JD(NY)-01-18
Brooklyn, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NEW YORK BRANCH OFFICE
DIVISION OF JUDGES

PRIMEFLIGHT AVIATION SERVICES, INC.

And

Case 29-CA-191801
29-CA-196327

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 32BJ

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for the General Counsel.
Frank Birchfield, Esq., of New York, New York
for the Respondent.
Brent Garren, Esq., of New York, New York
for the Charging Party.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried in Brooklyn, New York, on June 27, 2017 pursuant, to a consolidated and amended complaint issued by Region 29 of the National Labor Relations Board (NLRB) on June 9, 2017. The complaint alleges that PrimeFlight Aviation Services, Inc. (Respondent) about January 20, 2017, unilaterally implemented changes to the employees' work schedules and hours without providing to the Service Employees International Union, Local 32BJ (Union) notice and an opportunity to bargain over the changes as the exclusive collective-bargaining representative of the Respondent's employees in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (Act).

The amended complaint further alleges that about January 25, 2017, the Respondent refused to meet and bargain with the Union's designated bargaining committee in violation of Section 8(a)(5) and (1) of the Act and about April 4, 2017, the Respondent threatened employees with more strict enforcement of work rules because of their activities in support of the Union in violation of Section 8(a)(1) of the Act (GC Exh. 1P).[1]

On the entire record, including my assessment of the witnesses' credibility[2] and my observations of their demeanor at the hearing and corroborating the same with the adduced evidence of record, and after considering the posthearing briefs, I make the following

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[1] The exhibits for the General Counsel are identified as "GC Exh." and the Respondent's exhibits are identified as "R. Exh." The posthearing brief for the General Counsel is identified as "GC Br."; the brief for the Charging Party is identified as "CP Br."; and the Respondent's brief is identified as "R. Br." The hearing transcript is referenced as "Tr."

[2] Witnesses testifying at the hearing included Olivia Singer, Irene Rodgers, Yolie Jean Benoit, Josh Heady, and William Stejskal.

FINDINGS OF FACT

I. JURISDICTION AND UNION STATUS

The Respondent, a domestic corporation, with an office and place of business located at 7135 Charlotte Pike, Suite 100, Nashville, Tennessee, and with places of business located at airports nationwide, including a place of business located at John F. Kennedy International Airport (JFK Airport) in Queens, New York, has been engaged in the business of providing airport terminal services, including baggage handling, skycap services, checkpoint services and wheelchair assistance, to JetBlue Airways, Corp. at JFK Airport where it derived projected gross annual revenue in excess of $50,000 to JetBlue Airways, an enterprise engaged in interstate commerce. The Respondent denies that it is an employer within the meaning of the Act because the Respondent falls within the exclusion of employers under the Railway Labor Act (Respondent's Answer at General Counsel Exhibit 1(O) and (R). The Service Employees International Union Local 32BJ is a labor organization within the meaning of Section 2(5) of the Act.

II. PROCEDURAL HISTORY

The consolidated complaint here alleges that from about March 26, 2015, through about May 9, 2016, the Union was the exclusive collective-bargaining representative of the following employees of Air Serv Corporation (Air Serv), constituting an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act

> All full-time and regular part-time employees, excluding security officers, office clericals, supervisors, managers and confidential employees employed by Air Serv at Newark Liberty, John F. Kennedy International and LaGuardia Airports.

The complaint further alleges that at all material times until about May 9, 2016, Air Serv has been engaged in the business of providing airport terminal services, including baggage handling, skycap services, checkpoint services and wheelchair assistance, to JetBlue Airways, Corp. at JFK Airport. About May 9, 2016, the Respondent entered into a contract with JetBlue Airways, Corp. to provide the terminal services previously performed by Air Serv at JFK Airport.

In the answer to the complaint, the Respondent denies that it is an employer under the Act and denies it is a successor to Air Serv. The Respondent further denies that it had employed a majority of Air Serv's employees and that it continued to operate the business of Air Serv at JFK Airport in essentially unchanged form.[3]

The parties stipulated (Jt. Exh. 1) that the parties had fully litigated the issues regarding the Board's jurisdiction and Respondent's obligation to bargain as a successor to Air Serv with the Union. In previous charges filed by the Union against the Respondent's operations at Terminal 5 at JFK Airport, a consolidated complaint was issued by Region 29 and the cases heard by Associate Chief Judge Mindy E. Landow.[4] The complaint alleged, inter alia, that Respondent failed to recognize and bargain in good faith with the Union, in violation of Section

[3] There is no dispute that the Respondent falls within basic monetary commerce jurisdiction. The issue is whether the Respondent is an employer subject to the jurisdiction of the NLRB within the meaning of Sec. 2(2), (6), and (7) of the Act.

[4] Case Nos. 29–CA–177992, 29–CA–179767, and 29–CA–184505

8(a)(5) and (1) of the Act, because it is a legal successor to Air Serv Corporation. In those cases, as here, Respondent offered an affirmative defense that it is not subject to the Board's jurisdiction because it is covered by the Railway Labor Act, and even if it is subject to the Board's jurisdiction, it is not obligated to recognize and bargain with the Union because Respondent is not a legal successor to Air Serv Corporation. The hearing in those cases took place before Judge Landow on October 18, 19, and 20, 2016.

The Respondent is subject to the jurisdiction of the NLRB

As a preliminary matter, it must first be determined whether Respondent is subject to the jurisdiction of the NLRB as an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In the matter before me, the parties agree that the issues raised in paragraphs 3, 6(a), 6(b), 6(c), 8(b), 8(c), 8(d), 9, and 10 of the complaint regarding the Board's jurisdiction and Respondent's obligation to bargain with the Union as a successor to Air Serv were fully litigated in Cases 29–CA–177992, 29–CA–179767, and 29–CA–184505 and need not be relitigated here. The parties further agree that I may rely upon the record evidence and the decision issued in Cases 29–CA–177992, 29–CA–179767, and 29–CA–184505. In the event that the Board issues an Order in Cases 29–CA–177992, 29–CA–179767, and 29–CA–184505 before I am able to issue a decision in Cases 29–CA–191801 and 29–CA–196327, then the parties agree that I may rely upon that Board Order. (Jt. Exh. 1.)

On March 9, 2017, Judge Landow issued her decision in Cases 29–CA–177992, 29–CA–179767, and 29–CA–184505, and found that Respondent is an employer within the meaning of the Act and is subject to the Board's jurisdiction, and Respondent is obligated to recognize and bargain in good faith with the Charging Party as the exclusive collective-bargaining representative of

> All full-time and regular part-time employees employed by Respondent at JFK Airport, Jamaica, New York, excluding confidential employees, office clericals, guards and supervisors, as defined by the Act.

In reliance of the record and Judge Landow's decision in Cases 29–CA–177992, 29–CA–179767, and 29–CA–184505, I find that the Respondent is under the jurisdiction of the Act. In the relevant portions of the decision issued by her, Judge Landow found that the Respondent comes within the purview of the National Labor Relations Act because PrimeFlight exercised "meaningful control over personnel decisions."

