

No. 17-442

2017 SEP 27  
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In the  
**Supreme Court of the United States**

ALLIED AVIATION SERVICE COMPANY  
OF NEW JERSEY,

*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**PETITION FOR A WRIT OF CERTIORARI**

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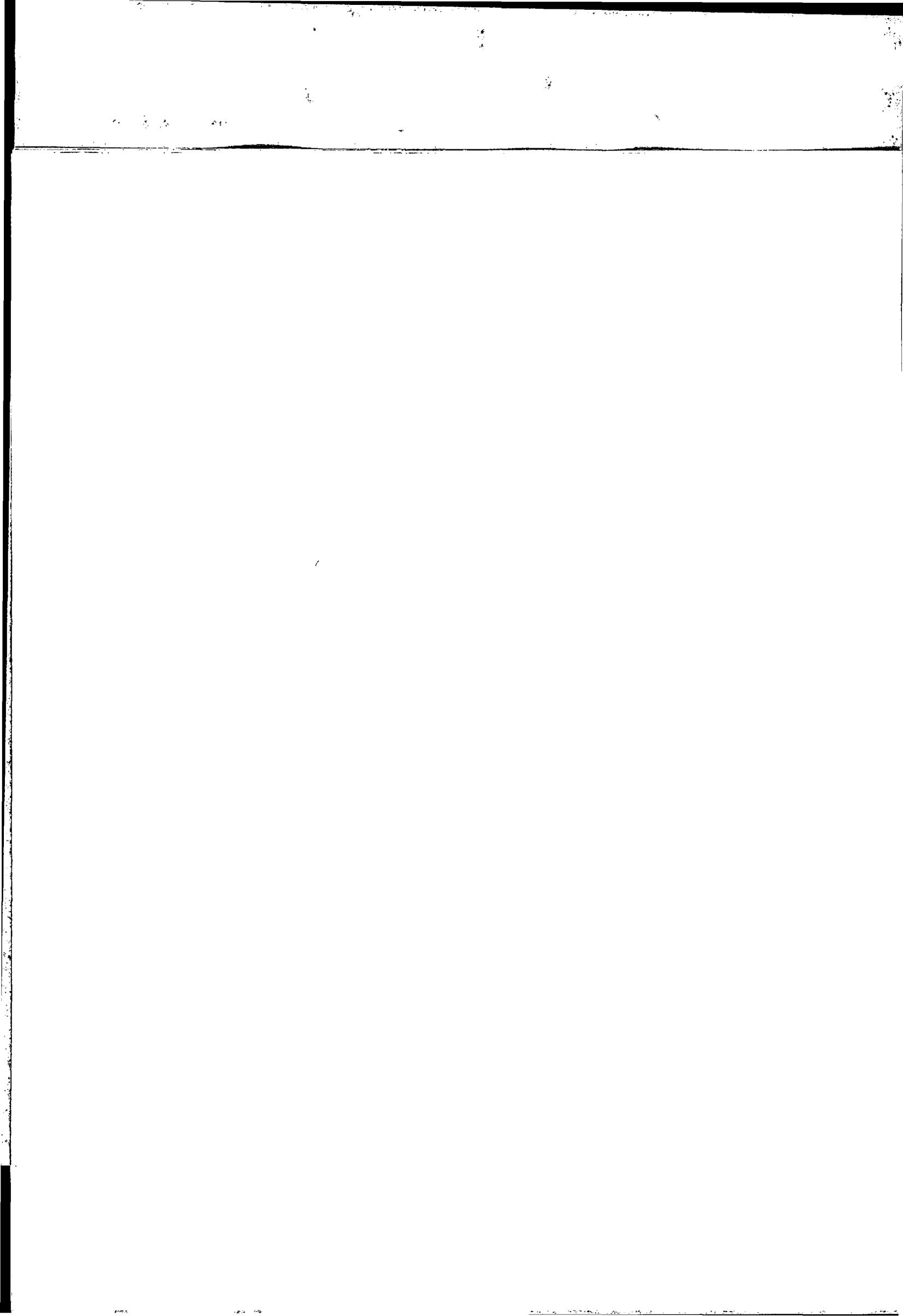
## QUESTIONS PRESENTED

This case involves a challenge to the National Labor Relations Board's authority over an airline fueling service company, which is the sole fuel supplier to the commercial and cargo carriers operating out of Newark Liberty International Airport. The questions presented by the appeal are:

(a) Whether the NLRB improperly departed from the longstanding two-part "function and control test" established by the NMB and reaffirmed by various circuit courts to determine whether an employer, that is not itself a carrier, is sufficiently controlled by a carrier to be subject to RLA jurisdiction and exempted from NLRA's jurisdiction.

