

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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CASE NOS. 29-CA-191801, 29-CA-196327

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**PrimeFlight Aviation Services, Inc.,**

Respondent,

and

**Service Employees International Union  
Local 32BJ,**

Charging Party.

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**RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Dated: February 20, 2018

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## STATEMENT OF THE CASE

SEIU 32BJ filed two unfair labor practice charges with Region 29 of the National Labor Relations Board, beginning with Case No. 29-CA-191801 on January 25, 2017, alleging that PrimeFlight had (a) unlawfully altered employee schedules and reduced employee hours without notice to and bargaining with the Union and (b) failed to bargain with the Union by refusing to bargain with “observers” invited by the Union in the negotiating room. The Union filed Case No. 29-CA-196327 on April 5, 2017, alleging that a PrimeFlight management employee unlawfully threatened PrimeFlight employees for engaging in protected activity by making a statement to a Union lawyer relating to potential unexcused absences by employees to attend union bargaining sessions.

The Regional Director issued a Complaint and Notice of Hearing on April 20, 2017 addressing the allegations in Case No. 29-CA-191801. After the filing of Case No. 29-CA-196327, the Regional Director issued an “Order Consolidating Cases and Amendment of Complaint (“Amended Complaint”) on June 9, 2017 alleging violations of the Act as set forth above. On June 23, 2017, Respondent filed its Answer to the Amended Complaint.

The hearing was held before Administrative Law Judge Kenneth W. Chu on June 27, 2017 in Brooklyn, New York, at which time, for purposes of this proceeding, the parties entered into a stipulation by which PrimeFlight reserved its argument that it is not subject to the jurisdiction of the National Labor Relations Act because PrimeFlight falls within the exclusion of employers under the Railway Labor Act. See 29 U.S.C. § 152(2). The parties agreed not to address that issue before Judge Chu, with all parties consenting to be bound by the pending appeal to the Board in Case No. 29-CA-177992, *et al.* for purposes of this proceeding. (Tr. 6-7.)

On January 9, 2018, the ALJ issued his decision, finding that (1) Respondent was properly subject to the NLRB’s jurisdiction under the National Labor Relations Act; (2) Respondent was the successor employer of a bargaining unit of employees represented by Charging Party; (3) Respondent violated the Act by making changes to staffing levels and schedules without decision bargaining with Charging Party; (4) Respondent did not violate the Act by terminating a single bargaining session over the unbargained presence of non-bargaining unit “observers”; and (5) Respondent violated the Act by threatening reprisals directly to non-bargaining-unit employees for allegedly protected activity.

### **QUESTIONS INVOLVED**

1. Did the ALJ err in finding that Respondent is subject to jurisdiction under the National Labor Relations Act instead of the Railway Labor Act? [Exceptions 1, 2.]

2. Did the ALJ err in finding that Charging Party represents a bargaining unit of Respondent’s employees at JFK International Airport because Respondent is a successor employer bound by its predecessor’s bargaining relationship with Charging Party? [Exceptions 3, 4, 5.]

3. Did the ALJ err in concluding Respondent violated Section 8(a)(1) and 8(a)(5) of the Act by making unilateral changes to staffing levels and employee schedules without decision bargaining with Charging Party? [Exceptions 6, 7, 8.]

4. Did the ALJ err in concluding Respondent violated Section 8(a)(1) of the Act by threatening non-bargaining unit employees with discipline for attending union bargaining involving employees in the bargaining unit? [Exceptions 9, 10, 11.]

## STATEMENT OF FACTS

### **I. PrimeFlight Begins Operations at JFK International Airport and Becomes Embroiled in Litigation Over a Recognition Demand by SEIU 32BJ.**

PrimeFlight is in the business of contracting with airline carriers to provide terminal support services to those airlines at airports around the United States. In March 2016, PrimeFlight was awarded a contract to provide airline support services to JetBlue Airways, Inc., at JFK International Airport. PrimeFlight commenced providing services to JetBlue at Terminal Five at JFK on May 9, 2016. PrimeFlight employs workers at JFK to provide JetBlue with wheelchair handling for disabled customers, skycap curbside check-in, baggage handling, and security line queue monitoring.<sup>1</sup>

On May 23, 2016, SEIU 32BJ sent a letter to PrimeFlight demanding recognition as the bargaining representative of PrimeFlight's employees at JFK, based on a purported recognition agreement the Union had entered into with a prior contractor to JetBlue, to which the Union claimed PrimeFlight was a legal successor for purposes of recognition. PrimeFlight declined to recognize the Union based on (a) PrimeFlight's status as a derivative carrier not subject to the National Labor Relations Act by virtue of the Railway Labor Act, discussed further below, and (b) PrimeFlight's substantial changes to the composition of the bargaining unit resulting in the Union's lack of presumed majority support among the employees. SEIU 32BJ subsequently filed unfair labor practice charges with Region 29 of the Board over PrimeFlight's refusal to recognize and bargain with the Union.

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<sup>1</sup> As part of the Stipulation entered as Joint Exhibit 1, the parties entered the transcript and exhibits from the prior hearing involving the jurisdictional question under the Railway Labor Act. Those materials provide detailed background on the nature of PrimeFlight's operations at JFK International Airport and the origin of PrimeFlight's current bargaining relationship with SEIU 32BJ. The parties' Stipulation has potentially preclusive impact on this entire proceeding because of a pre-existing jurisdictional question pending before the Board, as discussed in Section I of the Argument, below.

