common control with any [air] carrier.” 45 U.S.C. § 151, First; *Allied Aviation Serv. Co.*, 362 NLRB No. 173 (2015), *enf’d*, 854 F.3d 55 (D.C. Cir. 2017).<sup>1</sup> An airport contractor is under the NLRA unless the carriers exercise greater control, especially over key personnel decisions such as hiring and firing, than that found in the typical independent contractor relationship. Control for RLA jurisdiction requires the carrier to possess “the definite legal right to control the business policies and operations” of PrimeFlight. DDE at 2-3, citing *Marriott In-Flite Services*, 171 NLRB 742, 752 (1968) (*citing, inter alia, Martin v. Federal Security Agency*, 174 F.2d 364 (3d Cir. 1968)), *enf’d denied on other grounds* 417 F.2d 563 (5th Cir. 1969). The record is devoid of evidence of jurisdictionally significant airline control over PrimeFlight at LGA.

Likewise, the Employer’s argument that this matter must be referred to the National Mediation Board (“NMB”) is unavailing. ER Br. At 16-19. The Employer relies on a 2007 NMB decision finding RLA jurisdiction over its operations, *PrimeFlight Aviation Servs.*, 34 NMB No. 33 (2007). However PrimeFlight ignores critical factual differences showing reduced airline control in the current record and disregards the robust line of NMB cases declining jurisdiction over airline contractors. The Employer fails to mention the string of decisions

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<sup>1</sup> The D.C. Circuit relied on *Airway Cleaners*, 41 NMB 262 (2014), and similar recent NMB cases setting forth the control standard. *See, e.g., Aero Port Services, Inc.*, 40 NMB 139 (2013); *Air Serv Corp.*, 39 NMB 450, recon. den’d, 39 NMB 477 (2012); *Bags, Inc.*, 40 NMB 165 (2013); *Huntleigh USA Corp.*, 40 NMB 30 (2013); and *Menzies Aviation*, 42 NMB 1 (2014).

finding NLRA jurisdiction over PrimeFlight. *Paulsen v. PrimeFlight Aviation Servs.*, 216 F. Supp. 3d 259, 2016 U.S. Dist. LEXIS 146786 at \*8-16 (E.D.N.Y. 2016) (Kennedy Airport); *PrimeFlight Aviation Servs.*, 12-RC-113687, 2015 NLRB LEXIS 475 (June 8, 2015) (San Juan airport); *PrimeFlight Aviation Servs.*, JD(NY) 05-17 (Kennedy Airport); *PrimeFlight Aviation Servs.*, 02-RC-186447, 02-RC-158251 and 02-RC-178645 (Westchester Airport); and *PrimeFlight Aviation Services*, 04-RC-193810 (Philadelphia Airport).

## II. Airport Independent Contractors Are Under NLRA Jurisdiction

The Employer attacks the NLRB/NMB's jurisdictional standard as expressed in *Allied Aviation, supra*, which in turn relied on *Airway Cleaners*, 41 NMB 262 (2014) and similar cases. We will show that the *Airway Cleaners* standard correctly expresses Congressional intent as manifest in the legislative history, an analysis of the statutory text and decades of judicial and agency precedent. Moreover, the *Airway Cleaners* standard promotes the twin goals of federal labor policy — industrial stability through collective bargaining and employee free choice in the selection of a bargaining representative.

### A. The Airway Cleaner Framework Implements Congressional Intent to Exclude Independent Contractors

#### 1. Legal Background

When an employer is not a rail or air carrier engaged in the transportation of freight or passengers, the NLRB/NMB applies a two-part test to determine whether that employer is subject to the RLA:

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

*Airway Cleaners*, 41 NMB at 262.

Whether workers perform work “traditionally performed by employees” of air carriers is not at issue in the airline subcontractor cases under discussion. Since PrimeFlight is not owned by a carrier, the decisive issue is whether it is “directly or indirectly owned or controlled by or under common control with any carrier” by air. RLA § 1, First; 45 USC § 151, First. The NMB looks to six factors to infer jurisdictionally significant control, including:

the extent of the carrier’s control over the manner in which the company conducts its business, access to the company’s operations and records, role in personnel decisions, degree of supervision of the company’s employees, whether employees are held out to the public as carrier employees, and control over employee training.

*Airway Cleaners*, 41 NMB at 267.

Control is jurisdictionally significant only if it is more extensive than that found in a “typical subcontractor relationship.” *Id.* at 268. RLA jurisdiction requires the carriers to have “meaningful control over personnel decisions,” particularly “hiring, firing and/or discipline.” *Id.* This approach is compelled by the legislative history, statutory text and decades of judicial and agency precedent.

## 2. Legislative History Supports Airway Cleaners

### a. Section 151 Did Not Extend RLA Coverage to Independent Contractors

Congress intended the “control” requirement to have the effect of excluding independent contractors from RLA coverage. Indeed, Congress specifically refused to extend RLA jurisdiction to independent contractors. When Congress enacted the RLA in 1926, it initially covered only rail “carriers.” At the time, it was the only federal legislation protecting the right to collectively bargain. Some railroads responded to the enactment of the RLA by creating wholly-owned subsidiaries in an effort to evade collective bargaining obligations. *See, e.g., Reynolds v. N. Pac. Ry. Co.*, 168 F.2d 934, 941 (8th Cir.), *cert. denied*, 335 U.S. 828 (1948). Congress

reacted in 1934 by amending the definition of “carrier” under RLA § 1, First, 45 U.S.C. § 151, First, to include companies owned or controlled by carriers.

Joseph Eastman, the Federal Coordinator of Transportation and drafter of the 1934 amendment, had initially sought to extend the RLA to all employees doing rail transportation work, regardless of whether they worked for a carrier – *i.e.*, “to bring within the scope of the act operations which form an integral part of railroad transportation, but which are performed by companies which are not now subject to the Railway Labor Act.” *Hearing on S. 3266 Before the Senate Comm. On Interstate Commerce, 73rd Cong., 2nd Sess. (1934)*, reprinted in 3 *The Railway Labor Act of 1926: A Legislative History* § 2, at 10 (1988) (excerpts attached as Appendix). Thus, his draft would have added to the definition of “carrier” “any company operating any equipment or facilities or furnishing any service included within the definition of the terms ‘railroad’ and ‘transportation’ as defined in the Interstate Commerce Act.” *Id.* The original bill “would have covered the independent companies also.” *Id.* at 17. Critically, the amendment as originally proposed had no limitation requiring railroad control or ownership. That is, under that original formulation, RLA jurisdiction would have turned on function alone.

The railroads objected that the amendment would “affect their contracts for all kinds of work.” *Id.* at 145. In response to those and other railroad objections, Eastman revised the amendment with the intent to avoid “possible conflicts with N.R.A. [National Recovery Administration] codes.” *Id.* The revised amendment, which was ultimately enacted, added the operative language that incorporated an additional criterion for RLA jurisdiction: carrier control. “The term ‘carrier’ includes . . . any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad . . .” *Id.* Eastman made clear that trucking controlled by railroads would be included, but when asked whether trucking by independent contractors would be under the RLA, Eastman replied: “I think it would not.”