(b) Whether the NLRB's assertion of jurisdiction based on a statute under which it was not delegated any authority should be subject to a *de novo* standard of review.

(c) Whether the D.C. Circuit improperly shifted the burden of establishing the NLRB's jurisdiction to petitioner, and in so doing determined that petitioner waived its un-waivable right to challenge the NLRB's jurisdiction.



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**PETITION FOR A WRIT OF CERTIORARI**

Petitioner, Allied Aviation Service Company of New Jersey (“Allied”) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Allied Aviation Serv. Co. of NJ v. NLRB*, Case Nos. 15-1321 and 15-1360.

**OPINIONS BELOW**

The opinion for the United States Court of Appeals for the District of Columbia Circuit is published at 854 F.3d 55 (D.C. Cir. 2017), and a copy is attached as Appendix (“App.”) A.

A petition for rehearing and rehearing en banc of Petitioner Allied was denied by the United States Court of Appeals for the District of Columbia Circuit on June 23, 2017. This decision has not been published in the federal reporter. A copy of this decision is attached as App. B.

**STATEMENT OF JURISDICTION**

The Court of Appeals for the District of Columbia Circuit filed its opinion on April 18, 2017 and Petitioner’s Petition for Rehearing En Banc was denied on June 23, 2017. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

**STATUTES INVOLVED**

This case involves provisions of the National Labor Relations Act (the “NLRA”), 29 U.S.C. §151 *et seq.* The pertinent provisions are reproduced below:

employer risks crippling the nation's transportation system.

The question of whether a company is controlled by a common carrier is one that the National Mediation Board ("NMB"), which is the agency charged with administering the RLA, and the National Labor Relations Board ("NLRB"), which is the agency charged with administering the NLRA, have radically redefined – without explanation – since 2013. Traditionally both agencies applied a two prong "function and control test," in which the agency or court considers "(1) 'whether the nature of the work is that traditionally performed by employees of rail or air carrier,' or (2) 'whether the employer is directly or indirectly controlled by, or under common control with a carrier or carriers.'" *Allied Aviation Serv. Co. of New Jersey v. NLRB*, 854 F.3d 55, 61 (D.C. Cir. 2017); see also *ABM Onsite Servs.-W., Inc. v. NLRB*, 849 F.3d 1137, 1142 (D.C. Cir. 2017); *Roca v. Alphatech Aviation Servs., Inc.*, 960 F. Supp. 2d 1368, 1372 (S.D. Fla. 2013); *Dist. 6, Int'l Union of Indus. v. Nat'l Mediation Bd. of U.S.*, 139 F. Supp. 2d 557, 561 (S.D.N.Y. 2001).

The NMB up until 2013-2014, and by extension the NLRB and courts, applied a six-factor test when considering the control prong of the "function and control" test, *to wit*:

- (1) the extent of the carrier's control over the manner in which the company conducts its business;
- (2) the carrier's access to the company's operations and records;
- (3) the carrier's role in the company's personnel decisions;
- (4) the degree of carrier supervision of the company's employees;
- (5) whether company employees are held out to

the public as carrier employees; and (6) the extent of the carrier's control over employee training.

*ABM Onsite Servs.-W., Inc. v. NLRB*, 849 F.3d 1137, 1142 (D.C. Cir. 2017).

However, starting in and around 2013, the NMB "[i]n a clear departure from precedent...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." *ABM Onsite*, 849 F.3d at 1144, citing *Re: Huntleigh USA Corp.*, 40 NMB 130, 137 (Feb. 20, 2013). The D.C. Circuit in its decision in *ABM Onsite*, decided just a month prior to its decision in *Allied Aviation*, which is the subject of this petition, rejected the NLRB and NMB's unreasoned and unexplained change in precedent as arbitrary and capricious. *Id.* at 1147.

