

No.

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In the
Supreme Court of the United States

ALLIED AVIATION SERVICE COMPANY OF NEW JERSEY,

Applicant,

- v -

NATIONAL LABOR RELATIONS BOARD,

Respondent.

LOCAL 553, I.B.T.,

Intervenor.

APPLICATION FROM THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
(NOS. 15-1321 AND 15-1360)

APPLICATION FOR STAY

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PARTIES TO THE PROCEEDING BELOW

The Applicant is Allied Aviation Services Company of New Jersey.

The Respondent is the National Labor Relations Board.

The International Brotherhood of Teamsters, Local 553 is also a party to the proceeding. It was an intervenor in the court of appeals.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, applicant states that Allied Aviation Services Company of New Jersey is a privately held corporation incorporated in the state of Delaware, and it has no publicly held parent or subsidiary corporations and no publicly held corporations has a 10% or greater ownership interest.

Dated: August 16, 2017

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT AND CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Applicant Allied Aviation Service Company of New Jersey (“Allied”), pursuant to Rule 23 of the Rules of this Court and 28 U.S.C. §2101(f) respectfully seeks an order recalling and staying the mandate or staying enforcement of the D.C. Circuit’s decision in *Allied Aviation Serv. Co. of New Jersey v. N.L.R.B.*, 854 F.3d 55 (D.C. Cir. 2017), which upheld a Decision and Order from the National Labor Relations Board (“NLRB”) (Appendix (“App.”) E), in which the NLRB usurped the authority of the National Mediation Board (“NMB”) and erroneously determined that Allied, the sole fuel service provider to Newark Liberty International Airport (“Newark Airport”) was not a derivative carrier subject to the Railway Labor Act (“RLA”), 45 U.S.C. §151, and compels Allied to commence negotiations with the Local 553, International Brotherhood of Teamsters (“Union”).

Allied applied for a stay to the United States Court of Appeals for the District of Columbia Circuit on July 25, 2017. In an unpublished decision issued on August 11, 2017, the D.C. Circuit denied Allied’s application for a stay. (App. D).

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 App. A.

A petition for rehearing and rehearing En Banc of Allied was denied by the United States Court of Appeals for the District of Columbia Circuit on June 23,

2017, and a copy is attached as App. B. This decision has not been published in the federal reporter. The mandate was issued on July 3, 2017, and a copy is attached as App. C. The D.C. Circuit denied Allied's application for an emergency stay by Order dated August 11, 2017, and a copy is attached as App. D.

JURISDICTIONAL STATEMENT

The final judgment of the United States Court of Appeals for the District of Columbia Circuit on appeal is subject to review by this Court under 28 U.S.C. §1254(1), and this Court therefore has jurisdiction to entertain and grant a request for a stay pending filing of a petition for certiorari under 28 U.S.C. §2101(f).

STATEMENT OF THE CASE

Allied is the only fuel service company at Newark Liberty International Airport ("Newark Airport"), which pumps jet fuel into commercial airplanes, maintains the jet fuel farm where fuel is stored and maintains the equipment that helps Allied transport the fuel and put such fuel into the commercial jets. (App. H at 2-3). Allied's operations at Newark Airport service 50 common air carriers, including the largest airlines in the United States. *Id.* Newark Airport is one of the nation's busiest airports, and a vital commercial and industrial transportation hub. Allied's job is vital to the smooth operation of Newark Airport, and by relation, to commercial airlines all over the United States. Due to the important nature of services provided, the employees at issue who operate and manage the jet fuel system are subject to a rigorous training process, and must pass a detailed background check to obtain security clearance that takes approximately 30 days to

complete. Accordingly, any work stoppage to Allied's fueling operations at Newark Airport would result in a catastrophic situation that would bring transportation on the Northeast, and ultimately, the globe to a halt because planes would be unable to fly in and out of Newark Airport.

The devastating effect that work stoppages have in the transportation industry is precisely why carriers and derivative carriers like Allied covered under the RLA are subject to increased safeguards and protections to avoid strikes and work stoppages during the labor negotiation process. See *ABM Onsite Servs.-W., Inc. v. Nat'l Labor Relations Bd.*, 849 F.3d 1137, 1139 (D.C. Cir. 2017) (remarking that "[c]oncerned, however, that labor strife in the railway and airline industries could disrupt commerce nationwide, Congress expressly carved out these industries, which were already covered by the Railway Labor Act, from coverage under the NLRA framework when it passed the NLRA."). These are precisely the protections that Allied is deprived of as a result of the D.C. Circuit's erroneous decision that Allied waived its un-waivable right to contest the NLRB's jurisdiction and upheld the NLRB's unreasoned finding of jurisdiction.