PrimeFlight contends that it not bound by the Board's jurisdiction because it is a Railway Labor Act (RLA) employer exempt from the NLRA. The NLRA protects the rights of employees to organize and bargain collectively, see 29 U.S.C. §§ 151, 157, but expressly exempts employers "subject to the Railway Labor Act" and "any individual employed by an employer subject to the Railway Labor Act" from its reach, id. §§ 152(2)-(3). The distinction between coverage under the NLRA and the RLA is significant for employers and employees. Each Act protects employees' right to join together to improve working conditions and facilitates labor-management relations. But because of the central role in the national economy of smooth operation of the nation's rail and air carriers, the RLA places a higher priority than the NLRA on avoiding strikes or lockouts. To that end, the RLA requires more extensive dispute resolution efforts before either employer or employee can take unilateral action. See *ABM Onsite Servs.-West, Inc. v. NLRB*, 849 F.3d 1137, 1139–1140 (D.C. Cir. 2017). The National Mediation Board (NMB), which administers the RLA, employs a two-part "function and control" test to determine whether an employer that is not itself a carrier is sufficiently controlled by a carrier to be subject to RLA jurisdiction. See *Signature Flight Support of Nev*., 30 NMB 392, 399 (2003). The

conjunctive test asks (1) "whether the nature of the work is that traditionally performed by employees of rail or air carriers," and (2) "whether the employer is directly or indirectly owned or controlled by, or under common control with a carrier or carriers." Id. To determine whether an employer is under the control of a rail or air carrier, the NMB traditionally considers six factors: (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. *Aircraft Service International, Inc.*, 365 NLRB No. 94 (2017).

The Board and the NMB each has independent authority to decide whether the RLA bars the NLRB's exercise of jurisdiction. *United Parcel Serv., Inc. v. NLRB*, 92 F.3d 1221, 1224-26 (D.C. Cir. 1996). When presented with a claim of RLA jurisdiction, the Board's stated practice is to refer the parties to the NMB and dismiss the charge or petition in cases in which it is clear the employer is subject to the RLA or to retain cases in which RLA jurisdiction is clearly lacking. There is, however, "no statutory requirement that the Board first submit a case to the NMB for an opinion prior to determining whether to assert jurisdiction." *Spartan Aviation Indus., Inc*., 337 NLRB 708, 708 (2002); accord *United Parcel Serv*., 92 F.3d at 1224–1226.

Upon my review of the record and decision in Cases 29–CA–177992, 29–CA–179767, and 29–CA–184505, I find that the Respondent' raised claim of RLA jurisdiction fails because the record evidence did not establish the requisite carrier control. *Allied Aviation Service Co. of New Jersey*, 362 NLRB No. 173 (2015). I find that Respondent failed to establish the "control" portion of the "function and control" test is supported by substantial evidence.

Here, the parties previously stipulated before Judge Landow that the Respondent has exclusive control over the hiring of its employees at JFK Airport. The Respondent further stipulated that JetBlue does not provide recommendations with regard to the PrimeFlight employees for demotions and promotions. The record as developed before Judge Landow also showed that employee disciplines and terminations are controlled by the PrimeFlight's employee handbook, rather than with any contractual arrangements with JetBlue. Likewise, the supervision and management of employees is the exclusive responsibility of PrimeFlight.

Accordingly, I find that Respondent is an employer under the jurisdiction of the Act.

PrimeFlight is a Burns Successor

Before discussing the alleged unlawful labor practices, I will first address Respondent's denial that it is a perfectly clear successor to predecessor Air Serv. As noted above (Jt. Exh. 1), the parties stipulated that I may properly rely on the record and Judge Landow's decision in Cases 29–CA–177992, 29–CA–179767, and 29–CA–184505 to determine whether PrimeFlight is a *Burns* successor with an obligation to bargain with the Union.

The complaint alleges that the Respondent since May 9, 2016, continued to operate the business of Air Serv at JFK Airport in essentially unchanged form and has employed a majority of the predecessor's employees. As such, the counsel for the General Counsel argues that PrimeFlight is a *Burns* successor. Respondent maintains that it is not a Burns successor and has no obligation to recognize and bargain with the Union.

Under *NLRB v. Burns Security Services*, 406 U.S. 272, 281–295 (1972), and its progeny, an employer that acquires a predecessor's operations succeeds to the predecessor's

collective-bargaining obligation if: (1) there is a "substantial continuity" between the predecessor's enterprise and that of the successor, (2) a majority of the successor's employees at the facilities it acquired from the predecessor were former predecessor employees, and (3) the unit remains appropriate for collective bargaining under the successor's operations.

A successor is not bound by the substantive terms of a collective-bargaining agreement negotiated by the predecessor and is ordinarily free to set initial terms and conditions of employment unilaterally. The Court explained in *Burns* that the duty to bargain will not normally arise before the successor sets initial terms because it is not usually evident whether the union will retain majority status in the new workforce until after the successor has hired a full complement of employees. Id. at 295. The Court recognized, however, that "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." Id. at 294–295. In *Spruce Up Corp.,* 209 NLRB 194 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975), the Board interpreted the "perfectly clear" caveat in *Burns* as "restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." Id. at 195 (footnote omitted).

In subsequent cases, the Board has clarified that, although the Court in *Burns*, and the Board in *Spruce Up*, spoke in terms of a "plan[] to retain *all* of the employees in the unit" (emphasis added), the relevant inquiry is whether the successor "[p]lanned to retain a sufficient number of predecessor employees to make it evident that the Union's majority status would continue" in the new workforce. *Galloway School Lines*, 321 NLRB 1422, 1426–1427 (1996); *Spitzer Akron, Inc*., 219 NLRB 20, 22 (1975) ("Clearly, the phrase 'plans to retain all the employees in the unit,' . . . would cover not only the situation where the successor's plan includes every employee in the unit, but also situations where it includes a lesser number but still enough to make it evident that the union's majority status will continue."), enfd. 540 F.2d 841 (6th Cir. 1976), cert. denied 429 U.S. 1040 (1977).

There is substantial continuity between Air Serv and the Respondent. The transition was seamless, with Air Serv concluding its operations on May 8 and the Respondent beginning its operations on May 9. As noted in Judge Landow's decision, the Respondent's changes, including rebranding uniforms and IDs, the location of clocking in and out, and the new location for the help desk, are minor, considering that the employees are doing the same work they were doing under Air Serv, in the same location, with substantially the same supervision, and with no break in service.

Furthermore, the Respondent employed both a "substantial and representative complement" and a majority of the predecessor's employees when it commenced regular operations on May 9. The fact that the Respondent continued to hire additional employees between late May and July does not preclude a finding that there was a substantial and representative complement of employees on May 9, when the Respondent was fully functioning and employing a majority of the predecessor's employees.[5]

[5] *See, e.g., Pennsylvania Transformer Technology,* 331 NLRB 1147, 1147–1148 & fn. 6 (2000), enfd. 254 F.3d 217 (D.C. Cir. 2001) (employer had hired a "substantial and representative complement" on the date that it employed 68 employees, even though it employed 100 at the time of hearing, and 130 at the time that case came before the

Continued

Finally, the unit remains appropriate for collective bargaining. The Board has long held that a single-facility unit is presumptively appropriate and that the party opposing it has a heavy burden to rebut its presumptive appropriateness. Here, the unit is in a single facility located at the Respondent's Terminal 5. While the unit includes the wheelchair attendants, who were unrepresented at the time that PrimeFlight took over operations from the predecessor, the Board has found an appropriate unit for a successor obligation to bargain where the unit included previously unrepresented employees as long as a majority of the unit is comprised of predecessor employees.[6] The appropriateness of including the wheelchair assistance work in the unit is finally demonstrated by the fact that that work was originally included in the unit recognized by the predecessor, and the Respondent hired some of the predecessor's employees as wheel chair assistants even though they had been performing baggage handling, skycap services, or checkpoint services for the predecessor (Judge Landow's decision at 10-16). For all these reasons, the bargaining unit comprised of the Respondent's employees in Terminal 5, including employees performing baggage handling, checkpoint services, skycap services, and wheelchair assistance, is an appropriate bargaining unit.

Accordingly, I find that the Respondent is a *Burns* successor and is under a duty to bargain with the incumbent Union.