In contrast to its reasoned decision in *ABM Onsite*, the D.C. Circuit in *Allied Aviation* upheld the NLRB's assertion of jurisdiction, on the erroneous finding that the NLRB in rendering its determination did not place an outsized emphasis on the carrier's role in personnel decisions. *Allied Aviation*, 854 F.3d at 63.

The D.C. Circuit's determination that the NLRB did not apply the single-factor "meaningful control over personnel decisions" test when asserting jurisdiction over *Allied*, is contradicted by current precedent in the Second Circuit, which specifically relies on the NLRB's underlying determination in *Allied Aviation Serv. Co. of New Jersey & Local 553, Int'l Bhd. of Teamsters, AFL-CIO*, 362 NLRB No. 173 (Aug. 19, 2015), for the proposition that there has been a change in the NMB's precedent since 2013 to require evidence of carrier control over personnel decisions, in order for

there to be sufficient amount of carrier control for the company to be covered by the RLA. See *Paulsen v. PrimeFlight Aviation Servs., Inc.*, 216 F. Supp. 3d 259, 266 (E.D.N.Y. 2016). The District Court's determination in *Paulsen* has been appealed to the United States Court of Appeals for the Second Circuit. See Second Circuit Case Nos. 16-3877 and 17-008. In support of the District Court's determination, the NLRB in its brief to the Second Circuit has specifically cited to the NLRB's decision in *Allied Aviation*, to support the proposition that the NMB and NLRB has shifted its precedent since 2013, and now requires a heightened level of control from the carrier before the NMB will assert jurisdiction.

There is now a split in precedent in the D.C. Circuit and precedent in the Second Circuit regarding the factors that must be considered to determine whether a company is directly or indirectly controlled by a common carrier, such that it is an "employer" under the RLA, 45 U.S.C. §151(1), and thereby exempt from the requirements of the NLRA and outside the jurisdiction of the NLRB.

This petition further involves questions regarding the standard of review that should be applied to an agency determination over a statute that is outside of its delegated authority. The D.C. Circuit, in upholding the NLRB's decision that it had jurisdiction applied a substantial evidence standard of review. However, the statute at issue, the RLA, is outside the NLRB's delegated authority. Therefore, when reviewing the NLRB's determination, the D.C. Circuit should have applied a *de novo* standard of review.

Additionally, this action involves questions regarding whether an employer may waive its right to contest the NLRB's jurisdiction. During its fact-finding administration the NLRB, beyond a passing question, made no inquiry into whether and to what extent Allied is controlled by the airline carriers at Newark Airport. Despite the NLRB's failure to develop any record regarding carrier control (or the lack thereof), the D.C. Circuit erroneously shifted the burden of establishing the record of carrier control on Allied, and then determined that the record regarding carrier control being undeveloped, upheld the NLRB's flawed assertion of jurisdiction. This is a departure from Supreme Court precedent in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49-50, 58 S. Ct. 459, 463, 82 L. Ed. 638 (1938), which determined that it is the NLRB's burden to establish its jurisdiction. By improperly shifting the burden of establishing the NLRB's jurisdiction on Allied, the D.C. Circuit's holding stands for the unprecedented determination that Allied waived the un-waivable right to contest the NLRB's jurisdiction. See *Allied Aviation*, 849 F.3d at 62.

## STATEMENT OF FACTS

Petitioner Allied is the sole source of fueling services to the commercial airlines and cargo services operating out of Newark Liberty International Airport ("Newark Airport"). (App. E at 4). Approximately 50 airlines including the nation's largest, American Airlines, United and Delta,<sup>1</sup> operating 40 different types of aircraft operate out of Newark Airport. *Id.* at 5. The airport operates 24 hours a day, 7 days per week, 365 days per year. *Id.* Allied operates in shifts to ensure full coverage each day. *Id.*

Allied dispenses 2-3 million gallons of airplane fuel per day, utilizing tanker trucks driven by Allied's fuelers, and through a system of pipeline, which is comprised of approximately 85 miles of pipelines that terminate in 500 separate fueling hydrants, also maintained by Allied. *Id.* Allied also maintains a wastewater facility. *Id.*

Allied's Training Department is responsible for training new recruits and existing employees on how to fuel aircraft. *Id.* Each airline and aircraft requires separate training and certification to each fueler. *Id.* at 5, 7. Allied's fuelers can only work for the airlines for which they are individually certified. *Id.* at 7. Training takes between three to four weeks to complete. *Id.* at 10. It takes approximately 400 hours to train an Allied fueler to work for all airlines operating at Newark Airport. *Id.* at 10. Any issues

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<sup>1</sup> A list of all airlines operating out of Newark Airport is available at: <https://www.panynj.gov/airports/ewr-airlines.html> (last visited 13 Sept. 2017).

with training are reported to the airlines, FAA and Port Authority (who owns the airport). *Id.* at 6.