In addition to issuing an administrative complaint, Region 29 filed a civil court action with the United States District Court for the Eastern District of New York seeking an injunction requiring PrimeFlight to recognize and bargain with the Union. After proceedings before Judge Brian Cogan, that court issued a Preliminary Injunction and Memorandum Decision and Order on October 24, 2016. Finding that the district court owed “substantial deference” to regional directors in such matters, requiring that the Regional Director be given “the benefit of the doubt” (Exh. R-2, Memorandum at 5), Judge Cogan ordered PrimeFlight to recognize and bargain with the Union with respect to PrimeFlight’s full-time and regular part-time employees at JFK Terminal Five.<sup>2</sup> (Exh. R-2, Preliminary Injunction at 1-2.)

In his initial order, Judge Cogan recognized that PrimeFlight had substantial business interests in not being required to bargain over scheduling and staffing matters dictated by JetBlue’s business requirements. In the Preliminary Injunction, the district court stated, “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 ....” (Exh. R-2, Preliminary Injunction at 2.) The Memorandum Decision and Order specifically addressed this issue, making clear that PrimeFlight could continue to staff its operation at JFK based on the needs of JetBlue, without first bargaining an agreement with the Union:

[ ] PrimeFlight must engage in good faith collective bargaining with the Union; however, 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 determine the shifts and staffing levels when JetBlue provides notice of its staffing and shift needs, and PrimeFlight will not be forced

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<sup>2</sup> References to the hearing transcript appear as "Tr. ." References to the General Counsel's, and Respondent Employer's Exhibits appear respectively as “Exh. GC-\_\_\_” and “Exh. R-\_\_\_.”

to needlessly staff and pay employees when there is no need to staff them .... These restrictions will enable the parties to bargain in good faith to facilitate the Union being able to represent PrimeFlight employees in negotiations without sacrificing PrimeFlight's flexibility to assign appropriate coverage to meet JetBlue's service needs.

(Exh. R-2, Memorandum at 22 (emphasis supplied).)

Unsatisfied with Judge Cogan's decision to protect PrimeFlight's flexibility, Region 29 challenged the staffing carve-out through an "emergency motion" on November 21, 2016, claiming that, by not requiring PrimeFlight to bargain over staffing changes, the Preliminary Injunction would irreparably hamper negotiations. Specifically, Region 29 (a) acknowledged that Judge Cogan's Preliminary Injunction:

- *"excis[es] shifts and staffing from the collective bargaining process"* and
- *"forces the Union to concede to [PrimeFlight] the sole discretion to determine shifts and staffing levels."*

(Exh R-3 at 3.) In other words, Region 29's November 21, 2016 attack on Judge Cogan's injunction is completely at odds with Region 29's position in the instant unfair labor practice proceeding.

Judge Cogan promptly and conclusively struck down Region 29's attempt to require bargaining on PrimeFlight's part over interim staffing changes made by PrimeFlight to meet JetBlue's needs. In a Memorandum Decision and Order issued on December 13, 2016, Judge Cogan reiterated that the Preliminary Injunction excused PrimeFlight from bargaining over changes to staffing levels made to accommodate JetBlue's flight schedules:

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.

(Exh. R-4 at 4.) Judge Cogan then specifically linked the staffing carve-out under the

Preliminary Injunction to seasonal fluctuations, particular fluctuations linked to 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.

(Exh. R-4, Memorandum at 5 (emphasis supplied).)

## **II. PrimeFlight Recognizes the Union on a Provisional Basis and Begins Bargaining with the Union in December 2016.**

Meanwhile, consistent with Judge Cogan's directions, PrimeFlight contacted the Union and initiated bargaining. William Stejskal, PrimeFlight's Senior Vice President of Human Resources, had the responsibility for negotiating with the Union following the issuance of the Preliminary Injunction. (Tr. 108, 110.) Stejskal contacted the Union's Deputy General Counsel, Brent Garren, immediately after PrimeFlight received Judge Cogan's order, for the purpose of scheduling bargaining sessions. (Tr. 110-11.) After an initial telephone call, Stejskal and Garren communicated by e-mail about the make-up of their bargaining teams and potential bargaining dates. (Tr. 112, Exh. R-5.)

In their initial e-mail chain, Stejskal and Garren agreed to an initial bargaining date of December 13, 2016. (Tr. 114; Exh. R-6.) Garren also committed to Stejskal that the Union would advise PrimeFlight of the identities of those PrimeFlight employees on the Union's bargaining team in order to arrange for those employees to be released from work: "I will let you know about the employee committee well before[December] 13th." (Tr. 112; Exh. R-5.) Ultimately the Union elected not to have employees present at the first session. (Tr. 115.) As shown below, however, the parties did agree that the Union would provide the information

for later sessions. PrimeFlight's bargaining team, consisting of Stejskal and an operations executive, Matthew Barry, met with Garren and two other Union representatives on December 13, 2016. (Tr. 114.) PrimeFlight agreed to meet with the Union at the Union's headquarters in Manhattan. (Tr. 115.)