III. ALLEGED UNFAIR LABOR PRACTICES

1. The alleged refusal and failure to bargain with the Union on changes to the Employee's work schedules and hours

On August 5, 2016, Region 29 issued a complaint in Case 29-CA-177992, and alleges that the Respondent violated Section 8(a)(5) and (1) of the Act, when, it refused and failed to bargain with the Union (Jt. Exh. 2). Prior to the hearing before Judge Landow on that case and two additional cases that were consolidated as noted above, the Region also sought preliminary injunctive relief seeking Respondent to recognize and bargain with the Union. On October 24, 2016, Judge Brian Cogan of the Eastern District of New York issued a preliminary injunction ordering PrimeFlight to recognized and bargain with the Union with respect to PrimeFlight's full-time and regular part-time employees at JFK Airport Terminal 5 (JetBlue). Paragraph 2 (b) of Judge Cogan's order stated that

> Any agreement reached between PrimeFlight and the Union may not include minimum shift or employee requirements so that PrimeFlight is able to assign shifts and employees commensurate with JetBlue's expressed employment needs. (R. Exh. 2). Next, PrimeFlight must engage in good faith collective bargaining with the Union.

Although Judge Cogan ordered PrimeFlight to engage in good-faith bargaining with the Union, he also stated in his Memorandum Decision (GC Exh. 7) that

> …the bargaining is subject to the following limitations: (i) any agreement reached between PrimeFlight and the Union may not include any provisions regarding a minimum number of shifts per employee or minimum staffing levels per shift - PrimeFlight will

Board approximately 2 years later).

[6] *See Good N' Fresh Foods,* 287 NLRB 1231, 1231 fn.1, 1236–1237 (1988) (successor was obligated to bargain with union for unit comprised of formerly unrepresented maintenance employees and represented production employees).

> determine the shifts and staffing levels when JetBlue provides notice of its staffing and shift needs, and PrimeFlight will not be forced to needlessly staff and pay employees when there is no need to staff them.

On November 21, the General Counsel filed an "Emergency Motion to Amend Judgment" on Judge Cogan's Order and essentially argued that "…the preliminary injunction forces the Union to concede to Respondent the sole discretion to determine shifts and staffing and places the Union in the untenable position of bargaining from an artificially imposed, disadvantaged position" (R. Exh. 3 at 13).

On December 13, Judge Cogan issued his Order and Memorandum Decision (R. Exh. 4 at 4) and specifically stated

> The NLRB refuses to acknowledge that JetBlue's needs determine staffing levels, instead arguing that the Union should be able to bargain about staffing needs. The NLRB is effectively arguing that JetBlue should not have authority to determine its own staffing requirements and that the Union has better information about JetBlue's needs than JetBlue itself. This argument fails. The staffing limitation appropriately gives staffing authority to JetBlue, which in turn provides that information to PrimeFlight. The Union has no basis to determine staffing levels.

Judge Cogan was particularly concern that PrimeFlight would be restricted in staffing and shifts dictated by JetBlue if PrimeFlight was required to bargain with the Union during the airline industry seasonal fluctuations and holiday travel

> It is this fluctuation against which I wanted to guard. PrimeFlight should not have to pay for the same number of employees on Groundhog Day as it does in the days before Thanksgiving, and it seems unjust to me to permit the Union to dictate staffing levels over the needs of JetBlue to the unnecessary expense of PrimeFlight, at least for the temporary period that this injunction covers.

It is this backdrop that the counsel for the General Counsel now argues that the preliminary order would nevertheless require the Respondent to bargain over the unit employees' work hours and assigned work schedules. The General Counsel argues that Judge Cogan only "…limited bargaining between PrimeFlight and [the Union] to exclude negotiations over "minimum number of shifts per employee or minimum staffing levels per shift" (R. Exh. 4 at 2) and that the Respondent's obligation to bargain was not limited in any other way (GC Br. at 7, 8).

The counsel for the General Counsel proffered the testimony of two service workers at the Respondent's JFJ Airport Terminal 5 work site to show that their work schedules were changed without notifying the Union and bargaining over the changes.

Irene Rodgers (Rodgers) testified that she has been employed as a wheelchair attendant since June 2016 with Air Serv and then with PrimeFlight. While working with PrimeFlight, Rodgers testified that her work schedule was 20 hours per week. In December 2016, Rodgers was informed that her work schedule had been revised to an 8-hour day, 6 days per week, for a total of 48 hours a week. Rodgers stated that this new schedule continued until the second week in January, when she resumed her prior work scheduled of 20 hours per week. Rodgers testified that her schedule again changed towards end of January with 7 hours per day and a 5-day work week. Rodgers testified that her present schedule is from 12–6 p.m.; 5 days per week for a total of a 30-hour work week (Tr. 38-42).

Yolie Jean Benoit (Benoit) testified that she has been employed as a wheelchair attendant since June 2016 at JFK Airport Terminal 5. Benoit stated that her schedule in December 2016 was from 3:30-11 p.m.; 5 days per week. She believed that that worked 7½ hours per day. Benoit stated that her schedule changed in January to 6 p.m. to midnight, 5 days per week. Benoit stated that she only worked 5½ hours under this new schedule with a 30 minute unpaid lunchbreak, for a total of 27½ hours per week. Benoit has continued with this schedule through the time of this hearing (Tr. 46–49).

Josh Heady (Heady) testified that he was and is the director of operations for PrimeFlight. Heady stated that he is familiar with the work schedules and payroll records of the PrimeFlight employees working a Terminal 5. He prepares the work schedules based upon the needs and level of staffing required by JetBlue at the terminal. With regards to the wheelchair employees, Heady testified that their schedules are build up from the needs of JetBlue (Tr. 59).

> Basically I work in conjunction with JetBlue and their designated representative and we build the work schedule basically together to fit the need of JetBlue's operational schedule.

Heady further stated that the wheelchair attendants are scheduled to work a particular zone at the terminal where wheelchairs are needed by the passengers, such as at the arrival gates and departure gates or when passengers first arrive at the terminal. Heady indicated that the wheelchair attendants worked a specific zone from September to January, but that in February 2017; the attendants received their own specific work schedules. He stated that

> So what we had done in working with our customer JetBlue when we built the schedule is we assigned a specific amount of staff to a particular zone and a zone—the airport zoned out into these four zones which are behind the gates and specific services…we [then] went away from specifically assigning employees to a particular zone and just overall laying out a wheelchair schedule (Tr. 61).

Heady explained that in working with the JetBlue representative, PrimeFlight found it more beneficial for the operation to have all the wheelchair agents classified under one work schedule so that staffing the operation would be more successful (Tr. 81).

Heady insisted that PrimeFlight tried to minimize the impact the hours worked by the wheelchair attendants when their work schedules changed. He admitted that seasonal changes and holidays would affect the work schedules based upon the staffing needs of JetBlue to have a minimal number of employees working during the busy periods of the year. But, Heady maintained that overtime hours are not mandatory for the employees so, in effect, even during the busy season, the work schedules are not greatly impacted (Tr. 82–86, 101; R. Exh. 1: seasonal changes in the number of JetBlue's flights). However, Heady admitted that he did not know the exact number of employees that were impacted by the schedule changes when the number of airline flights goes from a slow period to a busy holiday season (Tr. 104, 105).

2. The alleged refusal to meet and bargain with the Union's designated bargaining committee on January 25, 2017

The complaint alleges that the Respondent and the Union agreed to a bargain, but that the Respondent refused to bargain with the Union after the parties initially convened the bargaining session on January 25, 2017. The Respondent's answer to the complaint maintains

that the Union failed to meet and bargain with the Respondent and acted in bad faith with respect to such bargaining (GC Exh. 1).