*Railway Labor Act Amendments: Hearings Before the House Comm. On Interstate and Foreign Commerce on H.R. 7650, 73rd Cong., 2nd Sess. (1934)*, reprinted in 3 *The Railway Labor Act of 1926: A Legislative History* § 3, at 17 (1988) [hereinafter “1934 House Hearings”] (excerpts attached as Appendix). Instead, the amendment would “limit the definition to railroads or similar companies and the subsidiaries which they control which are engaged in transportation service recognized by the Interstate Commerce Act,” including those subsidiaries that are part of a “complicated holding company situation” in which a non-railroad company is “under common control with a railroad.” *Id.* at 18-19. Thus, it was clear that “[s]imply by making a contract with a private company a railroad would not” bring that private company under the provisions of the RLA. *Id.* at 21. Eastman further stated that “private contractors were not subject to the provision[s] of this bill.” *Id.* at 20. Thus, Congress specifically considered extending RLA coverage to include independent contractors performing rail carrier work but rejected this overly broad approach in favor of including only those companies that are owned or controlled by a rail carrier and excluding independent contractors.

The Supreme Court in *R.R. Ret. Bd. v. Duquesne Warehouse Co.*, 326 U.S. 446, 451 n.6 (1946), highlighted Eastman’s statement summarizing the language that was adopted: “I am inclined to believe that for the present it would be well not to go beyond carriers and their subsidiaries engaged in transportation.” The Court also cited Senator Robert F. Wagner’s statement that the control language was intended to make the rail labor statutes “more clearly applicable to subsidiaries of railroad companies . . .” *Id.* at 452 n.10. The Court relied on the Senate Report’s declaration that the de facto control sustaining RLA jurisdiction “may be exercised not only by direct ownership of stock, but by means of agreements, licenses, and other

devices which insure that the operation of the company is conducted in the interests of the carrier.” *Id.*<sup>2</sup>

b. 1936 Amendments Covered Airlines and Their Employees

Congress extended the RLA to cover air transportation in 1936. *Bhd. Of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 381 n.16 (1991) (citing 45 U.S.C. §§ 181-182). Just as Congress did not intend to cover independent contractors in the 1934 amendments, it similarly excluded them in the 1936 amendments, using even narrower language than in § 151.

Section 181 reads:

All of the provisions of subchapter I of this chapter except section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

Section 181 defines employers as: “every common carrier by air engaged in interstate or foreign commerce” and “every carrier by air transporting mail.” Significantly, § 181 does not include companies under the control of air carriers, the catch-phrase by which rail contractors were brought under RLA jurisdiction in § 151.

The purpose and statutory language of the 1936 amendments focus clearly on the relationship between air carriers, including common carriers and mail-transporting carriers, and their own employees. Testimony at the Senate hearings on those amendments reinforces that focus. *See, e.g., A Bill to Amend the Railway Labor Act to Cover Every Common Carrier by Air Engaged in Interstate or Foreign Commerce: Hearings before a Subcomm. of the Senate Comm.*

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<sup>2</sup> The report also stated that the amendment extended RLA jurisdiction to “substantially all” companies in rail transportation. *Id.* At that time, most companies in rail transportation were carriers or wholly owned subsidiaries.. *Herzog Transit Servs. v. U.S. R.R. Ret. Bd.*, 624 F.3d 467, 471 n.11 (7th Cir. 2010). Congress was clearly aware of and chose not to cover independent contractors. As demonstrated *infra*, courts found that RLA coverage did not extend to independent contractors, including those performing services integral to rail transport on a long-term, continuing basis.

on *Interstate Commerce on*, 74th Cong., 1st Sess. (1935), reprinted in 3 *The Railway Labor Act of 1926: A Legislative History* § 5, at 3 (1988) (letter from Frank McManam, Chairman of the Legislative Comm. of the Interstate Commerce Comm'n) (“The bill proposes to amend the Railway Labor Act, as amended, by adding a title II, which would apply to *carriers by air and their employees.*” (emphasis added)).<sup>3</sup> The airline amendments simply do not support an argument for RLA jurisdiction over independent contractors of air carriers.

Section 181 also defines employees as “every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.” The NMB reads that language as applying the common law definition of employee, so that jurisdiction would extend to those deemed airline employees under the common law, but not to those employed by or as independent contractors. *Eastern Airlines, Inc.*, 9 NMB 285, 296 (1982). Clearly, § 181 does not expand § 151’s jurisdictional reach with regards to independent contractors and their employees.

### 3. Section 151’s Text Supports Airway Cleaners Framework

As amended, § 151, First provides in relevant part:

The term ‘carrier’ includes . . . any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates . . . in connection with the transportation . . . of property transported by railroad . . .

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<sup>3</sup> Additional statements to the same effect include: Statement of George A. Cook, Secretary of the NMB, *id.* § 5, at 10 (“[T]he National Mediation Board has revised bill H.R. 7268, being a proposed amendment of the Railway Labor Act so as to bring the *carriers by air and their employes* [sic.] within a plan of regulation similar to that provided for railway employees.” (emphasis added)); Statement of Timothy Shea, Assistant President of the Brotherhood of Locomotive Firemen & Enginemen, *id.* (“The purpose of S. 2496 is to include *employees of air lines* under the jurisdiction of the Railway Labor Act.” (emphasis added)); Statement of O.S. Beyer, Director of the Section of Labor Relations and Federal Coordinator of Transportation, *id.* at 23 (“Senate bill S. 2496 proposes to amend the Railway Labor Act . . . by bringing *airplane carriers and their employees under the provisions of this act.*” (emphasis added)). Nothing in the legislative history refers to jurisdiction over companies under the control of airlines.

“Control” in the phrase “directly or indirectly owned or controlled by” should be given the same meaning as “control” in the phrase “common control,” which requires a definite legal right of control. “A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning.” *Powerex Corp. v. Reliant Energy Svcs., Inc.*, 551 U.S. 224, 232 (2007). Here, the root word “control” is used twice in close proximity: first in “controlled by” and then in “under common control.” As dictated by fundamental statutory construction principles, the use of the same word in two closely related phrases should be given the same or at least a similar meaning in both places.

As explained by the Federal Circuit, “[n]ecessary to a finding of common control is the existence of corporate entities . . . which are in parallel position, both controlled by a single additional corporate entity such as subsidiaries owned by a common parent.” *Union Pac. Corp. v. United States*, 5 F.3d 523, 526 (Fed. Cir. 1993) (quoting *Union Pac. Corp. v. United States*, 26 Cl. Ct. 739, 750 (1992)) (interpreting the Railroad Taxing Act); *see also Trans-Serve, Inc. v. United States*, 2004 U.S. Dist. LEXIS 7784 at \* 10 (W.D. La. 2004) (citing cases involving common control, all of which involve an entity having a legal right of control); *Livingston Rebuild Ctr., Inc. v. R.R. Ret. Bd.*, 970 F.2d 295 (7th Cir. 1992) (common control present because the same individual was a principal investor in one entity and the controlling shareholder of another); *AMR Svcs. Corp.*, 18 NMB 348, 351 (1991) (common control exercised through holding company owning airline and contractor). “Common control” is given the same meaning by the legislative history of the RLA: The author of the 1934 amendments, then-Federal Transportation Coordinator Joseph Eastman, discussed a hypothetical “complicated holding company situation” as potentially indicating common control. 1934 House Hearings § 3, at 19 (1988). Thus, “control” as used in the RLA (both in the phrases “common control” and

“controlled by” suggests a relationship involving the carrier’s having a definite legal right of control such as that between a parent and subsidiary corporate entities.<sup>4</sup>

4. Over 50 Years of Precedent Finds NLRA Jurisdiction Over Independent Contractors

a. Courts Reject RLA Jurisdiction Over Independent Contractors

In 1937 the Supreme Court made clear that independent contractors are outside the scope of the RLA. In *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515 (1937), a carrier was obligated to comply with an NMB certification for its own employees performing heavy repair work on rail cars because their work was sufficiently related to rail transportation to affect interstate commerce. *Id.* at 554-56. The Court acknowledged that the employees doing the same work would *not* be covered by the RLA if they were employed by an independent contractor.