At the initial bargaining session, a Union official named Hill spoke with PrimeFlight about joining a multi-employer bargaining group consisting of contractors with operations at JFK, Newark Airport, and LaGuardia Airport. (Tr. 115-16.) Garren then proposed that PrimeFlight join the multi-employer group. (Tr. 116.) Stejskal testified that the only specific proposal made by SEIU 32BJ on December 13 was to bring all PrimeFlight employees at the three New York City-area airports – including JFK, LaGuardia Airport, and Newark Liberty International Airport – into a single multi-employer bargaining unit: “there was only one proposal made that day and that was for us to lump in our employees at Newark, our employees at LaGuardia with our employees at JFK and join this other group of 11 contractors. That was it.” (Tr. 116; see also Tr. 117.) It is critical to note that, as of December 13, 2016, SEIU 32BJ did not represent any PrimeFlight employees at either Newark Liberty International Airport or LaGuardia Airport.<sup>3</sup> (Tr. 116.)

Following the December 13 session, Stejskal and Garren agreed by e-mail to set another bargaining date for January 25, 2017. (Tr. 119; Exh. R-7.) In that e-mail exchange, Garren again committed to Stejskal on December 27, 2016, “I will let you know about who will be on our committee and when we need release time after the new year.” (Exh. R-7.)

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<sup>3</sup> As discussed in more detail below, as of December 13, 2016, SEIU 32BJ was attempting to organize PrimeFlight's employees at both Newark and LaGuardia in order to represent those employees as their bargaining agent.

Garren followed up on January 17, 2017 with an e-mail to Stejskal stating, “Please see a list of our bargaining committee members below.” (Tr. 119; Exh. R-8.) Garren’s e-mail identified eight PrimeFlight employees by name and asked that they be released from work on specific dates to prepare for and attend bargaining. (Id.) Stejskal forwarded the list to the appropriate manager at JFK to ensure that the employees would be released. (Tr. 119.)

Garren subsequently contacted Stejskal to advise him that the Union had left a name off the January 17 list, and the Union added another JFK employee to the list. (Tr. 120.) At no point did Garren mention to Stejskal that the Union’s team would include any additional PrimeFlight employees beyond the eight initial names plus the one left off. (Tr. 120.) Stejskal later confirmed that all of the employees identified by the Union were released. (Tr. 121; Exh. R-9.)

**III. SEIU 32BJ Invites Unrepresented PrimeFlight Employees from Other Airports to Attend January 25, 2017 Bargaining With No Notice to PrimeFlight.**

SEIU 32BJ and PrimeFlight met on January 25, 2017, again at the Union’s headquarters in Manhattan, to engage in collective bargaining. (Tr. 122.) Stejskal traveled from Nashville to attend for PrimeFlight, while Barry came in from Boston. (Tr. 122.) Josh Heady from the JFK operation also attended. (Tr. 122.) Stejskal and Heady met at the Union’s office before Barry arrived and went into the building to meet the Union’s team. (Tr. 122.)

Stejskal immediately detected something amiss from his prior discussion with the Union about who would attend the bargaining session. The session was held in a glass-walled room, and Stejskal could see that many more people were in attendance than had been identified by Garren, at least twice as many as identified by the Union. (Tr. 122, 125.)

The session opened with introductions by each side, and Stejskal was very surprised when one of the people in attendance identified himself as an employee of PrimeFlight from

Newark's airport. (Tr. 124.) Stejskal was quite surprised, as Garren had made no mention of bringing any PrimeFlight employees other than those from JFK. (Tr. 124.)

While still in the room, Stejskal stated to Garren that they needed to discuss the presence of non-JFK employees. (Tr. 124.) Garren and another SEIU representative, Olivia Singer, stepped out of the room, and Stejskal asked Garren to explain the situation, stating he (Stejskal) had not expected anyone from PrimeFlight's Newark operation to be there. (Tr. 124-25.) Garren made clear to Stejskal that multiple employees from Newark and LaGuardia were present.<sup>4</sup> (Tr. 125.)

Stejskal immediately had serious concerns about the Union's decision to bring non-JFK employees to bargaining with no advance notice to PrimeFlight. (Tr. 125, 126.) During his testimony, Stejskal identified various points of concern, as follows:

1) The Union had already proposed to have PrimeFlight join a multi-employer group with PrimeFlight's Newark and LaGuardia employees in the unit, without further NLRB proceedings.<sup>5</sup> (Tr. 125.) The presence of employees from those locations implicated the Union's prior proposal on this point.

2) Stejskal, who is not a lawyer, also did not know the legal implications of engaging in collective bargaining with non-JFK employees in the room, specifically, whether agreeing to bargain in their presence could be interpreted as implicit recognition of the Union as the bargaining agent at Newark or LaGuardia. (Tr. 127.)

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<sup>4</sup> Garren later shared a sign-in list from the January 25 meeting, which included the names of the employees from Newark and LaGuardia. (Tr. 129; Exh. R-10.) Based on that list, it appears that seven employees attended from LaGuardia, one from Newark, and eight from JFK.

<sup>5</sup> After the December 13 meeting where they discuss this topic, SEIU 32BJ officials had again approached Stejskal about the subject at another meeting in Philadelphia, unrelated to JFK bargaining. (Tr. 125-26.)

3) Stejskal believed that some of the employees might have work shifts at Newark and LaGuardia and were missing work to attend bargaining, which could create operational problems for PrimeFlight at those airports. (Tr. 127.)