Olivia Singer (Singer) is employed with the Union as a legal assistant since September 2016. In her role, Singer performs legal research, prepares legal briefs and has handled arbitrations. Singer testified that there is currently no collective-bargaining agreement between PrimeFlight and the Union, although the Union has been recognized at JFK. Singer has assisted the lead counsel at bargaining sessions and has attended at least four bargaining sessions between the Union and PrimeFlight. She recalled the initial bargaining session was held on December 13, 2016, and subsequent meetings on January 25, in April and May 2017 (Tr. 22–25).

Singer attended the initial December 13 bargaining session. She stated that the session started at 9 a.m. and ended at 12:30 p.m. She recalled that union labor counsel, Brent Garren (Garren); organizer, Michael Cassidy; and union vice-president, Rob Hill, were present. She also recalled that William Stejskal, director of human resources and Matt Berry, operations executive, attended for the Respondent. The parties agreed to meet again and to discuss the scheduling for subsequent bargaining sessions. Singer said there were no discussions as to who will attend the next session or which employees needed to be excuse from work to attend the session. Singer stated that there were no discussions on changes to employees work schedules that were occurring at the time the parties met in December (Tr. 25-27).

William Stejskal (Stejskal) testified that he is the senior vice-president of human resources for approximately 15 years with the Respondent and was responsible for negotiating with the Union. Stejskal testified that PrimeFlight was ordered to bargain with the Union by Judge Cogan and he immediately reached out to Garren to bargain (Tr. 116–118). Stejskal testified that he followed-up the phone call with Garren with an email, dated November 1, setting forth proposed several bargaining dates in November and December. He also informed Garren of the individuals on his negotiating team. Stejskal also offered to facilitate arranging for the Union's bargaining committee in the email. Stejskal testified that PrimeFlight was willing to arrange for employees' attendance at the sessions that were identified as part of the Union's bargaining committee. In a reply email on November 2, Garren stated that the Union was only available to meet on December 13 and stated that he and Larry Engelstein will be on the union bargaining team and promised that he "…will let you know about the employee committee well before the 13th." (Tr. 119–122; R. Exh. 5.)

Stejskal recalled meeting Garren and Hill on December 13. Stejskal testified that there were no PrimeFlight employees presented on the union's bargaining committee. Garren had emailed Stejskal on November 4 that the union will not have an employee committee present for the December 13 meeting (R. Exh. 6). Stejskal thought that there would be a "full-blown" bargaining session but recalled that the only proposal raised by Hill was to have PrimeFlight join a group of 11 other contractors in a master agreement that would cover the JFK, LaGuardia, and Newark airports. Stejskal did not outright reject the proposal, but testified that he informed Garren that the bargaining was only for the PrimeFlight employees at JFK Terminal 5 and would not include PrimeFlight employees at the LaGuardia and Newark airports. Stejskal and Garren agreed to email each other to exchange additional dates for bargaining and for releasing employees to attend the next bargaining session. Stejskal did not recall if the releasing of employees was discussed at the December 13 session (Tr. 123–126).

By email dated December 22, 2017, Stejskal asked Garren if January 25 was a good day to meet again. Garren replied on December 27 that January 25 was good for him and he promised to identify the members of the committee and when release time was needed for their

attendance on January 27 (R. Exh. 7). By email on January 17 to Stejskal, Garren listed several names of unit employees at JFK Airport Terminal 5 that would be attending as part of the union committee for the January 25 bargaining session (R. Exh. 8). Stejskal replied in the affirmative and forward Garren's name of employees to the responsible supervisors at Terminal 5. Stejskal testified that another employee's name was subsequently added to the list, but there was no indication from Garren that what Stejskal finally received was a partial list or that other names were missing from the list (Tr. 127–130).

Singer attended the January 25, 2017 session. She stated that the parties met at 9 a.m. at Union's office. Singer stated that Garren; another organizer, Cathy Delaguilar; and a group of bargaining and nonbargaining employees from Newark and LaGuardia were in attendance. Singer said there were approximately 20 employees in attendance. Singer also recalled that Stejskal and Heady were present for the Respondent.

Singer testified that the Respondent first identified its bargaining team and then the Union went around the room having each employee identify themselves with their names and titles. Singer said that first group identified themselves from JFK and then Garren and Singer introduced themselves. The next employee identified himself as from Newark. Singer testified that upon hearing who and where the employee came from, Stejskal requested that he needed to speak with the union bargaining team in private and outside the meeting room. Stejskal, Heady, Garren, and Singer stepped outside of the room (Tr. 27–30).

According to Singer, Stejskal asked if there were workers not from the JFK airport at the meeting and Garren replied in the affirmative. Singer testified to the following upon examination by the counsel for the General Counsel (Tr. 30–33).

> Bill [Stejskal] asked if there were workers who were not from JFK there and Brent [Garren] said yes, that they were there to observe. And Bill said that he would not continue the session if the workers from the other two airports were present.

Singer testified that Stejskal replied that he would not continue the bargaining session unless the workers from Newark and LaGuardia left. Singer said that the Respondent team then went back to the meeting room, packed their belongings and left.

Stejskal testified that he observed more people in attendance at the January 25 meeting than was listed on Garren's email to him. Stejskal stated that Garren had made no mention of bringing any PrimeFlight employees other than the ones that are employed at JFK. Stejskal asked Garren and others to step out of the room once an employee identified himself as from another airport. It is not disputed that seven employees were from LaGuardia and one was from Newark (R. Exh. 10). Stejskal perceived that the Union had staged a "dog and pony show" to show the employees from Newark and LaGuardia that the Respondent actually recognized them as part of the unit employees at JFK. Stejskal was also concerned that some of the employees were missing their work shifts at LaGuardia and Newark by attending the meeting which posed an operational problem for PrimeFlight at those airports (Tr. 132–136).

Stejskal told Garren that he was not bargaining with the Union over the PrimeFlight employees in Newark and LaGuardia. According to Stejskal, Garren replied that the Newark and LaGuardia employees were at the meeting as observers and that the group was not part of the bargaining committee. Garren also stated that "…I can have whoever I want to be here and you don't have a say in the matter." Stejskal maintained that Garren was very clear that the non-JFK employees were not on the bargaining committee. Stejskal requested that the non-JFK unit employees leave the meeting and Garren refused. Stejskal testified that his bargaining team

then left the session (Tr. 135–139).

It is undisputed that the Respondent's bargaining team walked out of the session shortly after Stejskal had his private conversation with Garren. Stejskal testified that he never refused to bargain with the Union after the January 25 meeting. Stejskal stated that there were no further discussions of future sessions at the January 25 meeting but there were subsequent emails between him and Garren on future dates for sessions. Stejskal explained that the parties did not talk right away about future dates for bargaining because the Union filed a charge with the NLRB shortly after the January 25 session, but stated that the parties eventually met again after some discussions over the parameters of who would be attending the future sessions (Tr. 139–141).

In a series of emails between Stejskal and Garren, the two individuals continued to discuss dates and the parameters of future sessions. In an email provided by the counsel for the General Counsel dated February 22, 2017 (GC Exh. 2), Garren thanked Stejskal for the information requested by the Union (presumably for the purpose of bargaining) and ended his email with the following statement to Stejskal

> Please let me know if you have changed your position and are willing to bargain with us when PrimeFlight employees from LGA and/or EWR, on their own time, attend the session as observers on the Union's bargaining team.