It is no answer, as petitioner suggests, that it could close its back shops and turn over the repair work to independent contractors. Whether the railroad should do its repair work in its own shops, or in those of another, is a question of railroad management. *It is petitioner’s determination to make its own repairs which has brought its relations with shop employees within the purview of the Railway Labor Act.*<sup>5</sup>

*Id.* at 557 (emphasis added).

In *Duquesne Warehouse Co, supra*, the Supreme Court repeatedly cited RLA legislative history to determine whether a warehouse company owned by a railroad was an employer under the Railway Retirement Act (“RRA”), 45 U.S.C. § 231 *et seq.*,<sup>6</sup> and the Railroad Unemployment

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<sup>4</sup> The RLA covers entities “indirectly controlled by” carriers. Congress’s use of “indirect” was intended to extend RLA coverage to controlled enterprises regardless of the form through which control is exercised, so long as the carrier had a legal right of control. The plain English meaning of “indirect” does not reduce the extent of control necessary for jurisdiction. An “indirect” route gets one to the same place as the direct route, just by a different path. Hence, Merriam-Webster Dictionary gives “roundabout” as a synonym for “indirect.” Merriam-Webster Dictionary, *Indirect*, <http://www.merriam-webster.com/dictionary/indirect> (last visited Mar. 29, 2017).

<sup>5</sup> The Court then referenced the nature of the work performed by these employees because the case turned on the function test, not the control test.

<sup>6</sup> An “employer” under the RRA includes: “any company which is directly or indirectly owned or controlled by, or under common control with, one or more” rail carriers. 45 U.S.C. § 231(a)(1)(i).

Insurance Act (“RUIA”), 45 U.S.C. § 351 *et seq.*<sup>7</sup> It did so because the RLA, RRA, RUIA, and the Carrier Taxing Act (now the Railroad Retirement Taxing Act, 26 U.S.C. § 3201 *et seq.*) form an integrated system of railway labor legislation that rely on a common definition of covered employer. *Id.* at 451. *See also Herzog Transit Servs. v. U.S. R.R. Ret. Bd.*, 624 F.3d 467, 471 n.11 (7th Cir. 2010) (coverage of RLA “not materially different” than RRA); *Reynolds*, 168 F.2d at 941 (Carrier Taxing Act adopted RLA definition of carrier); *Marriott In-Flite Services*, 171 NLRB 742, 752 (1968) (“Congress intended uniformity of interpretation of the definition of carrier” in the different rail labor acts).<sup>8</sup> The Court explained that the “control” language in the RLA’s definition of “carrier” was aimed at corporate subsidiaries, affiliates and those under similar control. *Duquesne Warehouse*, 326 U.S. at 451.

The Eighth Circuit stressed that Congress specifically decided to exclude independent contractors from the RLA and related statutes in *Reynolds v. N. Pac. Ry. Co.*, *supra*. The court in *Reynolds* found that two companies providing boarding camp and general services to railroads were not “directly or indirectly owned or controlled” by a carrier and were therefore excluded from the Carrier Taxing Act. 168 F.2d at 936. The court noted that Congress was aware of the use of “outside contractors of services such as those here involved, and it chose not to include such contract workers generally or as a class in the scope of this railroad legislation.” *Id.* at 941. Indeed, “when it was proposed in 1934 to bring all the contracting companies performing services which were an integral part in railroad transportation within the definition of a ‘carrier’ in the Railway Labor Act . . . Congress would not accept the proposal.” *Id.* (citations omitted).

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<sup>7</sup> An “employer” under the RUIA includes “any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith . . .” 45 U.S.C. § 351(a).

<sup>8</sup> The NMB has found that the definitions of employer in the RLA and the Railroad Retirement Act are “close in wording” but “not synonymous.” *S. Cal. Reg’l Rail Auth.*, 43 NMB 71, 82 (2016). However, the NMB has not squared that conclusion with *Duquesne Warehouse* and has not explained how the wording differs or the consequences of the difference. The NMB should accept the authoritative judicial conclusion that the definitions of employer in the rail acts are materially indistinguishable. However, the NMB is not required to defer to Railroad Retirement Board decisions based on these definitions.

Since the companies at issue in *Reynolds* had the “dignity and status of actual business enterprises,” *id.* at 935, and neither had “lost in effect its identity or status as a separate business enterprise in furnishing the services involved,” *id.* at 940, they were outside the ambit of Carrier Taxing Act and therefore also outside the coverage of the RLA.<sup>9</sup>

The Third Circuit reached the same conclusion in *Martin v. Fed. Sec. Agency*, 174 F.2d 364 (3d Cir. 1949). The contractor operated grain elevators for the railroad in a long term relationship. The contractor’s work was integral to the transportation of grain. *Martin v. Fed. Sec. Agency*, 73 F. Supp. 482, 484 (W.D. Pa. 1947). The Circuit Court stated:

We do not think that the Congress intended to exclude widows and orphans of the employees of independent contractors of carriers from the benefits of the Act, but only that it sought by Sec. 1532, and kindred sections, to prevent carriers from escaping the obligations laid upon them in the Railroad Retirement Act and the Carrier Taxing Act by the devices of organizing separate and distinct companies or contracting with companies over whose business policies and operations it, by various means, had the *definite legal right to control*.

174 F.2d at 367 (emphasis added).

The court was “favorably impressed” with the understanding that:

control has reference to the control of a company attained through financial arrangements, stock ownership, voting trust, interlocking directorates, and other corporate and business devices which have regard to its management, business policies, or corporate functions. Railroad Retirement Board Regulation 202.4 [codified at 20 C.F.R. 202.4] defines such control as the “mean, method or circumstances, irrespective of stock ownership, to direct . . . the policies and business of such a company . . .”

*Id.* at 366.

In *Nicholas v. Denver & RGWR Co.*, 195 F.2d 428, 433 (10th Cir. 1952) and *Kelm v. Chicago, St. P., M. & O. Ry. Co.*, 206 F. 2d 831 (8th Cir. 1953), the courts again held that the Carriers Taxing Act did not cover independent contractors. These courts noted that Congress

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<sup>9</sup> Subsequently, in *Kelm v. Chicago, St. P., M & O Ry. Co.*, 206 F.2d 831 (8th Cir. 1953), the Court confirmed that the 1947 amendments to the Railroad Retirement Taxing Act did not bring independent contractor companies under the railway legislation, as discussed *infra*.

also specifically rejected covering independent contractors in 1946, when it amended the Carriers Taxing Act through the Railroad Retirement Taxing Act.