The NLRB and the Union are now attempting to require posting and negotiations well before Allied's time to seek certiorari expires, under penalties of contempt.

Given the important issues raised regarding labor harmony in the nation's transportation system, the fact that there is clear error in the D.C. Circuit Court's decision; with the D.C. Circuit having applied the incorrect standard of review and

having improperly abdicated the Board's obligation to establish its jurisdiction, and the fact that Allied (and the global transportation system) will suffer irreparable injury in the event that the D.C. Circuit's decision is not stayed, Allied respectfully requests a recall and stay of the D.C. Circuit's mandate, or a stay of enforcement of the D.C. Circuit's April 18, 2017, decision pending certiorari.

PROCEDURAL HISTORY

Proceedings before the NLRB

The Union filed an NLRB petitioned for an election seeking certification as the bargaining representative for all full-time and regular part-time Fueling Supervisors/Dispatchers/Operations Supervisors, Maintenance Supervisors (including Parts Supervisors and Parts Person), Farm Tank Supervisors and Training Supervisors employed by Allied. (App. H at 1).

On March 20, 2012, an NLRB hearing was held before Hearing Officer Frank Flores. Concerned that Allied might be subject to RLA jurisdiction, Hearing Officer Flores briefly questioned Rory McCormack, Allied's supervisor at Newark whether Allied was subject to the Railway Labor Act. (App. H. at 2). No further information was sought by the NLRB as to whether Allied was subject to RLA jurisdiction and the issue was not addressed by the NLRB again until June 2014. (App. E at 1-2).

On May 7, 2012, the NLRB issued a Decision and Direction of Election finding that the employees in the petitioned-for-unit were not statutory "supervisors" under Section 2(11) of the National Labor Relations Act ("NLRA"), who are exempt from the NLRA's protections. (App. H). On June 5, 2012, over

Allied's opposition, the Board ruled that all of the petitioned-for employees were not excludable supervisors under the NLRA, except Allied's Fuel Training Supervisors, who were permitted to vote through the Challenged Ballot procedure. (App. G).

On June 7, 2012, the NLRB conducted an election. Without counting the three ballots cast by Allied's Fuel Training Supervisors against certification, the employees voted 21-20 for union representation. (App. E at 2). Thereafter, the NLRB certified the Union and the Union served upon Allied a request for recognition and bargaining. Allied objected to the NLRB's improper certification. The Union filed an unfair labor practice charge against Allied for its refusal to bargain. *Id.*

On May 6, 2014, the NLRB issued a Complaint against Allied for refusing to recognize and bargain with the Union. (App. E at 1). Allied filed its Answer, denying any violation of the NLRA and asserting that the Union was improperly certified. *Id.* Thereafter, the NLRB's General Counsel filed a motion for summary judgment. *Id.*

On June 30, 2014, Allied filed its response by asserting that the NLRB lacked jurisdiction under the NLRA and Allied was, in fact, subject to RLA jurisdiction. Thereafter, the NLRB issued its August 19, 2015 Order ("2015 Order"), *Allied Aviation Serv. Co. of N.J.*, 362 NLRB No. 173 (Aug. 19, 2015), which is the subject of this petition. (App. E).

In its 2015 Order, finding against Allied the NLRB improperly disregarded the longstanding six-factor test, restated in *ABM Onsite*, 849 F.3d at 1142, to

determine whether an employer is under the requisite control of an air carrier to warrant RLA jurisdiction, and instead focused on one factor, whether Allied's carriers had "meaningful control over personnel decisions" as dispositive of RLA jurisdiction. (App. E at 1). Further, the NLRB erroneously found that Allied "does not argue that the airlines at Newark exercise 'meaningful control over personnel decisions' and the record contains no such evidence." (App. E at 2). The NLRB also erroneously found that the elements of control identified by Allied are "no greater than that found in a typical subcontractor relationship," which the NMB found in *Menzies Aviation*, 42 NMB at 7, to be insufficient for establishing RLA jurisdiction. (App. E at 2). Moreover, the NLRB makes the conclusory assertion that "the evidence of carrier control in the instant case also falls substantially short of the considerations relied upon in Member Geale's dissents" in *Airway Cleaners*, 41 NMB at 262 and *Menzies Aviation, Inc.*, 42 NMB at 1, without discussing or addressing the considerations to which it was referring or otherwise applying the record evidence to the six-factor test for determining whether the requisite control of an air carrier exists to warrant a finding of RLA jurisdiction. (App. E).