Stejskal stated that he was not in New York to bargain with the Union about Newark or LaGuardia, to which Garren responded by citing the National Labor Relations Act, stating that “he could have whoever he wanted, any third party observer, whoever be there.” (Tr. 128.) Stejskal asked Garren to have the non-JFK personnel leave so that the parties could get on with bargaining. (Tr. 128.) Stejskal added that he would not stay at the session if Garren insisted that the observers remain in the room. (Tr. 128.) Garren would not budge, and Stejskal gathered his belongings and left with Heady. (Tr. 128-29.)

**IV. PrimeFlight States to SEIU 32BJ’s Counsel That PrimeFlight May Discipline Employees for Unexcused Absences to Attend Union Bargaining and Subsequently Instructs Employees Skipping Work to Return to Work.**

Subsequent to the January 25 meeting, Stejskal and Garren continued to discuss the presence of non-JFK “observers” at bargaining over the JFK bargaining unit. In March 2017, Stejskal confirmed that PrimeFlight would consider bargaining with these observers in the room but remained concerned about those observers missing work to attend bargaining. (Tr. 131; Exh. GC-2 at 2.) On April 4, 2017, Stejskal again raised the issue of confirming that such observers would not be missing work to attend bargaining. (Tr. 132-33; Exh. GC-2 at 1.)

In his April 4 message, Stejskal began by conceding, “We are agreeable to bargaining with non-union PrimeFlight employees present as your Observers.” (Exh. GC-2 at 1). Stejskal went on to note that PrimeFlight remained concerned about the potential for such employees to miss work, particularly in light of the Union’s ongoing refusal to identify such observers ahead of time so that PrimeFlight could ensure shift coverage. In response to the Union’s refusal to have any meaningful discussion about this concern, Stejskal stated PrimeFlight was

not content to merely leave such matters to chance. For convenience, the entirety of the e-mail at issue states as follows:

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?

(Exh. GC-2.) In explaining his intent in sending this e-mail to Garren, specifically the reference to attendance infractions, Stejskal stated:

I just wanted to make the point to him that not allowing us to know who the observers would be in advance so that we could check their schedules because that could have a negative impact on the operation and for you to hint or tell or indicate to anybody that you could just blow off work to come, it doesn't matter, that that probably wasn't -- that was not going to be a good idea.

(Tr. 132.) Stejskal differentiated such situations from an employee calling in sick, where the employee would not intentionally miss work without providing notice to the employer, even though the employee knew ahead of time that he or she was not going to cover a shift. (Tr. 133.) Stejskal stated that he would consider such conduct more akin to insubordination because of an employee's decision to disregard a directive to work even in the absence of an emergency or other condition preventing the employee from giving notice. (Tr. 133-34.)

At the next meeting, on April 25, 2016, Stejskal advised employees from airports other than JFK that they needed to ensure that they were not missing work without permission to attend bargaining:

I told them that I'd asked Mr. Garren to let us know in advance who would be there so we could check their schedules and make sure it was okay for them to be there. And since I wasn't afforded that opportunity, I let them know that if they were, in fact, skipping work to be in attendance that day, at that session in April, that they needed to get back to work and I was directing them to go back to work.

(Tr. 137.) Stejskal stated that no one responded.

**V. In February and March 2017, PrimeFlight Makes Slight Changes to Hours and Schedules Consistent With Staffing Demands Provided by JetBlue.**

As part of its operations at JFK, PrimeFlight plans its employee needs around the flight schedules of PrimeFlight's client, JetBlue. (Tr. 55.) PrimeFlight Director of Operations Josh Heady has responsibility for the entire operation at JFK and is the direct liaison for PrimeFlight with JetBlue. (Tr. 54.) As stated by Heady, "I work in conjunction with Jet Blue and their designated representative and we build the work schedule basically together to fit the need of Jet Blue's operational schedule." (Tr. 55.) Heady has a direct liaison from JetBlue, Christopher Kamera, with whom Heady interacts on a daily basis. (Tr. 82.) Kamera provides JetBlue flight schedules to Heady in advance of each month. (Tr. 85.)

Heady and PrimeFlight management try not to change employees' schedules at JFK, "but it does happen on a rare occasion." (Tr. 77.) Heady acknowledged that some employees' schedules were changed between the schedules in September and November 2016 and February 2017.<sup>6</sup> (Tr. 77.) When such schedule changes occur, "It's strictly the operation ...

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<sup>6</sup> Heady observed that the first two schedules, for September and November 2016, were broken down into zones, but in February 2017, PrimeFlight ceased referring to employees by zone in the schedules. He confirmed that PrimeFlight did not change the way the employees were assigned but simply stopped referring to those assignments in the schedule itself. (Tr. 64, 76-77.)

we work directly with the airline to be able to supply a certain amount of staff during certain peak periods of the day.” (Tr. 77.) With respect to “static” positions, i.e., baggage and line queue positions, the start and stop times for the day may fluctuate, but the actual days worked typically do not. (Tr. 77-78.) Such shift start and end times are adjusted in response to airline requests based on airline operations or airport demands, such as requests from the Transportation Security Administration. (Tr. 78.)

The wheelchair operation is “more complicated,” as it relates directly to flight activity. (Tr. 78.) For that reason, PrimeFlight “tr[ies] to staff accordingly so that we can cover those peaks and make sure [] that we’re fulfilling our obligation to the airline in servicing the passengers.” (Tr. 78.) Heady also added, “we also don’t want to have an abundant amount of staff just standing around doing nothing.” (Tr. 78.)