Each day the airlines set out a daily schedule of their departure times, gates and fuel requests. *Id.* at 7. The airlines' requests and schedules are utilized by Allied's supervisors and dispatchers to assign Allied's fuelers to work at a particular gate, or airline during their assigned shift. *Id.* The airlines provide Allied's Fueling Supervisors with updates on their fueling needs, and Allied's fuelers are then reassigned to different jobs to ensure that the airline's fueling needs are fulfilled. *Id.* Updates are relayed to the airlines by Allied's Fueling Supervisors throughout each shift. *Id.*

At the conclusion of each shift, Allied's Fueling Supervisors contact each airline to determine whether there were any delays. *Id.* at 10. If any airline is delayed, even by a few minutes, the attending Allied Fueling Supervisor issues a delay report. *Id.* Delay reports are referred to either the Duty Manager or to a Hearing Officer, who then investigates the occurrence, and, where appropriate, institutes the five-step progressive disciplinary procedure. *Id.* at 10-11.

### *Petition For Bargaining Representative*

On March 20, 2012, Local 553, International Brotherhood of Teamsters ("Union") filed a petition to represent a unit of all full-time and regular part-time Fueling Supervisors/Dispatchers/Operations Supervisors/Maintenance Supervisors, Farm Tank Supervisor and Training Supervisors. *Id.* at 1. Following a four day hearing, where the Hearing Office deferred the question of jurisdiction and made no detailed factual findings as to the NLRB's jurisdiction, the Hearing Officer determined that the

NLRB had authority under Section 3(b) of the NLRA to oversee the proceeding, and rejected Allied's contention that the petitioned for unit were supervisors exempt from the Act. *Id.* at 2-3. While the Hearing Officer during the hearing questioned whether Allied was under direct or indirect carrier control and subject to the RLA, he deferred the jurisdiction question, and made no further factual inquiry into the issue beyond a cursory question to a lay witness.<sup>2</sup>

With the record regarding RLA jurisdiction undeveloped, and with no determination having been made regarding whether Allied was subject to the NLRA or RLA, the Regional Director directed a secret

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<sup>2</sup> A review of the NLRB Guide for Hearing Officers, which has been in effect since 2003, and was in effect at the time the hearing was held in 2012, evidences that the Hearing Officer was required to do more than just a cursory inquiry into whether there was direct or indirect carrier control. See The NLRB Hearing Officer Guide at 46-47, available at: [https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/hearing\\_officers\\_guide.pdf](https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/hearing_officers_guide.pdf) (last visited 13 Sept. 2017). The NLRB Hearing Officer Guide sets forth a series of issues, which the hearing office needs to resolve, to determine whether a hearing should be held at the Regional Office Level to render a determination regarding the application of the RLA, or to determine whether the matter should be referred to the NMB for an advisory opinion regarding RLA jurisdiction. *Id.* For parties that may be directly or indirectly controlled by a common carrier, the NLRB Hearing Officer Guide provides two separate set of factors – one for companies directly control by air carriers, and one for companies which may be indirectly controlled by air carriers. See Office of General Counsel, Division of Operations-Management Memo 90-83, available at: <https://www.nlr.gov/reports-guidance/operations-management-memos> (last visited 21 Aug. 2017). Notably, ability to “hire or fire employees” is listed only as a factor indicating direct control. *Id.*

ballot election of the petitioned for unit. *Id.* at 28. Allied requested a review of the Regional Director's determination. See App. F. On June 5, 2012, the NLRB, which was improperly constituted as determined by this Court in *NLRB v. Noel Canning*, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014), reviewed the Regional Director's determination, and upheld the Regional Director's Decision, except for the Training Supervisors, and ordered that the election proceed by challenged ballot proceeding, and directed further findings regarding the supervisory status of the training supervisors. See App. F.