Proceeding Before The D.C. Circuit

Allied petitioned the D.C. Circuit to review the NLRB's 2015 Order, and the NLRB submitted a cross-application to enforce such Order. Allied contends that the NLRB's 2015 Order (App. E at 1) and December 3, 2013 Certification (App. F) are nullities because Allied is exempt from the NLRA as an employer subject to the

RLA and the NLRB lacked statutory jurisdiction over Allied when it issued said Order and Certification.

On April 18, 2017, the D.C. Circuit issued an erroneous decision denying Allied's petition for review and granting the NLRB's cross-application for enforcement. (App. A). While not ignoring *ABM Onsite*, the D.C. Circuit distinguished this case from *ABM Onsite* in an incorrect and confusing manner for future precedential use. (App. A).

On June 2, 2017, Allied filed a petition requesting a rehearing and rehearing *en banc*. On June 23, 2017, the D.C. Circuit denied Allied's request for rehearing and rehearing *en banc*. (App. B). On July 3, 2017, the D.C. Circuit issued a mandate to the NLRB. (App. C).

On July 18, 2017, the NLRB issued a demand that Allied commence the bargaining process on or before August 4, 2017. Additionally, the Union sent a request for bargaining. These requests were issued despite the fact that Allied has until September 21, 2017 to request the Supreme Court's review of the D.C. Circuit Court's decision. Although Allied requested that the NLRB and Union stipulate to stay the bargaining process until the Supreme Court renders a determination on its petition for certiorari, the Union and NLRB refused. Allied filed an application with the D.C. Circuit, to request a stay on July 25, 2017. On August 11, 2017, in an unpublished decision, the Circuit Court denied Allied's application and declined to issue a stay. (App. D).

REASONS FOR GRANTING A STAY

It is well established that “as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal.” *Nken v. Holder*, 556 U.S. 418, 421, 129 S. Ct. 1749, 1753, 173 L. Ed. 2d 550 (2009), citing *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 4, 62 S. Ct. 875, 877, 86 L. Ed. 1229 (1942).

28 U.S.C. §2101(f) provides, in relevant part, that:

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court. (emphasis added).

An applicant requesting a stay of enforcement of a judgment pending the filing a petition for writ of certiorari to the Supreme Court must demonstrate:

(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay.

Indiana State Police Pension Tr. v. Chrysler LLC, 556 U.S. 960, 960, 129 S. Ct. 2275, 2276, 173 L. Ed. 2d 1285 (2009). Additionally, “in a close case it may be appropriate to ‘balance the equities’—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.” *Conkright v. Frommert*, 556 U.S. 1401, 1402, 129 S. Ct. 1861, 1862, 173 L. Ed. 2d 865 (2009) (Ginsburg, J.,

in chambers), *citing Rostker v. Goldberg*, 448 U.S. 1306, 1308, 101 S. Ct. 1, 2, 65 L. Ed. 2d 1098 (1980); *see also Hollingsworth v. Perry*, 558 U.S. 183, 190, 130 S. Ct. 705, 710, 175 L. Ed. 2d 657 (2010).

A recall of the mandate and stay of the D.C. Circuit's Order, or a stay of enforcement of the D.C. Circuit's Order is appropriate because: (a) the issues of national import, confusion caused by the D.C. Circuit's irreconcilable precedent and potential split with the Second Circuit renders it likely that four Justices will grant review of Allied's petition; (b) the D.C. Circuit's decision is likely to be overturned because of the D.C. Circuit's application of the improper standard of review and erroneous placement of the burden to establish the NLRB's jurisdiction on Allied; and (c) the potential work stoppage seizure to the global transportation that will likely result if the D.C. Circuit's Order is not stayed will result in irreparable harm to both Allied and the global transportation system.

(1) There is a Reasonable Probability that Four Justices Will Find the Issues Raised in the Petition Sufficiently Meritorious to Grant Review.

Given the question of national import, the clear error in the D.C. Circuit's determination in *Allied Aviation*, and the potential split between the D.C. Circuit and the Second Circuit, certiorari should be granted by this Court. Rule 10 of the Supreme Court provides that when reviewing a petition for certiorari, the Supreme Court considers, in part:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that

conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power

The D.C. Circuit Court's decision should be reviewed by the Supreme Court as it (i) holds that Allied has waived a non-waivable jurisdictional objection to the Board's usurpation of jurisdiction conferred by Congress upon the NMB and (ii) because the decision renders a new heightened test, as argued by the NLRB in *Paulsen v. PrimeFlight Aviation Servs., Inc.*, 216 F. Supp. 3d 259 (E.D.N.Y. 2016) (Second Circuit Case Nos. 16-3877 and 17-008), that has caused confusion and will lead to a split between the Circuits regarding the Board's jurisdiction over airline contractors.