The Sixth Circuit enforced a NLRB decision finding an in-flight caterer to be under NLRA jurisdiction in *Dobbs Houses, Inc. v. NLRB*, 443 F.2d 1066 (6th Cir. 1971). The carriers provided “detailed instructions” as to how the caterer’s employees should perform their work, had “unlimited access to every phase of the catering operations,” gave direct orders to the employees on occasion, and had the right to and did in fact on ten occasions have objectionable contractor employees removed at various airports. *Id.* at 1069-70. Yet, because the carriers had no authority to discipline the caterer’s employees and did not “hire, promote, demote or control the pay, hours, shifts or working conditions,” the court held that the carriers did not exercise sufficient control over the contractor to bring it under the coverage of the RLA. *Id.* at 1069.

The *Dobbs Houses* court contrasted the facts before it to cases in which jurisdictionally significant carrier control was present. It distinguished cases involving wholly-owned subsidiaries. *Id.* at 1070-71. It also distinguished a case in which the contractor could do no work for any other company without the permission of the controlling carrier and the controlling carrier covered the losses and shared in the profits of the contractor. *Id.* at 1071. Finally, it distinguished a case in which the contractor was permitted to perform services only for a single carrier, which provided all of the premises and equipment and paid part of the salaries of some of the contractor’s employees. *Id.* at 1071-72. In contrast, *Dobbs Houses* sold “its services to whomever it will and can,” and thus did not have an exclusive contracting relationship with any particular airline or airline consortium. *Id.*<sup>10</sup>

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<sup>10</sup> In recent years, four district courts have examined airline control, and all found independent contractors outside RLA jurisdiction. The district court in *Air Serv Corp. v. SEIU Local 1*, No. 16-10882, 2016 U.S. Dist. LEXIS 166437 (E.D. Ill. Dec. 2, 2016) rejected the employer’s request for an injunction against a strike under the RLA after finding no evidence of control greater than that found in a typical contractor relationship. Another district court found it “resoundingly” clear that PrimeFlight’s operations at JFK Airport were under the NLRA in *Paulsen ex. Rel.*

b. *Both the NMB and NLRB Consistently Found Independent Contractors Subject to NLRA Jurisdiction for Decades*

*Airway Cleaners* is consistent with NMB decisions reaching back to the 1930s. *See, e.g., Erie Railroad Co.*, 1 NMB 20, 21 (1937) (employer was “an independent contractor not subject to the RLA”); *Sabena Belgian World Airlines*, 3 NMB 25, 25 (1956) (no jurisdiction over employees because the caterer-employer operated as an “independent contractor” even though the chef was a Sabena employee and Sabena provided the kitchen facilities and vehicles); *Great Lakes Airlines*, 4 NMB 5 (1961) (no jurisdiction because employees work for and receive compensation from contractor and are not carrier employees); and *Pinkerton’s*, 5 NMB 255, 257 (1975) (no RLA jurisdiction because employer was “an independent corporation, [and] its airline related activities are clearly *de minimis* . . .”). *Cf. Thaddeus Johnson Porter Service, Inc.*, 3 NMB 82 (1958) (RLA jurisdiction over a baggage-handling entity that was not a commercial enterprise and could only accept work with the carriers’ permission).

In 1980, the NMB reevaluated its jurisdictional standard. Nonetheless, in the following 15 years, it declined jurisdiction over many airport contractors for reasons that are fully consistent with *Airway Cleaners*. Thus, for example, in *Miami Aircraft Support*, 21 NMB 78, 82 (1993), the NMB declined jurisdiction because the contractor (“MAS”) was a typical independent contractor.

There is no evidence that a carrier or carriers control the manner in which MAS does business. MAS is an independent company, which contracts with air carriers through a competitive bidding process. MAS controls its own budgets and expenditures, and is responsible for its own profitability. The carriers do not have access to MAS business or personnel records, except for training records which are checked periodically to verify compliance with FAA regulations and contract terms.

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*NLRB v. PrimeFlight Aviation Services*, 216 F. Supp. 3d 259, 267 (E.D. N.Y. 2016). *See also Roca v. Alphatech Aviation Services, Inc.*, 961 F. Supp. 2d 1234, 1239-40 (S.D. Fl. 2013) (“Meticulous work instructions and prior approval of an independent contractor’s employees will not convert those employees into a carrier’s employees for RLA purposes.”), and *Cunningham v. Elec. Data Sys. Corp.*, No. 06-3530, 2010 U.S. Dist. LEXIS 32112 (S.D.N.Y. Mar. 30, 2010) (rejecting RLA defense to overtime requirement).

The NLRB has rejected RLA jurisdiction over independent contractors going back over 50 years. For instance, the Board found NLRA jurisdiction over an airline caterer in *Marriott In-Flite Services*. The ALJ wrote: “[C]ontrol does not mean simply specifications in some detail as to the nature of the services to be performed and the method used, but control of the management and business policy of the subordinate company.” 171 NLRB at 752. The ALJ cited many cases in which the NLRB had asserted jurisdiction over airport independent contractors, *id.* at 750 n.11, and no NMB case finding RLA jurisdiction absent common ownership. *Id.* at 751 n.16. See also *Hot Shoppes, Inc.*, 143 NLRB 578, 580 (1963) (no RLA jurisdiction since contractor’s employees are not employees of carrier even though the carrier directed their work while they are on the airfield); *D & T Limousine*, 207 NLRB 121 (1973) (no RLA jurisdiction over independent contractor even though carrier provided all on-site supervision); *Wings & Wheels, Inc.*, 139 NLRB 578, 580 (1962). (NLRA jurisdiction over a contractor that “has no exclusive contractual relationship with any airline” and “operates independently of any airline”).

In sum, the decisions of the courts, the NMB and the NLRB show that it has long been the case that independent contractors are not subject to RLA jurisdiction even when they perform functions traditionally performed by carriers.<sup>11</sup>

#### **B. Airway Cleaners Framework Promotes Federal Labor Policy**

The *Airway Cleaners* framework provides predictable results and promotes federal labor policy’s twin goals of industrial stability/labor peace through collective bargaining and employee free choice in the selection of a bargaining representative. These twin goals are common to both the NLRA and RLA, despite significant differences in how the different legislative schemes

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<sup>11</sup> Indeed, a search of NMB cases shows that the term “derivative carrier” did not come into existence until 60 years after the 1934 amendments, first appearing in *Federal Express Co.*, 23 NMB 32, 1995 NMB Ltr. LEXIS 14, \* 47 (1995). Before that time, very few independent contractors were deemed under RLA jurisdiction so there was no need to create a new category of RLA-covered companies.

accomplish the common goals. The RLA's text stresses protecting employees right to organize and to bargain.<sup>12</sup> *E.g.*, 45 U.S.C. § 151a; § 152, Fourth. The "heart" of the RLA is the duty to make and maintain collective bargaining agreements. *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969). The RLA's "provisions are aimed at the settlement of industrial disputes by the promotion of collective bargaining . . ." *Virginian Ry.*, 300 U.S. at 553. The NLRB has the same goals. 29 U.S.C. §§ 151 ("protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce . . . by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees"), 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing . . .").