Stejskal replied in his email of March 1 (GC Exh. 2 at 4) on how he felt deceived by the Union when he walked into the January 25 meeting with observers that were not previously identified by Garren

> With regard to bargaining, PrimeFlight has reasons for not being keen on employees from our union-free Newark Liberty and LaGuardia airport operations participating as observers.
>
> First, to the extent that you may wish create the impression that the 32BJ actually represents these non-union PrimeFlight employees, we have no such desire to deceive our employees.
>
> Secondly, although you have failed to provide the list of attendees at the January session as you committed, it seemed there were about as many "observer" present as PrimeFlight JFK employees you had indicated would participate. From a practical stand point, having so many people present, especially observers from our union-free locations, seems potentially disruptive and not conducive to open, frank and effective bargaining. It would be fair to say that it was indeed disruptive in January.
>
> Finally, we had a deal. You agreed to advise PrimeFlight who you wished to participate. PrimeFlight agreed to do everything it could to see they were excused from duty so that they could participate. PrimeFlight made good on our end of the agreement. I am sure that you will contend that our agreement was limited to JFK employees, so there was no breach on your end. Perhaps someone other than me will actually buy that poor excuse. PrimeFlight has passengers to serve at all three airports, not just JFK. Asking the simple courtesy of letting us know in advance who you wish to participate so that we can verify their work schedules to ensure service to passengers at all three airports seems very reasonable.

There did not seem to be a reply from Garren to the Stejskal March 1 email, but another email dated March 24 from Stejskal seem to indicate that Stejskal was busy during the month of March in negotiating a contract with 32BJ at another site and asked Garren as to his availability to bargain over the JFK airport employees in April (GC Exh. 2 at 3). In response, Garren requested in an email dated March 27 that Stejskal confirmed that the Respondent was willing to bargain with the Union's bargaining team, "…which is likely to include PrimeFlight employees from outside the bargaining unit (on their own time, of course). Stejskal replied on March 27 that the Respondent would not have a problem with the request (GC Exh. 2 at 2).

The parties eventually met to bargain on April 25, 2017, and continue to bargain through the time of the hearing on this complaint. Stejskal testified that the parties also bargained on April 26 and May 31 (Tr. 144, 145). Stejskal again explained that the delay in not bargaining between January and April was due to his uncertainties on proceeding after the Union immediately filed a NLRB charge following the January session. Stejskal also stated that he was in the midst of bargaining with 32BJ in Pittsburgh, Pennsylvania, and was focused in wrapping up that contract (Tr. 145, 146).

Singer confirmed that the parties continued to bargain after the initial meeting in January (Tr. 33).

3. The alleged threat to discipline employees with more strict enforcement of work rules on about April 4, 2017

The complaint alleges that following the January 25 bargaining session, the Respondent threatened on about April 4 to apply stricter enforcement of an attendance work rule on the PrimeFlight employees who may decide to attend the April 25 bargaining session as observers.

The work rule under contention was a statement made by Stejskal after he had stated to Garren on March 27 that the Respondent did not have an issue with observers at the next bargaining session. In reply to the March 27 email, Garren asked for the release of PrimeFlight employees who are not in the Union's bargaining unit. Garren wanted an understanding that the "usual attendance policies would apply to any who is not released to attend the bargaining." Garren also asked Stejskal to confirm that the Respondent is willing to bargain even if PrimeFlight employees from the Newark and LaGuardia employees are present. In response, Stejskal stated on April 4 (GC Exh. 2 at 1).

> We are agreeable to bargaining with non-union PrimeFlight employees present as your Observers. We merely sought your ideas on how to allow your Observers to be present without having any unexpected absences in the workplace.
>
> Our idea is to check the work schedules of your proposed Observers in advance. You are not agreeable to this.
>
> Your idea is to shrug off any unexcused absence of an Observer as an ordinary attendance infraction. We are not agreeable to this because it could do more to encourage unexpected absences than prevent them. Any PrimeFlight employee who considers skipping work without management permission to attend bargaining as your Observer needs to understand that such unexcused absence may not be treated as an ordinary attendance infraction.
>
> Yes, we are okay with Observers as long as they are not missing work. What dates do you have available for bargaining?

Stejskal testified that the purpose of his statement to Garren was to allow the Respondent know in advance who the observers would be attending so that their work schedules could be coordinated as to not have a negative impact on operations at the Newark and LaGuardia airports. Stejskal explained that in not providing the names of the observers, the Respondent did not want everyone to "just blow off work to come" and he would consider such an action as, not an attendance issue, but rather an insubordination issue if the non-unit employees refuse to work in order to attend as observers. Stejskal explained that an ordinary attendance issue is an employee calling in sick on a scheduled work day and that an insubordination issue is when an employee refused a directive to work (Tr. 141–144).

> We wanted the opportunity to be advised in advance who they were so we could check up against their schedule. So that if they inquired about it and we said no and they said, well, screw you, I'm going to go anyway because Mr. Garren says it's okay and everything like that, we would say, listen, you need to understand and I'm telling you and directing you that you need to report for work tomorrow.
>
> Whether you do that or not is your choice, but if you choose not to, if you choose to ignore the directive we'll consider it insubordination, failure -- refusal to work. So we weren't really even thinking in terms of attendance, as being an attendance matter as somebody's who's really sick in the morning and can't make it to work.

Stejskal testified that PrimeFlight employees from Newark and LaGuardia attended the April 25 and May 31 bargaining sessions as observers. Stejskal could not recall the number of observers, but believed there were "quite a few" at the April 25 and maybe a couple of observers at the May 31 session (Tr. 145, 146).

Stejskal made an opening statement to the observers at the April 25 bargaining sessions by telling them that Garren had refused to inform PrimeFlight who would be in attendance at the meeting in order to verify their absence from work. Stejskal told the observers that if they were "skipping work to be in attendance…", then he direct them to return to work. Stejskal recalled one employee from Newark who had participated as an observer at the April 25 meeting who had told her dispatcher that morning that she was not coming to work. Stejskal testified that the employee who refused to work that day to attend the meeting was not disciplined. Stejskal further stated that he did not recall if he made the same statement at the May 31 session (Tr. 147–150).

DISCUSSION AND ANALYSIS

The counsel for the General Counsel argues that PrimeFlight Aviation Services, Inc. unilaterally implemented changes to the employees' work schedules and hours without providing to the Union notice and an opportunity to bargain over the changes as the exclusive collective-bargaining representative of the Respondent's employees in violation of Section 8(a)(5) and (1). The General Counsel also alleges that about January 25, 2017, the Respondent refused to meet and bargain with the Union's designated bargaining committee in violation of Section 8(a)(5) and (1) of the Act and the Respondent threatened employees with more strict enforcement of work rules on about April 4, 2017, because of their activities in support of the Union in violation of Section 8(a)(1) of the Act.

1. *The Respondent violated Section 8(a)(5) and (1) when it refused and failed to bargain with the Union on changes to the Employee's work schedules and hours*

The counsel for the General Counsel argues that the Respondent refused and failed to bargain with the Union over the changes made to the unit employees' wages, hours of work, and work schedules. The General Counsel contends that Respondent violated 8(a) (5) and (1) of the Act when it unilaterally implemented new work schedules and revised hours without notice and an offer to bargain over the changes with the Union (GC Br.).

Section 8(a)(5) of the Act requires an employer to provide its employees' representative with notice and an opportunity to bargain before instituting changes in any matter that constitutes a mandatory bargaining subject. *NLRB v. Katz*, 369 U.S. 736 (1962); *Toledo Blade Co*., 343 NLRB 385 (2004). The duty to bargain in good faith includes a duty to abstain from unilaterally changing terms and conditions of employment without first bargaining to impasse with the designated representative regarding the changes. *NLRB v. Katz,* 369 U.S. 736, 743 (1962). However, a unilateral change in a mandatory subject of bargaining is unlawful only if it is a "material, substantial, and significant change." *Flambeau Airmold Corp*., 334 NLRB 165 (2001), quoting *Alamo Cement Co*., 281 NLRB 737, 738 (1986).[7]

The Respondent's counsel argues that its actions were consistent with Judge Cogan's order. Alternatively, the Respondent argues that there was no material, substantial, and significant change in the wages and work schedules and wages.