The question of whether airline contractors are subject to the NLRB's jurisdiction under the NLRA or subject to the NMB's jurisdiction under the RLA is a question that was addressed by the D.C. Circuit in *ABM Onsite*, 849 F.3d at 1139. Where an employer is not a rail or air carrier engaged in the transportation of freight or passengers, a two-part test is applied to determine whether the employer and its employees are subject to the RLA. *Id.* at 1139-40. Part-two of the test, which is at issue in these cases, relates to the degree of the carrier's control over the airline contractor. Historically, when determining whether there was carrier control, sufficient to confer jurisdiction to the NMB, both boards utilized the longstanding six factor test most recently restated in *Air Serv Corp.*, 33 NMB 272 (2006). These factors are:

(1) the extent of the carrier's control over the manner in which the company conducts its business; (2) the carrier's access to the company's operations and records; (3) the carrier's role in the company's personnel decisions; (4) the degree of carrier supervision of the company's employees; (5) whether company employees are held out to the public as carrier employees; and (6) the extent of the carrier's control over employee training.

ABM Onsite, 849 F.3d at 1142.

In 2013-2014, the NMB in its decisions in *Menzies Aviation, Inc.*, 42 NMB 1 (2014); *Airway Cleaners, LLC*, 41 NMB 262 (2014); and *Bags, Inc.*, 40 NMB 165 (2013), deviated from its established precedent and began using a “new” single factor test, which required a carrier to have “meaningful control” over personnel decisions without providing any reason for such deviation. *ABM Onsite*, 849 F.3d at 1144. The NLRB quickly began applying the NMB’s unprecedented “meaningful control” test in both *ABM Onsite* and *Allied Aviation* and in both cases asserted jurisdiction.

In addressing the first challenge to the NLRB’s adoption of the NMB’s unreasoned heightened standard, the D.C. Circuit in *ABM Onsite*, held that the NMB’s unreasoned deviation from precedent in favor of a new test was arbitrary and capricious and, thus, the Board’s reliance upon the NMB’s unreasoned deviation was arbitrary and capricious.

In contrast, the D.C. Circuit upheld and ratified the NLRB’s 2015 Order in *Allied Aviation* in finding that Allied essentially waived its un-waivable jurisdictional challenge to the NLRB’s exercise of jurisdiction under the RLA by having failed to present sufficient evidence in the underlying record to satisfy the

“new” test that carrier(s) have “meaningful control over personnel decisions” (App. E at 1-2). Although the D.C. Circuit, in *Allied Aviation*, states that the NLRB did not utilize this “new” test when it asserted its jurisdiction, this determination is erroneous. Indeed, the NLRB has relied on and cited to its 2015 Order, which was affirmed by the D.C. Circuit, in its brief to the Second Circuit in *Paulsen v. PrimeFlight*,¹ to support the NLRB’s adoption and application of the new “meaningful control” test, even after this “new” test was rejected by the D.C. Circuit in *ABM Onsite*.

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” test when it asserted its jurisdiction, the District Court for the Eastern District of New York, in *Paulsen*, 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 2015 Order, applied the “new” test and determined that the NLRB properly asserted jurisdiction because although PrimeFlight had demonstrated the presence of the six

¹ In its brief to the Second Circuit, requesting to uphold the District Court’s finding that the NLRB had jurisdiction over a contractor who provided services to JetBlue, the NLRB specifically advised in its brief to the Second Circuit, that “[s]tarting in 2012-13, the NMB (and the Board) began placing more reliance on the ‘meaningful control over personnel decisions’ factor in its analysis of the second prong of the test.” *citing Allied Aviation Service Co. of New Jersey*, 362 NLRB No. 173, slip op. at 1 (Aug. 19, 2015). NLRB Brief at 28.