On June 7, 2012, the challenged ballot election was held. The vote was 21 votes for representation to 20 votes against representation. App. G at 2. Accordingly, the vote of the three fuel training supervisors would be determinative. *Id.* On October 16, 2012, a hearing was held regarding the status of whether the Fuel Training Supervisors were statutory supervisors under the NLRA. *Id.* On December 3, 2013, the NLRB issued a Decision and Certification of Representation, upheld the recommendation of the hearing officer that the three challenged ballots of the Fuel Training Supervisors were statutory supervisors who were ineligible to vote in the certification election, and certified the Union as the appropriate bargaining unit. App. H. There was no discussion of jurisdiction. *Id.*

On April 22, 2014, after allegedly serving Allied with a demand for bargaining, the Union filed an unfair labor charge alleging Allied violated Section 8(a)(5) and (1) of the NLRA by refusing to bargaining. App. D at 1. On May 6, 2014, the General Counsel of the NLRB filed a complaint against Allied alleging its violation of Section 8(a)(5) and (1) of the NLRA. *Id.*

indirectly owned or controlled by or under common control with any carrier." 45 U.S.C. § 151(1). At issue in this action is the portion of the RLA, which applies to entities that are "directly or indirectly owned or controlled by" a carrier. This is a question, which this Court has not had the opportunity to review. There is a split in precedent between the D.C. Circuit and in the Second Circuit regarding the factors, which should be considered to determine whether an entity is subject to the RLA.

Driving this split in precedent is the D.C. Circuit's erroneous determination in *Allied Aviation*, wherein the D.C. Circuit incorrectly upheld the NLRB's assertion of jurisdiction on the finding that the NLRB correctly applied the traditional six factor test when the NLRB found that Allied – whose sole function is to provide fueling services to the 50 commercial and cargo airline carriers present at Newark Airport – was not directly or indirectly controlled by common carriers and therefore not covered by the RLA. However, the D.C. Circuit's flawed finding is contradicted by a District Court decision pending review before the Second Circuit, in which the District Court, relying on the NLRB's underlying decision in *Allied* applied the single-factor "material control over personnel decision" test, when it found that the NLRB properly asserted jurisdiction over a contractor providing ground services to JetBlue at JFK International Airport. See *Paulsen*, 216 F.Supp.3d at 269. This split between the two circuits has and will continue to cause confusion to labor relations in the nation's transportation systems and undermines Congress's intent of enacting the RLA to work stoppages to the nation's transportation system, and improperly expands the NLRB's reach to include

entities either under the "direct" or "indirect" control of common carriers.

In contrast to the D.C. Circuit's decision in *ABM Onsite*, which resoundingly rejected the NMB's precedents set forth in *Menzies Aviation, Inc.*; *Airway Cleaners, LLC*; and *Bags, Inc.*, and, in contrast to the D.C. Circuit's decision in *Allied Aviation*, which determined that the NLRB did not apply this "new" precedent when it asserted its jurisdiction, the District Court for the Eastern District of New York, in *Paulsen*, 216 F. Supp. at 259, relying heavily on the "new" test cited in the NMB's recent decisions in *Bags, Inc.*, *Menzies Aviation, Inc.*, and *Airway Cleaners*, and the NLRB's underlying decision in *Allied Aviation*, determined that the NLRB properly asserted jurisdiction because although PrimeFlight had demonstrated the presence of the six factors traditionally considered in the "control portion" of the function and control test, where the air carrier had no control over the PrimeFlight's personnel decisions, this was "insufficient to establish jurisdictional control without additional evidence of material control by a carrier." *Paulsen*, 216 F.Supp.3d at 269, citing *Bags, Inc.*, 40 NMB at 165. PrimeFlight has appealed the District Court's decision to the Second Circuit.

The D.C. Circuit's decision in *Allied Aviation* and *ABM Onsite* are now headed for a direct conflict with *Paulsen*. If the Second Circuit adopts the D.C. Circuit's reasoning in *ABM Onsite*, and rejects the application of the "new" test requiring a showing that a carrier have "meaningful control" over personnel decisions, the Second Circuit will be in direct conflict with the D.C. Circuit and the NLRB's stated position in *Allied Aviation*, and the District Court's position in