Heady provided testimony about JetBlue flight schedules for September 2016 through April 2017, which showed substantial fluctuations in JetBlue departures at JFK from month to month. (See generally, Exhs. R-1a – R-1h.) Heady relies directly on the flight schedules to prepare the staffing levels for PrimeFlight employees at JFK. (Tr. 80.) Critically, as stated in Heady’s testimony, PrimeFlight staffs to cover JetBlue’s peak demand: “what we do is we try to staff accordingly so that we can cover those peaks.” (Tr. 78.) Therefore, peak dates on and periods on the flight schedules are the critical numbers reviewed by PrimeFlight to staff in a given month, not daily averages. Staffing to a daily average of 156.6 departures in December 2016 does not prepare PrimeFlight to deal with 175 departures per day from December 21 through December 23. The comparable daily average for March 2017 of 152.6 departures per day conceals a far lower peak of 160 departures, which only occurred once in that month.

The flight schedules demonstrated that in September 2017, JetBlue experienced an a high of 166 departures on September 1, 2016 (the Thursday before Labor Day weekend) and continued high activity through Labor Day itself, with 165 departures on Labor Day, with average daily departures for the month at 145.7. (Exh. R-1a.) Not surprisingly, JetBlue's JFK departures fell somewhat in October 2016, a month with no significant travel holidays, to a peak of 158 and an average of 143.0. (Exh. R-1b.)

In contrast, in November, with a major travel holiday at the end of the month, departures jumped again, with a substantial rise in daily departures during the week of Thanksgiving, cresting at a high of 164 departures on the Sunday of Thanksgiving weekend, November 27, 2016. (Exh. R-1c.) Quite predictably, this upward trend continued in December 2016 as the holidays approached. Not only did average daily departures throughout December increase to 156.6 per day, but every day from December 17 until December 31, 2016, departures were at least 160. (Exh. R-1d.)

Although departures continued to be heavy in the first three days of January 2017, the overall flight schedule in January shows relatively low volume. (Exh. R-1e.) The New Year's Day weekend, a significant travel holiday for New York City, had three consecutive days of high departures, with 175, 174, and 166 on January 1, 2, and 3, respectively. The highest daily departure number for the remainder of the month, however, was 150 on January 5. Throughout the second half of January 2017, departures hovered between 135 and 146 per day. February reflected similar numbers throughout the month. (Exh. R-1f.) Notwithstanding a few days of departures in the 150 to 160 range, the average daily number in February was 147.9. The numbers in March and April 2017 remained in the same range, with peaks at 160 and 159, respectively, and averages slightly over 152 departures per day. (Exhs. R-1g, R-1h.)

As stated by Heady, employees in wheelchair assistance are the most sensitive to flight schedule changes, as the demand for wheelchair assistance to passengers is not “static” and reacts directly to flight volume. (Tr. 78.) The payroll documents submitted subsequent to the hearing, per the agreement among counsel during the hearing, indicate reductions to the weekly hours of some wheelchair assistance employees. (See Exh. GC-4.)

The General Counsel offered testimony from two wheelchair assistance employees, Irene Rodgers (“Rodgers”) and Yolie Jean Benoit (“Jean Benoit”). Rodgers testified that her work schedule was changed “at the end of January” 2017. (Tr. 38) Benoit testified that her work schedule was changed “Beginning of January” 2017. (Tr. 44.) The General Counsel’s complaint alleges that “On about January 20, 2017, Respondent altered Unit employees’ work schedules and/or reduced Unit employees’ work hours.”<sup>7</sup> (Complaint ¶ 10.)

The schedules show that both Rodgers and Jean Benoit experienced schedule changes in February 2017. What is indisputable from the payroll documents showing their hours, however, is that their scheduled hours per week generally bore very little resemblance to the hours they actually worked, over a long period of time.

Month	Friday	Saturday	Sunday	Monday	Tuesday	Wednesday	Thursday
11/16	12:00-16:00	12:00-16:00	Off	Off	12:00-16:00	12:00-16:00	12:00-16:00
02/17	13:00-20:00	13:00-20:00	Off	Off	13:00-20:00	13:00-20:00	13:00-20:00

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<sup>7</sup> Because the General Counsel bears the burden of proving all of his Complaint allegations, PrimeFlight herein analyzes only the schedule changes alleged by Rodgers and Jean Benoit. As discussed further below, to the extent any other employee’s schedule was changed, whether in January 2017 or any other time, the General Counsel has the burden of proving PrimeFlight made such a unilateral change. The General Counsel offered no such evidence as to any other employee.

In other words, Rodgers' went from working noon to 4:00 p.m. on Friday, Saturday, Tuesday, Wednesday, and Thursday, with Sunday and Monday off, to working 1:00 p.m. to 8:00 p.m. on the same work days and retaining Sunday and Monday off. (Exhs. GC 5, GC-6.) Jean Benoit's schedule also underwent an increase while retaining the same days off:

Month	Friday	Saturday	Sunday	Monday	Tuesday	Wednesday	Thursday	Total Sched Hours
11/16	15:30-21:00	15:30-21:00	Off	Off	15:30-21:00	15:30-21:00	15:30-21:00	27.5
02/17	18:00-00:00	18:00-00:00	Off	Off	18:00-00:00	18:00-00:00	18:00-00:00	30

Jean Benoit went from working 3:30 p.m. to 9:00 p.m. on Friday, Saturday, Tuesday, Wednesday, and Thursday, with Sunday and Monday off, to working 6:00 p.m. to midnight on the same work days and retaining Sunday and Monday off. (Exhs. GC 5, GC-6.) Turning to the employees' actual worked hours, shown in the payroll records introduced after the hearing, both employees' hours fluctuated extensively week to week and month to month.