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 of carrier having “meaningful control” over personnel decisions, the Second Circuit will be in direct conflict with the D.C. Circuit and NLRB’s stated position in *Allied Aviation*, and the position from the Eastern District of New York in *Paulsen*, 216 F.Supp.3d at 269, which upholds the application of the “new” test requiring that a carrier have “meaningful control” over personnel decisions in order for an employer to be subject to the RLA. In contrast, if the Second Circuit adopts the D.C. Circuit’s decision in *Allied Aviation*, the decision from the Eastern District of New York in *Paulsen*, and the NLRB’s stated position to the Second Circuit that in order to demonstrate an employer is subject to the RLA, the employer must demonstrate that the carrier has “meaningful control” over personnel decisions, the Second Circuit will be in direct conflict with the D.C. Circuit’s position in *ABM Onsite*, which rejects this “new” test. Accordingly, regardless of how the Second Circuit rules in *Paulsen*, there will be an inevitable conflict with the D.C. Circuit’s

current precedent, rendering Allied's petition for certiorari ripe for review by this Court.

(2) A Majority of the Supreme Court is likely to find that the Determination of the D.C. Circuit Court is Erroneous.

There is a strong likelihood that the Supreme Court will conclude that the decision of the D.C. Circuit Court was erroneous. The D.C. Circuit applied the inappropriate standard of review when reviewing the NLRB's finding of jurisdiction. In its decision the D.C. Circuit when reviewing whether the NLRB had jurisdiction, found "that the Board's factual findings regarding carrier control were supported by substantial evidence." *Allied Aviation*, 854 F.3d at 63-64. However, because the issue of "carrier control" is defined under the RLA, and necessarily involves statutory interpretation of a statute that is outside the Board's jurisdiction, the D.C. Circuit Court should have applied a *de novo* standard of review. *See, e.g., San Manuel Indian Bingo & Casino v. N.L.R.B.*, 475 F.3d 1306, 1312 (D.C. Cir. 2007) (noting that "[b]ecause the Board's expertise and delegated authority does not relate to federal Indian law, we need not defer to the Board's conclusion."); *United Parcel Serv., Inc. v. N.L.R.B.*, 92 F.3d 1221, 1226 (D.C. Cir. 1996) ("As the scope of the NLRB's jurisdiction thus depends on an interpretation of the RLA, which the NLRB does not administer, we cannot simply assume that the NLRB should receive *Chevron* deference in this case."). If the D.C. Circuit completed the requisite *de novo* review, there was ample evidence to demonstrate that there was sufficient

carrier control, such that Allied is subject to the RLA.² Accordingly, Allied has demonstrated a likelihood that the D.C. Circuit Court's decision will be reversed by the Supreme Court on review.

The D.C. Circuit further committed error when it determined that Allied waived its right to challenge the NLRB's jurisdiction, and placed the burden of establishing that the NMB had jurisdiction over Allied. *See Allied Aviation*, 854 F.3d at 62. This finding goes against the Supreme Court's longstanding decision in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49-50, 58 S. Ct. 459, 463, 82 L. Ed. 638 (1938), where the Supreme Court held that it was the NLRB who had the burden to establish that the complaint concerns interstate commerce. The interstate commerce requirement is in the same section of the NLRA that exempts employers subject to the RLA, and by that corollary it is the NLRB's burden to establish that it, and not the NMB, has jurisdiction over the employer.

Further, where the issue is whether the agency acted within its jurisdiction, there can be no waiver. The D.C. Circuit's cavalier disregard for whether the NLRB

² As the record evidence shows, "each airline and each type of aircraft has its own procedure for fueling." (App. H at 7); the carriers have a "fuel committee" to oversee Allied's work and staffing (App. A); the carriers must approve all staffing changes; (App. H at 7-8); these fueling supervisors trainers are held out to the general public, through the FAA, as the airline carrier trainers (App. H at 6); every employee at Allied knows before Allied is allowed to work on the carrier's equipment, that each carrier confirms that the personnel working on its equipment have the proper certification and training, individual to each airline, to perform the very dangerous task of fueling passenger carrier jet airliners for national and international flights (App. H at 6).

has acted within its jurisdiction is critical because when agencies act improperly, and act beyond their jurisdiction, those actions are *ultra vires*. See *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1869, 185 L. Ed. 2d 941 (2013) (“Both [an agency’s] power to act and how they are to act is authoritatively prescribed by Congress, so that when [agencies] act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*.”). Accordingly, a challenge to the NLRB acting outside of its jurisdiction cannot be waived because when the agency acts outside of its statutory authority, its actions are *ultra vires* and unenforceable as a matter of law. Further, the ability to review the NLRB’s jurisdiction is even more prescient in this action because at issue here is not an interpretation of the NLRA, which the NLRB administers, but rather the RLA, which is the under the province of a wholly separate agency. See *Id.* at 1884. (“When presented with an agency’s interpretation of such a statute, a court cannot simply ask whether the statute is one that the agency administers; the question is whether authority over the particular ambiguity at issue has been delegated to the particular agency.” (Roberts, C.J. dissenting)).