#### 1. *Airway Cleaners* Provides Predictability

The *Airway Cleaners* restatement of the traditional two-part/six factor test provides much greater predictability. Even though the *Airway Carriers* framework generates different outcomes some NMB opinions, particularly many issued from 1997 to 2011, *Airway Cleaners* does not add to or delete from the NMB's long-standing six factors relevant to the control prong. It does only two things. It sets a measuring stick against which the factors are measured, *viz.*, do the carriers exercise more control over the employer than would be found in a typical independent contractor relationship. And it prioritizes control over personnel decisions and supervision. In the words of the ALJ in *Oxford Electronics*, *Airway Cleaners*, as adopted by the NLRB in *Allied Aviation*,

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<sup>12</sup> Employers may argue that frustrating the right to organize will ensure labor peace by preventing unionization. However, Congress made a diametrically opposed choice so that preventing unionization is contrary to the RLA's purposes as defined by Congress.

sets forth the “Two-Part Test with Emphasis on Control over Personnel.” JD-43-17 slip op. at 18.

Prior to *Airway Cleaners*, the NMB listed the six factors without any clarification of what level of control was significant and without any priority among the factors. The list of factors allowed for differing results on facts that appeared indistinguishable. As the Supreme Court has noted, a totality of the circumstances test without any standards is “not a test at all but an invitation to make an ad hoc judgment.” *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013). “The open-ended rough and tumble of factors” without any priority “can become simply a cloak for agency whim or worse.” *LeMoyné-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (citations omitted). Prior to the *Airway* cases, “it [was] difficult to draw a principled line between the outcomes, particularly under the NMB’s amorphous list of factors.” *Cunningham*, 2010 U.S. Dist. LEXIS 32112 at \*22. Chairman Hoglander made the same observation in his *Airway Cleaners* concurrence, stating that the two-part test had been “applied inconsistently and has the potential to result in a finding of RLA jurisdiction based on a level of indirect control never intended by Congress.” 41 NMB at 273. Without question, the adoption of a measuring stick and assigning relative weight to the six factors improves predictability.

## 2. Airway Cleaners Avoids Frustrating the Purposes of the Act

The result of including independent contractors in RLA jurisdiction has been to severely undermine industrial peace through collective bargaining and employees’ right to freely select a bargaining agent. Independent contractors simply do not fit within the NMB’s election system, and they can be forced into that system only by violating basic principles and creating irrational results.

The NMB will certify only bargaining units that constitute a national, “system wide class of employees.” All employees on an independent contractor within one craft or class must be

included in the bargaining unit regardless of their location. *Aircraft Servs. Int'l Grp.*, 40 NMB 43, 48 (2012); *see also Aircraft Servs. Int'l Grp.*, 31 NMB 508, 515 (2004). The system-wide unit requirement creates an impassable obstacle to organizing contractors' employees and is inconsistent with fundamental representation principles.

PrimeFlight has approximately 5,000 employees employed at over 45 airports. DDE at 2. Independent contractors frequently have accounts with more than one carrier at any given airport. Their contracts with any given carrier rarely extend to all of the carrier's business throughout the country. Contractors often provide widely differing services at different airports. Contractor employees may fall into different traditional crafts or classes even at the same airport.

The nation-wide unit, as applied to contractors, is artificial. The RLA's insistence on nation-wide units stemmed from the reality of bargaining among rail unions in the 1920s. Rail unions developed as national organizations with national bargaining units in opposition to locally-organized company unions. *Seaboard Air Line Ry. Co.*, 1 NMB 167, 169, 171 (1940). Airline unions followed this pattern. The NMB's national unit requirement reflected the then-existing reality of railroad collective bargaining: carrier employees working together to staff a single transportation system. *Id.* The nation-wide unit is at odds with reality in the independent contractor context.<sup>13</sup> Airport contractor organizing and bargaining requires the more flexible NLRB community of interest standards, including its presumptive propriety of including all employees in single location units.

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<sup>13</sup> For example, prior to an RLA jurisdiction determination, employees at Dobbs International Services, an in-flight catering services company, were eighty-percent organized under the NLRA, and their bargaining units were airport-specific. *Dobbs Int'l Servs.*, 34 NMB 97, 98 (2007). Ground Services, Inc. performed cleaning, fleet, and passenger-service work at fifteen airports. *Ground Servs., Inc.*, 8 NMB 112, 113, 116 (1980). Four unions represented employees at six airports on an individual airport basis, and employees at nine airports were unrepresented. *Id.* at 116; *see also Aircraft Servs. Int'l Grp.*, 40 NMB 43, 47 (2012) (contractor had "numerous collective-bargaining agreements" with "a number of different unions covering a variety of employees at single airport locations."); *ServiceMaster Aviation Servs.*, 24 NMB 181, 181 (1997) (organized unit of skycaps and wheelchair attendants limited to a single airport).

Imposing the nation-wide unit on independent contractors has resulted in the NMB certifying almost no units of contracted out workers. The handful of certifications involve companies that were previously organized under the NLRA or whose operations were limited to a single airport. See Brent Garren, *NLRA and RLA Jurisdiction over Airline Independent Contractors: Back on Course*, 31 A.B.A. J. Lab. & Emp. L., 77 (2015).

The NMB's units encompass transportation systems. A national unit of outsourced employees who work for many different carriers does not constitute a "transportation system" in any sense of the term. Rather, outsourced employees work for many different airlines which constitute different transportation systems. A dispute in a nation-wide unit between a contractor such as PrimeFlight and its employees would involve dozens of airlines rather than being limited to a single transportation system. Since the RLA permits secondary picketing, such a dispute might result in picketing every major airline in the country.

RLA jurisdiction over contractors stifles collective bargaining even if the employees could successfully organize. Jurisdiction is premised on the carriers' controlling terms and conditions of employment. However, the NMB does not require airlines to collectively bargain with contractor employees. NATIONAL MEDIATION BOARD REPRESENTATION MANUAL § 9.208 (2013). The NMB will not find airlines to be joint employers with contractors. *Int'l Total Servs.*, 20 NMB 537, 543 (1993).<sup>14</sup> The result is that, by definition, unions cannot bargain with the entity that controls key subjects of bargaining.

When the NMB expanded its view of RLA jurisdiction in 1980 and then again in 1997, it no doubt anticipated bringing its dispute resolution procedures and skills to bear for a growing number of employees associated with the air transportation industry. That has not happened.

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<sup>14</sup> There are only two exceptions: *Norwegian Air Shuttle*, 43 NMB No. 21, 2016 NMB LEXIS 9 Apr. 19, 2016)(involving operating crew), and *Ground Service Int'l*, 8 NMB 112, 115-17 (1980).

These employees are not organized. The NMB and its dispute resolution procedures have nothing to do with these employees. The reality is that these workers are left in the shadowlands without access to the NLRA's protections or NMB dispute resolution. This tragic fact is more than sufficient basis to reverse the expansion of jurisdiction.

C. PrimeFlight's Criticism of Airway Cleaners is Not Meritorious

1. Potential Disruption by Strikes Does Not Substitute for Airline Control

PrimeFlight argues that a "modicum" of airline control should suffice to create RLA jurisdiction because a strike by PrimeFlight employees would disrupt air transport. ER Br. at 17. Under the two-part test, a non-carrier may be covered by the RLA only if it *both* performs the traditional functions of a carrier *and* is under carrier control. By focusing only on whether a strike by an employer's employees would impact air transportation, this argument ignores the second part of the test.