Employee	Week Beginning Date	Sched Hours	Actual Hours Worked
Rodgers	12/1/16	20	28.75
Rodgers	12/8/16	20	46.25
Rodgers	12/15/16	20	45.50
Rodgers	12/22/16	20	46.75
Rodgers	12/29/16	20	37.50
Rodgers	1/5/17	20	53.00
Rodgers	1/12/17	20	22.25
Rodgers	1/19/17	20	27.75
Rodgers	1/26/17	20	30.50
Rodgers	2/2/17	35	34.50
Rodgers	2/9/17	35	27.75

Employee	Week Beginning Date	Sched Hours	Actual Hours Worked
Rodgers	2/16/17	35	29.25
Rodgers	2/23/17	35	30.00
Rodgers	3/2/17	35	30.50
Rodgers	3/9/17	35	33.50
Rodgers	3/16/17	35	26.25
Rodgers	3/23/17	35	36.00
Rodgers	3/30/17	35	36.25
Jean Benoit	12/1/16	27.5	42.50
Jean Benoit	12/8/16	27.5	45.00
Jean Benoit	12/15/16	27.5	44.50
Jean Benoit	12/22/16	27.5	37.75
Jean Benoit	12/29/16	27.5	18.50
Jean Benoit	1/5/17	27.5	13.50
Jean Benoit	1/12/17	27.5	25.50
Jean Benoit	1/19/17	27.5	34.25
Jean Benoit	1/26/17	27.5	32.25
Jean Benoit	2/2/17	30	21.50
Jean Benoit	2/9/17	30	18.25
Jean Benoit	2/16/17	30	30.00
Jean Benoit	2/23/17	30	25.25
Jean Benoit	3/2/17	30	33.25
Jean Benoit	3/9/17	30	6.25
Jean Benoit	3/16/17	30	0
Jean Benoit	3/23/17	30	18.25
Jean Benoit	3/30/17	30	25.25

(Exh. GC-4.) The hours worked reflect the seasonal changes in demand experienced by PrimeFlight. (*Compare to Exhs. R-1d – R-1g.*) As explained by Heady, all schedule changes imposed by PrimeFlight related directly to JetBlue’s demands. (Tr. 80-82.)

## ARGUMENT

### **I. The Resolution of PrimeFlight’s Jurisdictional and Successorship Objections in Prior Proceedings Governs the Disposition of This Proceeding.**

Currently pending before the Board are PrimeFlight’s Exceptions to the Decision of the Administrative Law Judge in a prior proceeding involving Region 29 and the same Charging Party, hereinafter referred to as “the RLA Proceeding.” *See PrimeFlight Aviation Services, Inc.*, Case Nos. 29-CA-177992, *et al.* (filed May 15, 2017). In the RLA Proceeding, PrimeFlight pursued two primary arguments to oppose unfair labor practice allegations: (a) PrimeFlight is a derivative carrier under the Railway Labor Act and therefore is not subject to the NLRA; and (b) even if subject to the NLRA, PrimeFlight was not a successor employer for purposes of bargaining with Charging Party in both the instant proceeding and the RLA Proceeding, because PrimeFlight did not hire a substantial complement of the predecessor’s employees.

The record in the RLA Proceeding is before the Board in this matter as part of Joint Exhibit 1, which was submitted to ALJ Chu. The parties in the current proceeding are identical to the parties in the RLA Proceeding and agreed that the jurisdictional and successorship issues did not require relitigation before ALJ Chu in this proceeding. As such, all parties agreed to be bound by the Board’s decision with respect to the RLA Proceeding. (*See* JE-1.) Should the Board conclude that PrimeFlight is a derivative carrier under the RLA, PrimeFlight submits that such a finding moots all issues presented in both the RLA Proceeding and this current proceeding. In the alternative, should the Board find that PrimeFlight was not a successor to AirServ, the prior employer at JFK International Airport as described in the RLA Proceeding, all bargaining issues relating to both proceedings would be mooted, though the disciplinary allegations could survive.

**II. PrimeFlight’s Staffing Decisions in Early 2017 Fall Well Within the District Court’s Directives Carving Out Staffing as a Non-Mandatory Subject of Bargaining in PrimeFlight’s Relationship with the Union.**

Region 29 failed entirely to meet its burden of proving that PrimeFlight violated the Act by reducing employees’ hours and changing their schedules without bargaining with SEIU 32BJ. In examining Region 29’s burden of proof on this issue, the analytical framework consists entirely of the Preliminary Injunction and Memorandum Decisions issued by Judge Cogan of the Eastern District of New York. For purposes of this proceeding, PrimeFlight’s bargaining obligation to SEIU 32BJ stems entirely from the Preliminary Injunction issued by Judge Cogan on October 24, 2017. Region 29’s allegation regarding hours reductions and schedule changes relates only to a period of time around January 20, 2017, prior to any other decision relating to PrimeFlight’s bargaining relationship with SEIU 32BJ at JFK. As such, the scope of the Preliminary Injunction, as enunciated in Judge Cogan’s Memorandum Decisions, is exclusively and conclusively determinative of whether PrimeFlight violated the Act by making changes without bargaining with the Union.