(3) Irreparable Injury Will Result if a Stay is Not Issued.

On July 18, 2017, Allied, through its counsel, received demands from the NLRB requesting that Allied comply with the NLRB’s posting requirements on or before July 31, 2017, and that it takes steps to commence the bargaining process on or before August 4, 2017. The NLRB has now issued a letter threatening to hold Allied in contempt as soon as September 1, 2017. (App. I). Additionally, the Union

issued a separate request for bargaining, requesting to commence bargaining in August 2017. Allied is now placed in the untenable position of either commencing the bargaining process, while it seeks certiorari of the decision compelling such bargaining, or subject itself to a potential motion holding it in contempt. *See* NLRB Rule No. 101.15.³

If Allied commences the bargaining process, it may subject not only itself, but the global transportation system, to a possible work stoppage. The reason is that the NLRA, unlike the RLA, has less procedural safeguards to guard against the possibility of a work stoppage, in the event the negotiations reach an impasse. *See ABM Onsite*, 849 F.3d at 1139 (remarking that the RLA “creates a ‘special scheme’ for the railway and airline industries, premised on ‘their unique role in serving the traveling and shipping public in interstate commerce.’”). Additionally, with the D.C. Circuit upholding the NLRB’s determination that Allied committed an unfair labor practice, Allied’s employees are able to strike at any time in protest of the charge.

In the event of a strike, Allied would be unable to replace the striking workers to ensure the continued flow of fuel to the aircraft at Newark Airport. Allied’s employees are subject to rigorous training, and screening from the United States Department of Homeland Security, a process that takes in excess of thirty

³ §101.15 “Compliance with Court Judgment.”

After a Board order has been enforced by a court judgment the Board has the responsibility of obtaining compliance with that judgment. Investigation is made by the regional office of the respondent’s efforts to comply. If it finds that the respondent has failed to live up to the terms of the court’s judgment, the General Counsel may, on behalf of the Board, petition the court to hold the respondent in contempt of court. The court may order immediate remedial action and impose sanctions and penalties.

(30) days to complete. (App. H at 10). Because Allied is the only supplier of fuel at Newark Airport, such a stoppage of its work would result in a complete stoppage of planes coming in and out of Newark Airport, which would strain neighboring airports and cause a domino effect that could bring the entire global transportation system to a stop. It is for this reason that absent a stay, Allied and the nation would suffer irreparable injury.

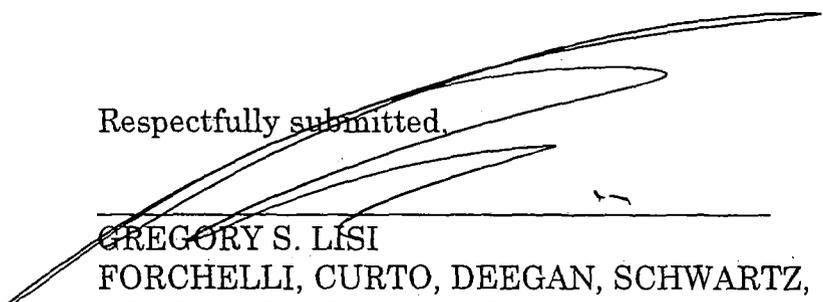
In contrast to these potential irreparable damages, the Union would suffer little harm if bargaining is delayed pending a determination on Allied's petition for certiorari. Particularly, as the entire bargaining process has been overseen by an agency that has no authority to have accorded the Union the relief requested. Accordingly, a balancing of the equities favors entry of a stay.

CONCLUSION

A recall and stay of the mandate or stay of enforcement of the D.C. Circuit's erroneous decision in *Allied Aviation*, 854 F.3d at 55, holding that Allied, the sole fuel supplier to over 50 carriers at Newark Airport is not covered by the RLA, not only creates confusion and breaks from precedent from the D.C. Circuit and potentially the Second Circuit, but it forces Allied to enter labor negotiations with the Union without the protections embedded in the RLA. As a result, if the D.C. Circuit Court's decision is not stayed, Allied is left in the untenable position of negotiating, with the potential of a strike, which could bring the global transportation system to a halt, or being subject to contempt proceedings. Accordingly, Allied respectfully requests that a stay be entered pending certiorari.

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Respectfully submitted,



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