The function prong of the two-part test is expressed in the statutory requirement that an RLA employer "operates any equipment or facilities or performs any service (other than trucking service) in connection with transportation . . . of property transported by railroad . . ." 45 U.S.C. § 151, First. Because the work is in connection with transportation, any strike by employees who satisfy the function prong will by definition have an impact on air transportation. Nonetheless, Congress insisted that a second independent requirement be added to the statute, *viz.*, that a non-carrier employer will be covered by the RLA only when it is "directly or indirectly owned or controlled by or under common control with any" carrier. *Id.*

The NMB has declined jurisdiction over employees who play an essential role in air transportation yet are not under airline control. For example, the NMB has declined jurisdiction over employees who fuel aircraft. *AIR BP*, 19 NMB 90 (1991); *Mercury Refueling*, 9 NMB 451 (1982), *Signature Flight Support*, *supra*. The employer at issue in *Allied Aviation* fueled all

aircraft at Newark Liberty Airport, one of the nation's busiest airports. 854 F. 3d at 59. Yet, the D.C. Circuit affirmed NLRA jurisdiction. In *Paulsen v. PrimeFlight*, 216 F. Supp. 3d at 267, the district court rejected the same strike argument, since it emphasizes the “function factor to the detriment of the substantial control factor.”

PrimeFlight may argue that because contracting out is now considerably more widespread than in the 1930's, the RLA should be stretched to cover the typical airline subcontractor. However, Congress has spoken clearly on this issue by twice rejecting RLA coverage of independent contractors. The NMB is not empowered to administratively amend the statute. *See Herzog*, 624 F.3d at 475.

## 2. Airway Cleaners Does Not Improperly Disregard NMB Precedent

PrimeFlight attacks the DDE as abandoning NMB precedent, relying heavily on a misunderstanding of the opinion in *ABM Onsite Servs.-West, Inc. v NLRB*, 849 F.3d 1137 (D.C. Cir. 2017). ER Br. at 16-19. PrimeFlight's claims to the contrary notwithstanding, the *ABM Onsite* court agreed that ABM's Portland airport operations are likely governed by the NLRA under current NMB. The Court did not reject the merits of the *Airway Cleaners* standard but merely found that it was not properly explained. The D.C. Circuit's affirming NLRA jurisdiction in *Allied Aviation* underlines its comfort with the NLRB/NMB's approach. Moreover, the facts of *ABM Onsite* show far more control than the record in the instant matter.

Critically, the D.C. Circuit merely remanded to the NLRB for an adequate explanation of its decision finding NLRA jurisdiction over an airport contractor. The Court did not find that the Board was mistaken concerning jurisdiction. To the contrary, it found that the NLRB “could fairly read recent NMB opinions to require greater carrier control over personnel matters than the record evinced” in *ABM. ABM Onsite*, slip op at 18. The remand merely requires the Board to explain why it has followed more recent NMB cases rather than earlier cases. The NLRB is free

to sustain its decision finding jurisdiction by providing a rationale supporting its purported departure from precedent. *Id.*, slip op. at 19. Nothing in *ABM* suggests that the NLRB's reliance on the *Airway Cleaners* framework is misplaced.

In addition, the facts of *ABM* show far greater carrier control than is present in the instant case. In *ABM Onsite*, the airlines provided all training manuals used by the contractor. *ABM Onsite*, slip op. at 6. Here, however, PrimeFlight provides its own training manuals. In *ABM*, the contractor's employees wore uniforms bearing the logo of the airline consortium. *ABM Onsite*, slip op. at 6. Almost all PrimeFlight employees wear uniforms bearing PrimeFlight's logo, clearly distinguishing them from the airline employees. Perhaps most significantly, the airline consortium in *ABM* exerted much more substantial control over its contractor's personnel decisions. There, the consortium had the right to approve all staffing plans, approve overtime, direct that employees be removed from the contract (seemingly for any reason), and to approve changes in the contractor's "key personnel." *ABM Onsite*, slip op. at 6.

Further, following *ABM Onsite*, D.C. Circuit considered the RLA/NLRA jurisdiction question a second time and upheld the NLRB's conclusion that an airport contractor was an NLRA employer. *See Allied Aviation, supra*. *ABM Onsite* does not provide support for RLA jurisdiction over PrimeFlight at LGA.

Moreover, the 1997-2011 cases were themselves an aberration which disregarded the statutory text, legislative history and prior judicial and agency interpretation of the RLA as discussed above. *Airway Cleaners* adheres to and is consistent with NMB precedent for 40 plus years. The 1997-2011 cases result from an unexplained and improper abandonment of applicable judicial and agency precedent and exceed the authority given by Congress to the NMB.

### III. The Record Shows PrimeFlight's Autonomy From the Airlines

#### A. Carriers Do Not Control The Manner In Which PrimeFlight Does Business

PrimeFlight provides services to many airlines at over 40 airports with approximately 4500 employees. T. 16.<sup>15</sup> Its 150-person headquarters provides marketing, HR, training, safety and other resources to local operations. T. 61-64. PrimeFlight engages in arm's length bargaining in pursuit of its own interests. T. 66-67. It determines the bids it places for work, based on its own determination of its labor costs, profits, administration and other factors. *Id.* It wins and loses work in the open market. *Cf. Reynolds v Northern Pac. Ry. Co.*, 168 F.2d 934, 936-37 (8th Cir.), *cert. denied*, 335 U.S. 828 (1948).

The airlines' contracts stress PrimeFlight's status as an independent contractor whose business operations are outside the control of the carriers. ER-1<sup>16</sup>, Amendment 9, ¶ 3(b); ER-2, ¶ 22.5; ER-4, ¶ 21.5; ER-5, ¶ 7.1; ER-6, ¶ 10; and ER-7, Exhibit B-5, ¶ 4.1 and B-3, ¶ 3.1. Such clauses strongly indicate NLRA jurisdiction. *Allied Maintenance Corp.*, 13 NMB 255, 256 (1986); *Andy Frain Svcs.*, 19 NMB 161 (1992); *Stanley Smith Security*, 16 NMB 379, 381 (1989).

PrimeFlight provides services to six different airlines at LGA alone, with American/US Air providing 60% of the work. Performing services for multiple carriers is a significant indicator of NLRA jurisdiction. *Air Serv*, 39 NMB at 479; *Marriott In-Flight Services*, 171 NLRB at 752. The Employer's independence is particularly clear when employees interchange among different airline accounts with no change in pay, uniforms or other terms of employment. *Id.* at 8. PrimeFlight's employees frequently switch among airline accounts depending upon

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<sup>15</sup> References to the hearing Transcript are denoted as "T.-" followed by the page number.

<sup>16</sup> References to Employer Exhibits at the hearing are noted as "ER-", Petitioner's Exhibits are noted as "Pet-" and Board Exhibits are noted as "Bd-".

demand, T. 27, and PrimeFlight's job descriptions are uniform regardless of airline. T. 80; Pet.-3. PrimeFlight equipment is also used interchangeably among airlines. T. 173.