**A. ALJ Chu’s Apparently Decided that Because PrimeFlight Could Bargain Over Staffing, PrimeFlight Was Obligated to Do So.**

In deciding that PrimeFlight violated Section 8(a)(1) by unilaterally deciding staffing levels and employee schedules, ALJ Chu repeatedly noted that he believed PrimeFlight had the *ability* to engage in bargaining over such matters, which he then equated to the legal obligation to do so with no evidence to support such an obligation:

- “Judge Cogan’s order did not prevent Respondent from bargaining with the Union over the hours and work schedules ....” (Decision at 14.)
- “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.” (Decision at 15.)

- “In my opinion a bargained-over agreement ... would be beneficial to both the Respondent and employees.” (Decision at 15.)

Perhaps the most telling quote from ALJ Chu was this one: “The parties could have bargained over the number of staffing and shifts above the minimal that was necessary to meet the needs of JetBlue.” (Decision at 15.) In fact, “staffing and shifts above the minimal” was exactly what Judge Cogan said PrimeFlight did not have to bargain over. ALJ Chu missed the point of Judge Cogan’s statements entirely.

In repeatedly referring to “minimums” to which PrimeFlight had to adhere, ALJ Chu also apparently ignored the only testimony on this issue, which came from PrimeFlight’s site manager, Josh Heady.<sup>8</sup> Neither the Counsel for the General Counsel nor the Charging Party offered any evidence that PrimeFlight staffed or scheduled employees other than in response to JetBlue’s flight schedules. In contrast, Heady repeatedly established that he personally was responsible for PrimeFlight’s staffing and employee schedules and that he set the levels in response to the JetBlue flight levels. The only evidence cited in ALJ Chu’s decision to support his analysis was a vague reference that the two bargaining unit employees who testified were not sure why their schedules were changed. Yet Judge Cogan gave no requirement that PrimeFlight explain scheduling and staffing changes to the bargaining unit.

**B. Judge Cogan’s Orders Could Not Make It More Clear that PrimeFlight Had the Right to Take the Employee Scheduling Actions Demonstrated by the Evidence at the Hearing.**

Contrary to ALJ Chu’s reading of the district court’s orders, Judge Cogan’s directives easily resolve this dispute in PrimeFlight’s favor. It could not be more clear from the Court’s two

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<sup>8</sup> For reasons that are unclear, ALJ Chu stated that “Respondent argues there was no material, substantial, and significant change in the wages and work schedules and wages [sic].” (Decision at 14.) In fact, PrimeFlight made no argument that the changes in staffing and schedules were *de minimis* or would be otherwise outside the ordinary scope of bargaining in the absence of Judge Cogan’s orders.

Memorandum Decisions that Judge Cogan’s injunction gave PrimeFlight the ability to adjust schedules and staffing levels to accommodate fluctuations in JetBlue’s flight schedule – not merely to set minimums, as ALJ Chu repeatedly stated. PrimeFlight’s manager of operations at JFK, Josh Heady, testified unequivocally and without contradiction that any scheduling changes or hours reductions imposed by PrimeFlight were limited to those caused by JetBlue’s operational needs. At no point did the General Counsel even bother to try to contradict Heady’s evidence.

Judge Cogan left no doubt about PrimeFlight’s ability to change or limit its employees’ schedules and hours of work, so long as JetBlue created a business need for such changes. *See* Section III.A., above. The pertinent passages from Judge Cogan’s Orders are as follows:

- “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 ....” (Exh. R-2, Preliminary Injunction at 2.)
- “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 \*\*\* [preserving] PrimeFlight’s flexibility to assign appropriate coverage to meet JetBlue’s service needs.” (Exh. R-2 at 22.)
- “The staffing limitation appropriately gives staffing authority to JetBlue, which in turn provides that information to PrimeFlight.” (Exh. R-4 at 4.)

In fact, under the Preliminary Injunction, PrimeFlight could adjust its staffing literally every single day so long as JetBlue expressed a need for such changes. JetBlue’s departures vary

significant within each month, and PrimeFlight could certainly save substantial amounts of money by reducing staff on low-departure days and increasing staff on high-departure days. Of course, the General Counsel cannot truthfully complain of such hyper-sensitive scheduling, because as PrimeFlight's JFK manager Josh Heady stated, PrimeFlight generally does not re-schedule employees' hours frequently. To the contrary, the General Counsel complains of a seasonal fluctuation in staffing, the kind of fluctuation the District Court specifically referenced as an acceptable exercise of PrimeFlight's right to staff according to JetBlue's needs.<sup>9</sup> Judge Cogan specifically linked the staffing carve-out under the Preliminary Injunction to seasonal fluctuations, particular fluctuations linked to 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.

(Exh. R-4, Memorandum at 5.)

In other words, Judge Cogan anticipated *the exact argument* Region 29 currently asserts in support of the instant unfair labor practice allegation, *i.e.*, Region 29's assertion that PrimeFlight cannot react to JetBlue's post-holiday draw-down in flights and staffing by reducing the number of hours PrimeFlight employees work for JetBlue during that period. Nevertheless, here is Region 29 again, pushing the exact same argument that failed with the drafter of the Preliminary Injunction.