I find that Judge Cogan's order did not prevent the Respondent from bargaining with the Union over the hours and work schedules of the unit employees.

With regard to the Respondent's first argument, and as noted above, Judge Cogan's order stated that

> Any agreement reached between PrimeFlight and the Union may not include minimum shift or employee requirements so that PrimeFlight is able to assign shifts and employees commensurate with JetBlue's expressed employment needs. Next, PrimeFlight must engage in good faith collective bargaining with the Union.

Judge Cogan ordered PrimeFlight to engage in good-faith bargaining with the Union, but subject the bargaining to the following limitations

> (i) any agreement reached between PrimeFlight and the Union may not include any provisions regarding a minimum number of shifts per employee or minimum staffing levels per shift - PrimeFlight will determine the shifts and staffing levels when JetBlue provides notice of its staffing and shift needs, and PrimeFlight will not be forced to needlessly staff and pay employees when there is no need to staff them.

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[7] "Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." *Katz*, supra at 747. "'The vice involved in [a unilateral change] is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge." *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994) (Board's brackets) (quoting *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970) (court's emphasis)), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997).

The Region sought an emergency clarification to Judge Cogan's order and on December 13, 2016, Judge Cogan issued another order and specifically stated

> The NLRB refuses to acknowledge that JetBlue's needs determine staffing levels, instead arguing that the Union should be able to bargain about staffing needs. The NLRB is effectively arguing that JetBlue should not have authority to determine its own staffing requirements and that the Union has better information about JetBlue's needs than JetBlue itself. This argument fails. The staffing limitation appropriately gives staffing authority to JetBlue, which in turn provides that information to PrimeFlight. The Union has no basis to determine staffing levels.

The counsel for the General Counsel argues that Judge Cogan's order did not affirmatively allowed the Respondent to ignore other aspects of bargaining over wages and work schedules. I agree. Judge Cogan's order only required that PrimeFlight be allowed to determine the minimum number of shifts per employee and the minimum staffing level as provided by the airline.

I simply cannot understand PrimeFlight's refusal to bargain with the Union on the other aspects of work schedules and wages once the minimal staffing levels and shifts were determined and provided by JetBlue to PrimeFlight. The parties could have bargained over the employees that would be given the extra hours of work, overtime, and new schedules. The parties could have bargained over which employees would be given preferential work schedules with extra hours of work or day shifts instead of night shifts. Heady, director of operations, testified that the wheelchair attendants were assigned various work zones (arrival gates, baggage, etc.). There is no reason why the parties could not have bargained over which employees and which zones they would work once the minimal level of shifts and staffing was determined by JetBlue. Further, the daily station departures record showing the number of flights in the month of February that was listed by JetBlue and provided to the Respondent did not dictate the number of staffing; the minimal hours of work; or the shift requirements (R. Exh. 1F). As such, the parties could have bargained over the number of staffing and shifts above the minimal that was necessary to meet the needs of JetBlue.

The parties could have also bargained over how the reduction of work hours or shifts be managed during the airline's off season schedule, which could have been based upon seniority or some other manner that would not seem arbitrary. As testified by Rodgers and Benoit, they had no clear understanding as to when and how their work schedules were changed in December and then changed again in January. In my opinion, a bargained-over agreement for a systemic and organized manner in identifying the employees selected for extra or lesser shifts, overtime, and work hours would be beneficial to both the Respondent and employees.

I further find that the changes made by the Respondent to the employees' hours and work schedules were not de minimis.

Work hours and schedules are mandatory subjects of bargaining. It is not disputed that the Respondent made changes to the wheelchair attendants' work schedules and hours during the months of December through February. An employer must provide adequate notice to the union and bargain concerning changes to unit employees' work schedules. See, e.g., *Sheraton Hotel Waterbury*, 312 NLRB 304, 307 (1993); *General Electric Co.*, 137 NLRB 1684, 1686 (1962). The foregoing changes affected employee terms and conditions of employment and were, thus, mandatory subjects of bargaining. See *Mid-Continent Concrete*, 336 NLRB 258 (2001), enfd. 308 F.3d 859 (8th Cir. 2002) (health insurance); *Desert Toyota*, 346 NLRB 132

(2005), citing *Abernathy Excavating, Inc.*, 313 NLRB 68 (1993) (regularly scheduled pay dates); *Migali Industries*, 285 NLRB 820, 825–826 (1987) (vacation scheduling); *E. I. du Pont & Co.*, 346 NLRB 553, 579 (2006) (severance pay).

As noted above, a unilateral change in a mandatory subject of bargaining is unlawful if it is "material, substantial, and significant." *Flambeau Airmold Corp.*, above. "The Board has long held that an employer is not obligated to bargain over changes so minimal that they lack such an impact." *W-I Forest Products Co.*, 304 NLRB 957 (1991) (citing *Rust Craft Broadcasting*, 225 NLRB 327 (1976)); *Toledo Blade Co.*, above. It is the Respondent's burden to show that there was no material, substantial, and significant changes to the employees' hours and work schedules. Here, the Respondent's action involves a system for administering work hours and schedules to employees doing unit work. Rodgers and Benoit credibly testified that their work hours and schedules had changed. Rodgers stated that she went from a 20 hour to a 48 hour work week. Benoit testified that her day schedule was revised to a night schedule. These are material, substantial, and significant changes to their terms and conditions of employment. Heady insisted that PrimeFlight tried to minimize the impact the hours worked by the wheelchair attendants when their work schedules changed. However, Heady admitted that he did not know the exact number of employees that were impacted by the schedule changes when the number of airline flights goes from a slow period to a busy holiday season. Consequently, all unit employees dealing with JetBlue flights would have been affected by the method used by PrimeFlight in determining their schedules and hours of work. Thus, I find and conclude that those changes had a material, substantial, and significant impact on the employees' terms and conditions of employment.

Accordingly, I find and conclude that the Respondent violated Section 8(a)(5) and (1) when it refused and failed to provide notice to the Union and an opportunity to bargain over the unilateral changes to the unit employees' work hours and schedules.

2. *The Respondent did not refuse to meet and bargain with the Union's designated bargaining committee on January 25, 2017, and thereafter in violation of Section 8(a)(5) and (1) of the Act*

Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the union that represents its employees. Section 8(d) defines the duty to bargain collectively to include the obligation to "meet at reasonable times" and "confer in good faith." The complaint alleges that the Respondent violated Section 8(a)(5) of the Act when it refused to meet and bargain with the Union on January 25 and had repeatedly failed to meet with the Union to bargain after January 25. I disagree.

It is not disputed that the Respondent bargaining team walked out on January 25 after Stejskal requested that the LaGuardia and Newark PrimeFlight employees in attendance as observers to leave the bargaining session and Garren refused his request. Stejskal testified that the Union acted in bad faith in failing to identify the employees who would be in attendance at the January 25 bargaining session when Garren submitted the Union's list of employees to Stejskal on January 17. Stejskal testified he was shocked and surprised to see more employees than were identified by Garren in his email. Stejskal further believed that it was the Union's attempt at a "dog and pony" show to impress the nonunit employees that the Union would purportedly achieve the same representation for them in Newark and LaGuardia. Stejskal believed that their presence would be disruptive to the bargaining session. I credit the testimony of Stejskal's rationale when he specifically informed Garren and Singer that the Respondent would not continue bargaining on January 25 if the nonunit employees from Newark and LaGuardia remained at the meeting.