PrimeFlight determines how the work is performed, while the carriers merely specify what services are needed. T. 18. PrimeFlight provides detailed training manuals for all its operations that are as detailed as the wheelchair training manual. T. 88; Pet-4. PrimeFlight has its own cabin cleaning procedures it markets to airlines. Pet. 7. PrimeFlight is much like the employer in *Miami Aircraft Support*, 21 NMB 78, 82 (1993), which was found to be an NLRA employer because it was an "independent company" which gained work through a competitive bidding process and controlled its own budget and profit or loss.

B. Carriers Have Limited Access to Operations and Records:

Carriers have much less access to PrimeFlight's records and operations than many employers under NLRA jurisdiction. *E.g., Menzies, supra; Bags, supra.* The American and US Air contracts do not provide for *any* carrier access to or audits or PrimeFlight's records or operations. ER-1; ER-7. The JetBlue contract provides a right of access that has not been utilized, T. 54-55; and the same contract at JFK Airport underlay NLRA jurisdiction as found by both a District Court Judge and an ALJ.

C. PrimeFlight Controls All its Own Personnel Decisions:

PrimeFlight completely controls its own hiring. T. 17. Its Employee Handbook applies regardless of airline, contains comprehensive, detailed personnel policies, and contains no reference to airline control. T. 69-70; Pet.-1; *cf. Air Serv Corp.*, 39 NMB at 453-54. PrimeFlight sets its own wage rates and benefit package. T. 17, 51, 67-68; Pet. 1, §§ 301 et seq. It promotes, demotes, assigns workers to shifts, schedule and job duties on its own. T. 18.

PrimeFlight makes disciplinary decisions based on its own rules and procedures. T. 109; Pet- 1, §§ 701 et seq.; *cf. Ogden Aviation Services*, 23 NMB 98, 103-07 (1996) (contractor's own

disciplinary procedure shows independence). PrimeFlight discharged involuntarily 129 employees in the last year. Pet-5. PF presented no evidence that any airline played a role in any of these discharges. PrimeFlight also discharged Crystal Brewington. ER-8.<sup>17</sup> While an airline initiated a complaint about Ms. Brewington, it asked for her removal from the account, not her discharge. *Id.*; T. 144. PrimeFlight Vice-President Barry, in consultation with PrimeFlight local management and HR, decided to discharge based on PrimeFlight's own policies, including the seriousness of the offense and PrimeFlight's probationary policy. Pet-1, § 205; T. 144-45. The mere right to have employees removed from an account is typical and does not create RLA jurisdiction. *Dobbs Houses, Inc. v. NLRB*, 443 F.2d 1066, 1069-70 (6th Cir. 1971) (NLRA contractor made its own decision to discharge employees on 10 occasions, allegedly at the carriers' request); *Ogden Aviation Services*, 20 NMB 181, 188-89 (1993) (NLRA employer even though carrier had right to have employees removed); *Miami Aircraft Support*, 21 NMB 78, 82 (1993); *Ebon Services International*, 13 NMB 3 (1985).

In decisions applicable to this matter, the NMB rejected jurisdiction because the contractor "pays all wages and benefits" and "directly supervise[s] the employees, impose[s] discipline and do[es] the hiring and firing." *Dynamic Science, Inc.*, 14 NMB 206, 206 (1987). *See also CFS Air Cargo, Inc.*, 13 NMB 369, 369 (1986) (NLRA employer because it "pays the employees and provides the benefits" and the airlines have "no control over hiring or firing").

D. PrimeFlight Supervises its Employees.

No service contract gives a carrier supervisory authority over PrimeFlight employees. Most specify that PrimeFlight has supervisory responsibility and emphatically and categorically deny any carrier role in supervision. ER-1, Amendment 9 & 11 ¶ 3(b) (airline has "no supervisory authority"); ER-2, ¶ 9.1 & 9.3; ER-5, ¶ 7.1; ER-6, ¶ 7& 8; ER-7, Exhibit A-3, ¶ 4.1.

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<sup>17</sup> For an unexplained reason, Brewington does not appear in ER-8.

PrimeFlight has a fully articulated supervisory structure. Pet-2; *see Flight Terminal Security*, 16 NMB 387 (1989) (fully developed supervisory structure counter-indicates RLA jurisdiction).

PrimeFlight assigns employees their jobs and determines their shifts and schedules. T. 18. *See Air Serv*, 39 NMB at 453 (contractor found to be NLRA employer although carriers determined when shuttle buses operate, but contractor assigned drivers to particular routes).

The carriers determine when PrimeFlight must perform its services and how much of the service is to be performed, as is typical in any subcontractor relationship, but this is not jurisdictionally significant. *Bags, Inc.*, 40 NMB at 167 (NLRA employer had daily calls with carrier to discuss issues such as staffing).

E. Branded as PrimeFlight Employees:

All PrimeFlight employees must display ID badges announcing their employment by PrimeFlight. T. 110. The overwhelming majority wear uniforms bearing the PrimeFlight logo. Only a handful of employees on the American account (about 25 baggage service office employees, about 15 priority parcel and some skycaps out of over 600 employees) wear airline uniforms.

F. PrimeFlight Controls Training:

PrimeFlight controls and performs much of the training of its employees. Many of the service contracts make PrimeFlight responsible for training. ER-2, ¶ 8.6, 8.7, 8.8; ER-3, ¶ 1.1.1; ER-4, ¶ 19.1.6 & 19.2.6; and ER-5, ¶ 2.3. PrimeFlight gives common initial classroom and on-the-job training to all its employees regardless of airline. T. 59-60. All employees are trained on wheelchair operation using PrimeFlight's 37-page Wheelchair Assistance Training Manual, Pet. 4, T. 85.

The airlines provide the content for some training to certain employees, much of which is required by laws and regulations. T. 89-90. A carrier ensuring that its contractors comply with

government mandated training is not jurisdictionally significant. *Bags, Inc.*, 40 NMB at 166 (carriers providing government required training including dangerous goods and hazmat, does not create RLA jurisdiction); *Miami Aircraft Support*, 21 NMB at 81 (same).

G. The 2007 NMB Decision is Not Controlling

Neither the earlier NLRB decision concerning PrimeFlight at LGA, *PrimeFlight Aviation Servs.*, 353 NLRB 467 (2008), nor the NMB's Advisory Opinion, *PrimeFlight Aviation Services, Inc.*, 34 NMB No. 33 (2007), is applicable to current facts or law. *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010) abrogated the two-member NLRB decision. *Masonic Temple Association of Detroit and 450 Temple, Inc.*, 364 NLRB No. 150, slip op. at 1 n.1 (2016).