The counsel for the General Counsel argues that the employees from Newark and LaGuardia were part of the Union's designated bargaining representatives and therefore entitled to stay to participate in the bargaining (GC Br. at 21, 22). In contrast, the Respondent argues that the employees from Newark and LaGuardia were merely observers and the presence of observers is a non-mandatory subject for bargaining (R. Br. at 17, 18).[8]

The counsel for the General Counsel's argument that the nonrepresented employees from Newark and LaGuardia were the Union's designated bargaining representatives at the January 25 session is misplaced. The factual situation here is that the employees from Newark and LaGuardia were not the Union's bargaining representatives for the January 25 session. In finding that the LaGuardia and Newark employees were observers at the bargaining, their entitlement to stay in the meeting is far different from being designated as bargaining representatives for the Union.

Stejskal testified that he was informed by Garren that the employees from Newark and LaGuardia were observers at the January 25 session. Oliver Singer, who was identified as a legal fellow and knowledgeable with labor law, clearly testified without dispute that the employees in attendance from their work sites at Newark and LaGuardia were observers and not part of the bargaining committee. As noted above, Singer testified on direct examination by the General Counsel (Tr. 30).

> Q. Once the group of you were outside of the bargaining session room how did that conversation begin?
> A. Bill [Stejskal] asked if there were workers who were not from JFK there and Brent [Garren] said yes, that they were there to observe.

On cross-examination, Singer further elaborated (Tr. 34, 35)

> Q. Good morning, Ms. Singer. I'm Frank Birchfield, I'm the attorney for Respondent Primeflight. During the meeting of the chief negotiators in the hallway that Judge Chu just mentioned, Mr. Garren referred to the non-unit employees as observers, is that correct?
> A. I believe he said they were only there to observe.
> Q. And he told Mr. Stejskal that they were not on the Bargaining Committee, they were there to observe, correct?
> A. I don't remember that statement.
> Q. You don't remember whether it happened?
> A. Can you restate the question?
> Q. Well, during that same meeting in the hallway, Mr. Garren said to Mr. Stejskal that the non-unit employees were not on the Union's Bargaining Committee, they were observers, correct?
> A. I believe he said that they were there to observe. That's what he said.
> Q. He didn't mention they were on the Bargaining Committee?
> A. I don't believe he said specifically that, those words. He didn't say that they were on the Bargaining Committee.

Further, her testimony is consistent with the email sent by Garren on January 18 that had identified by name all the bargaining representatives for the Union and his list of names did

[8] I would note that in its amended answer, the Respondent had previously contended that the attendance of observers at bargaining is a mandatory subject which the Union had refused to bargain over (GC Exh. 1).

not include any employees from Newark and LaGuardia (R. Exh. 8). Indeed, Garren stated in his February 22 email to Stejskal that the PrimeFlight employees from Newark and LaGuardia that would be attendance in future bargaining meetings were observers (GC Exh. 2).

The U.S. Supreme Court recognized that Section 7 the Act affords employees the "fundamental right" to select representatives of their own choosing for the purposes of collective bargaining. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). In general, parties have a right to choose whomever they wish to represent them in bargaining, and neither party can control the other party's selection of representatives. See generally *Wellington Industries,* 357 NLRB 1625 (2011); *Palm Court Nursing Home*, 341 NLRB 813, 819 (2004); *General Electric Co.*, 173 NLRB 253, 255 (1968), enfd. *General Electric v. NLRB*, 412 F.2d 512, 516–517 (2d Cir. 1969); *Minnesota Mining & Mfg. Co. v. NLRB*, 415 F.2d 174, 177–178 (8th Cir. 1969). The party seeking to exclude a selected representative from bargaining has a heavy burden of proving the individual poses a "clear and present danger" to the collective-bargaining process. See *General Electric v. NLRB*, 412 F.2d at 519–520; *Milwhite Co., Inc.*, 290 NLRB 1150 (1998).

The cancellation of bargaining sessions is an indicia of a failure to bargain in good faith, although ordinarily much more than a single, isolated cancellation of a bargaining meeting is required before a violation is found. See *Pavilion at Forrestal Nursing & Rehabilitation*, 346 NLRB 458 (2006); *Golden Eagle Sporting Co.*, *Inc.,* 319 NLRB 64, 75–79 (1995); and *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1382 (8th Cir. 1993).

In *BHC Northwest Psychiatric Hospital*, 365 NLRB No. 79 (2017), the Board adopted the recommended order of Administrative Law Judge Robert A. Giannasi. In dismissing the allegation that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain in the presence of mental health technicians at a bargaining session, Judge Giannasi noted that the observers were not members of the bargaining team, they were not themselves represented and had nothing to add to the bargaining. *BHC Northwest Psychiatric Hospital*, above, at slip op. 5. The Board specifically noted that in adopting the judge's dismissal of this allegation, it rely solely on the fact that the Respondent bargained in the presence of the technicians the next day and that there was no evidence that the incident negatively affected subsequent bargaining between the parties. *BHC Northwest Psychiatric Hospital*, above, fn. 1.

In my opinion, I find that the facts are similar to *BHC Northwest Psychiatric Hospital.* Here, Stejskal credibly testified that he believed that the Union wanted to demonstrate to the non-unit PrimeFlight employees in Newark and LaGuardia of the advantage of being represented by the Union and staged the meeting as a "dog and pony" show for the nonrepresented employees. At the same time, the observers had nothing to add to the bargaining session and, unlike the fact situation in *BHC Northwest,* the Union never even proffered a plausible rationale for the presence of the observers.

Further, whether the refusal to bargain in the presence of non-unit observers at one bargaining session rise to the level of a violation set forth by the Board in refusing to meet and bargain with the Union, I note that the Respondent did not refuse to bargain in future sessions in the presence of the observers and that the cancellation of one meeting did not adversely impact on the good-faith bargaining by the Respondent. On cross-examination, Singer testified (Tr. 35)

> Q. During the time that Mr. Stejskal was in your presence, whether in the bargaining room or in the hallway was there any statement on his part that he would not meet in the future with observers present?

A. No.
Q. There was no discussion of future sessions, correct?
A. Of no future sessions, no.
Q. And you have attended subsequent session where Mr. Stejskal was there, correct?
A. Yes.
Q. And the non-unit employee observers were there as well, correct?
A. Yes.

The counsel for the counsel for the General Counsel, however, maintains that the Respondent refused to meet and bargain after the January 25 session until April 25, 2017. It is alleged that the Union had "repeatedly request" resumption to bargain after January 25 and the Respondent had refused. I disagree.

The record does not show that the Respondent had repeatedly refused to bargain with the Union after January 25. While it is undisputed that the parties did not agree to another session after the cancellation of the January 25 meeting, this is not tantamount to a refusal to the bargain. The counsel for the General Counsel did not present any testimony from union representatives that they had made attempts to contact Stejskal or other members of Respondent's bargaining team to resume bargaining. The only communication from the Union to the Respondent regarding the resumption of bargaining was not until February 22 when Garren asked Stejskal on his position in allowing observers attend the next session (GC Exh. 2). The record is devoid of any request to bargain from the Union to the Respondent between January 25 and February 22. In the meanwhile, the parties were still in contact in discussing other matters in preparation of bargaining, such as a Union's request for information and the subsequent clarification of that request by the Respondent. The parties were also in discussions as to the observers who would be in attendance at the next session. A review of that string of emails shows that Stejskal never refused to bargain in the presence of the observers (GC Exh. 2). I further credit the testimony of Stejskal that he was also busy during the month of March in reaching a contract with 32BJ in Pittsburgh, Pennsylvania, which caused some delay due to his unavailability.

Accordingly, I recommend dismissal of this allegation.

3. *The Respondent threatened employees with more strict enforcement of work rules on about April 4, 2017, in violation of Section 8(a)(1) of the Act*

Section 8(a)(1) of the Act provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. Discharging and disciplining employees because they engaged in activity protected by Section 7 is a violation of Section 8(a)(1). Section 7 of the Act guarantees employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." See, *Brighton Retail Inc.*, 354 NLRB 441, 447 (2009). An employer violates Section 8(a)(1) of the Act when it more strictly enforces its work rules in response to employees' union activities. *Print Fulfillment Services LLC,* 361 NLRB No. 144, slip op. at 3–4 (2014).

In specifically assessing whether a remark constitutes a threat, the appropriate test is "whether the remark can reasonably be interpreted by the employee as a threat." *Smithers Tire*, 308 NLRB 72 (1992). Further, "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether

the coercion succeeded or failed." *American Tissue Corp*., 336 NLRB 435, 441 (2001) (citing *NLRB v. Illinois Tool Works*, above.

The mere threat of an unspecified reprisal is sufficient to support a finding that the employer has violated Section 8(a)(1). See, e.g., *SDK Jonesville Division, LP*, 340 NLRB 101, 101–102 (2003) (unspecified threat that it was not in employee's best interest to be involved with the union found violative, citing *Keller Ford*, 336 NLRB 722 (2001), enfd. 69 Fed. Appx. 672 (6th Cir. 2003) (a supervisor unlawfully advised an employee not to talk to other employees about insurance copayments, because it could be "hazardous to [his] health);" *Long Island College Hospital*, 327 NLRB 944, 945 (1999) (a supervisor unlawfully told employees to proceed with caution in taking a work related issue to the union, because one of the employees was getting an unfavorable reputation with management). Also, *Aqua-Aston Hospitality, LLC*, 365 NLRB No. 53 (2017) (where the vice-president of operations told employees that they would lose work, that they were lucky to have jobs, where employees would reasonably understand comments to mean that the employer was angry with their union activities and would feel threatened).

Here, I find that Stejskal's comment would be reasonably interpreted that the non-unit employees from Newark and LaGuardia would be subjected to a more severe discipline if they were to attend the bargaining session by calling in sick to their supervisors. Stejskal clearly testified that such employees calling in sick to attend the bargaining session would be disciplined with insubordination upon refusing to work and not merely with an attendance infraction. As noted above, Stejskal explained that an ordinary attendance issue is an employee calling in sick on a scheduled work day and that an insubordination issue is when an employee refused a directive to work

> Whether you do that or not is your choice, but if you choose not to, if you choose to ignore the directive we'll consider it insubordination, failure -- refusal to work. So we weren't really even thinking in terms of attendance, as being an attendance matter as somebody's who's really sick in the morning and can't make it to work.

The threat made was not just to the Union but also made by Stejskal to the Newark and LaGuardia PrimeFlight employees prior to the start of the April bargaining session. Stejskal testified that "there was quite a few" PrimeFlight employees as observers from Newark and LaGuardia at the April 25 meeting. He made an opening remark and told the observers that if they were "…skipping work to be in attendance…" then "…they needed to get back to work and I was directing them to go back to work" (Tr. 148).

I find that threatening employees with a stricter infraction of insubordination for a routine call-in sick day is a violation of the Act because such a threat is being made due to the employees' union activities. Here, the Respondent admits that it would discipline the employees solely because they would attend a scheduled bargaining session between the Union and the Respondent without providing advance notice and getting permission from the supervisor to attend. This is clearly analogous to a situation when employees call in sick to attend a union strike or participate in a picket. The Board has held that employees lawfully may strike without prior notice, notwithstanding an employer's policy that requires advance notice of employee absences. *Iowa Packing Co*., 338 NLRB 1140, 1144 (2003). I find no difference in this analysis here. Because the Respondent concedes that it would more severely discipline employees for conduct that was protected, its motive for the discipline is undisputed and no further analysis is required. *CGLM, Inc*., 350 NLRB 974, 974 fn. 2 (2007); *HMY Roomstore, Inc*., 344 NLRB 963, 966 (2005).

Accordingly, I find and conclude that the Respondent violated Section 8(a)(1) of the Act when it threatened employees with more strict enforcement of a work rule for their union activities.

CONCLUSIONS OF LAW

1. The Respondent, PrimeFlight Aviation Services, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union, Service Employees International Union Local 32BJ, is a labor organization within the meaning of Section 2(5) of the Act.
3. At all material times, the Union has been the designated exclusive collective-bargaining representative of Respondent's employees employed at Terminal 5 at JFK Airport, Jamaica, New York, in the following appropriate unit:

> All full-time and regular part-time employees employed by the Respondent at JFK Airport, Jamaica, New York, excluding confidential employees, office clericals, guards and supervisors, as defined by the Act.

4. By unilaterally implementing changes in the unit employees' hours of work and schedules in December 2016 and ongoing, without notice and bargaining with the Union to a lawful overall impasse in negotiations, the Respondent has violated Section 8(a)(5) and (1) of the Act.
5. By threatening employees with more strict enforcement of a work rule because of their activities in support the Union, the Respondent violated Section 8(a)(1) of the Act.
6. The unfair labor practices, described above, affect commerce within the meaning of Section 2(6) and (7) of the Act.
7. The Respondent did not otherwise violate the Act in this complaint.

REMEDY

Having found that the Respondent has engaged in an unfair labor practice, I find that it must cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally, without notifying and bargaining with the Union, I shall order the Respondent, upon the request of the Union, to bargain with the Union, as the exclusive collective-bargaining representative of its unit employees, noted above, before implementing any changes in work schedules and hours of the unit employees.

Further, upon request of the Union, rescind the unilaterally implemented changes in the unit employees' work schedules and hours and restore the preexisting work schedules and hours of the unit employees prior to about January 20, 2017.

ORDER

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended[9]

The Respondent, PrimeFlight Aviation Services, Inc., its officers, agents, successors, and assigns, shall

[9] If no exceptions are filed as provided by Sec. 102.46 and if no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

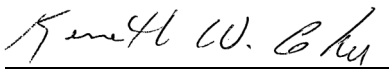
1. Cease and desist from

(a) Unilaterally implementing changes in its work hours and schedules of its unit employees.
(b) Threatening employees with more strict enforcement of work rules.
(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request of the Union, to bargain with the Union as the exclusive collective-bargaining representative of its unit employees, noted above, before implementing any changes in the work hours and schedules of unit employees and upon request of the Union, rescind the unilateral changes made to unit employees' work schedules and hours since about January 20, 2017.
(b) Rescind the threat to employees with a more strict enforcement of work rules.
(c) Within 14 days after service by the Region, post at its Terminal 5, JFK Airport, Jamaica, New York, where unit employees work, and at its facilities at the Newark and LaGuardia airports where its employees work, copies of the attached notice in English and Spanish marked "Appendix A."[10] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 1, 2016.
(d) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 9, 2018



Kenneth W. Chu
Administrative Law Judge

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefits and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively with the Service Employees International, Local 32BJ (Union) by unilaterally implementing changes in your work schedules and hours of work without first giving notice to the Union and an opportunity to bargain over the changes of the employees in the following unit:

> All full-time and regular part-time employees employed by the Respondent at JFK Airport, Jamaica, New York, excluding confidential employees, office clericals, guards and supervisors, as defined in the Act.

WE WILL NOT threaten employees with more strict enforcement of work rules because of your support of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, upon request of the Union, rescind the unilateral changes to the unit employees' schedules and hours since about January 20, 2017.

WE WILL, upon request of the Union, bargain with the Union as the exclusive collective-bargaining representative of the above unit employees over changes in unit employees' work schedules and hours of work.

WE WILL rescind the threat to employees with more strict enforcement of work rules because of your support of the Union.

PrimeFlight Aviation Services, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Region 29
Two Metro Center, 100 Myrtle Avenue, 5th Floor
Brooklyn, New York 11201
(718) 330-7713, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-191801 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (718) 330-2862.