Changes in material facts may result in a different jurisdictional outcome. *D & T Limousine Service, Inc.*, 320 NLRB 859 (1996). Just as the RD in *Menzies Aviation (USA), Inc.*, Case No. 19-RC-17701 (DDE, 7/26/16) found NLRA jurisdiction despite an earlier contrary NMB Opinion, material changes in the facts since 2007 sustain NLRB jurisdiction in the case at bar. When applying a multi-factor test that examines the totality of the circumstances, "minor differences in the underlying facts might justify different findings." *North American Soccer League v. NLRB*, 613 F.2d 1379, 1382 (5th Cir. 1996), *cert. denied*, 449 U.S. 899 (1980) (in context of joint employer determination). *See also Carrier Corp. v NLRB*, 768 F.2d 778, 781 n.1 (6th Cir. 1985). The differences here are extensive and central rather than minor.<sup>18</sup>

American Repudiated Any Control: American eliminated any argument that PrimeFlight LGA was under RLA jurisdiction in 2015 by dramatically changing its contract with PrimeFlight. ER-1, Amendment 9, ¶ 3(b). Paragraph 3(b) gives total and exclusive control over

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<sup>18</sup> These changes include different customers. PF no longer works for AirTran Airways, American Trans Air, Continental, and Midwest, but now services Southwest. The 2007 Opinion does not include many of the job categories that are present today, including the 69 cabin cleaners and cleaning dispatchers, 23 terminal cleaners, 118 customer service agent, 14 electric cart drivers, and 7 shuttle bus drivers. Board Ex-2, Statement of Position. The 2007 workforce was approximately 400, 34 NMB No. 33 at\* 4, while the workforce today is approximately 628. Bd-2, Statement of Position.

supervisory and personnel decisions to PrimeFlight, including “the right of control and the right to select, hire, assign, direct, train, promote, terminate, set compensation and benefits, and maintain all employment records.” It specifically disavows any supervisory authority for American and prohibits communication between American and rank and file PrimeFlight employees. Identical language appears in the 2016 amendments to the US Air contract, ER-7, Sixth Amendment to Skycap Services, Specification of Services, ¶ 4.1; Ticket Checker Services, Exhibit B-3, ¶ 3.1. Nothing even vaguely similar appeared in the PrimeFlight contracts at issue in 2007. This emphatic repudiation of carrier control over 60% of PrimeFlight’s operations creates a chasm between today and the 2007 Opinion, compelling a finding of NLRA jurisdiction.

Assignments and Transfers: In 2007, the NMB stressed that the carriers “determine specific assignments or transfers” of PrimeFlight employees and “make all decisions regarding changes in daily assignments.” 34 NMB No. 33 at \*10, \*13-14. In the instant case, in contrast, Matt Barry testified that PrimeFlight decides when it needs to shift resources from one airline to another and which resources it will shift. T. 82. PrimeFlight stipulated that it made decisions on specific assignments of specific workers to their shifts, schedules and assignments, not the carriers. T. 18.

Staffing: In 2007, the NMB found that the carriers gave PrimeFlight specific allocations of hours of work on a yearly basis and that all carriers determined staffing levels for all job classifications. 34 NMB No. 33 at \*9. Today, only certain carriers allocate hours for certain positions. American is billed on a “per passenger” basis for its largest job categories, including bag handler, baggage service agent, line queue and wheelchair agent.. ER-1, Pricing Schedule, Amendments 11-13. PrimeFlight has several “static” positions that are staffed at the same level irrespective of an airline’s traffic on a particular day. T. 49-50. JetBlue bills on a “per turn”

basis and does not allocate hours. T. 46-47. The contracts with Air Canada, ER-3, Frontier, ER-4, and Spirit, ER-5 do not authorize the airlines to allocate hours, even though they bill on a per labor hour rate.

Training: In 2007, the NMB found that all employees received airline training, one-half directly from the airlines and one-half through airline trained personnel. 34 NMB No. 33 at \*7-8. The NMB Opinion does not reflect any training by PrimeFlight using PrimeFlight materials. However, the instant record shows extensive training by PrimeFlight, using PrimeFlight materials, including PrimeFlight training manuals for every job performed and on the job training that can take up to one week. T. 143. Many employees testified that they were never trained by the airlines. T. 176-186.

Wages: In 2007, the NMB highlighted that the carriers set per-hour prices for “each service, which affects wage amount.” 34 NMB No. 33 at \*4. However, American does not set per hour rates for most PrimeFlight employees. ER-1, Ex. A, Attachment 2.4. JetBlue does not bill per hour.

Discipline: The NMB found that the carriers determined “when and if they [did] not want a particular employee working for them.” 34 NMB No. 33 at \*10. Now, JetBlue does not have authority to have employees removed except in two very limited circumstances. ER-2, 7.6 and Statement of Work, No. 2, Skycap Services, ¶ 5 (removal from skycap services only, not account). US Air, ER-7, Air Canada, ER-3 and Spirit, ER-5, have no authority to remove PrimeFlight employees. This very limited removal right is consistent with the evidence of actual practice discussed above.

Equipment: In 2007, the NMB relied on its finding that the carriers provide the “bulk of PrimeFlight’s equipment.” 34 NMB No. 33 at \*11. This is not true today. ER-15 lists all the equipment provided by the carriers. T. 142. It includes only certain equipment from American

and Southwest; none from other carriers. Other carriers require PrimeFlight to supply all the equipment needed. ER-2 §§ 9.1, 9.5; ER-3 § 1.1.3; ER-5 § 1.4. PrimeFlight provides the critical software package, SynTrack (now known as Watershed), and the tablets that use it for wheelchair dispatch and staffing purposes, to all its customers. T. 94. Southwest requires PrimeFlight to provide radios and tablets. ER-6 § 13. US Air's contract requires PrimeFlight to supply SynTrack. ER-7, Exhibit B-5, 1.2 and 1.2.1. PrimeFlight's marketing material highlights SynTrack's advantages. P-6; P-8. PrimeFlight supplies buses/vans for American's shuttle operation and buffers, vacuums and luggage carts for Southwest. PrimeFlight presumably provides the equipment omitted from ER-15, such as office and training equipment. These critical factual distinctions compel a different conclusion than that reached in the 2007 Advisory Opinion and the Board's abrogated adoption of it.

Furthermore, the NMB and NLRB's jurisdictional analysis has shifted significantly since 2007. Such an intervening change justifies a re-examination of jurisdiction. *Fayette Electrical Cooperative, Inc.*, 316 NLRB 1118 (1995).

#### **IV. The NLRB Should Decide This Matter Without Referral to the NMB:**

The NLRB should decide the instant case because it is factually similar to a long line of cases in which the NMB has declined jurisdiction. *See Spartan Aviation Industries*, 337 NLRB 708 (2002). Current Board law is clear and correctly reflects Congressional intent. *ABM Onsite* requires only that the Board explain why it has adopted this correct standard. The NLRB seeks to resolve questions concerning representation as expeditiously as possible. Referral to the NMB would involve enormous delay, as the NMB has extremely limited resources and prioritizes other tasks, such as preventing strikes, in accordance with its statutory mission.

## V. CONCLUSION

The record here is exceptionally devoid of evidence of carrier control. PrimeFlight is an independent business. There is no evidence of carrier control over personnel decisions or supervision. The paltry evidence of carrier access to records or control over training and uniforms is clearly no greater than the typical carrier-contractor relationship. The Regional Director should direct an election in this particularly clear case of NLRA jurisdiction.

Dated: August 22, 2017

Respectfully submitted,

Service Employees International Union,  
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## CERTIFICATE OF SERVICE

The undersigned, counsel for the Petitioner, certifies and attests that he caused a copy of the attached **PETITIONER SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 32BJ'S BRIEF IN OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**, to be served on the following individuals by electronic mail delivery on August 22, 2017:

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