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<sup>9</sup> Heady testified that the summertime season also causes substantial increases in staffing (tr. 80), meaning PrimeFlight staffs up its schedule of employees to give employees additional hours for the summer vacation season. Quite predictably, the General Counsel and Charging Party are only interested in complaining about *reductions* in hours – once again, falling directly into the language of Judge Cogan's decision, in which he specifically stated that the Preliminary Injunction permits PrimeFlight to avoid guaranteeing hours to employees when they are not needed by JetBlue.

**C. The General Counsel’s Evidence on the Alleged Reductions in Hours Does Not Contradict PrimeFlight’s Explanations That Schedules and Hours Were Changed to Accommodate JetBlue.**

In light of Judge Cogan’s pronouncements, the General Counsel bore the burden of proving that PrimeFlight made unilateral changes to employee hours or schedules for reasons other than JetBlue’s support needs – simply putting on two witnesses out of hundreds of employees to complain that their schedules were changed does not make an unfair labor practice case. In support of the allegation that PrimeFlight unlawfully changed employee schedules without bargaining with the Union, the General Counsel offered testimony from two wheelchair assistance employees, Irene Rodgers and Yolie Jean Benoit. Rodgers testified that she was scheduled to work “20 hours per week” in 2016 until she was offered heavier hours for the holiday schedule. (Tr. 36-37.) The heavier holiday hours ceased in early January 2017. (Tr. 37.) Rodgers stated that her work schedule was changed again “at the end of January” 2017. (Tr. 38) The schedules provided by PrimeFlight bear out the changes mentioned.

But the General Counsel simply gave up at that point in the hearing, with no further evidence regarding why the changes were made or how they impacted other wheelchair assistants. Heady is required to schedule hundreds of employees, including over 200 wheelchair assistants, of which Rodgers and Jean Benoit are only a tiny percentage.<sup>10</sup> In both cases, the General Counsel failed to offer any evidence of how Rodgers or Jean Benoit’s schedule related to JetBlue’s flight schedules. The General Counsel did not show his employee witnesses the flight schedules produced to him prior to the hearing by Respondent PrimeFlight, nor did he inquire of Josh Heady about the specific schedules worked by any employees. The General Counsel did not bother to elicit any testimony about how Rodgers or Jean Benoit’s schedules

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<sup>10</sup> It was established in the prior hearing that PrimeFlight employs more than 200 wheelchair assistants at JFK. (See Joint Exh. 1.)

might have increased or decreased based on the availability or unavailability of other wheelchair attendants. As a result, the only pertinent evidence relating to these schedules and hours is Heady's testimony that he changed schedules only as needed to accommodate JetBlue, and he worked with JetBlue management on a daily basis to match PrimeFlight's staffing to JetBlue's departure schedules and wheelchair demand.

What is further clear from the payroll hours is that PrimeFlight employees' hours actually worked frequently do not align with the schedule. As Heady testified, PrimeFlight offers extra hours to employees as the need arises, which is frequent. Rodgers was scheduled to work 20 hours per week from December 1, 2016 until the end of January 2017. During most weeks, her actual hours worked were substantially higher than 20 hours per week, both before and after the December holidays. When her schedule changed in February 2017, her actual hours worked continued to vary significantly from her scheduled hours. The results for Jean Benoit were the same: her actual hours worked rarely resembled the hours scheduled for her.

The General Counsel, bearing the burden of proving that PrimeFlight changed hours, schedules, or staffing for reasons other than JetBlue's needs, did not bother to explore the operational reasons for Rodgers' and Jean Benoit's wide-ranging hours worked each week. The General Counsel elicited no testimony or documentation about historical practices and norms for hours worked versus hours scheduled – there is no reason to suspect that either Rodgers or Jean Benoit experienced anything other than a typical seasonal change in their work hours and schedules or coverage problem among the 200 wheelchair attendants whose schedules the General Counsel simply ignored. What is clear, however, is that their actual hours and pay bore little resemblance to her scheduled work times, throughout the period for which the General Counsel subpoenaed records. The General Counsel's "theory," such as it is, apparently consists

of showing changes in schedules and hours, and then asking the judge to assume that the employer made a unilateral change in violation of the Act. Even leaving aside Judge Cogan's Orders, there is no evidence that PrimeFlight made any unilateral departure from its ordinary assignments and scheduling practices.

**III. PrimeFlight Did Not Violate the Act By Either Stejskal's Statement Directly to Non-Bargaining-Unit Employees or His E-Mail to the Union's Counsel.**

Although Region 29's primary argument on this issue was that PrimeFlight made a threat by proxy through an e-mail to the Union, ALJ Chu did not rule on that issue. Instead, ALJ Chu found that PrimeFlight executive William Stejskal threatened employees directly at a bargaining session with the Union by advising them that if they were skipping work to attend bargaining, they should return to their jobs. Neither Region 29's nor ALJ Chu's theory holds up to scrutiny, as established below.

**A. Stejskal's April 25, 2016 Statement to Non-Unit Employees from Other Airports Was Not a Threat of Reprisal for Protected Activity.**

There is no dispute that during bargaining about JFK employees, PrimeFlight's executive Stejskal advised employees from other airports that they should not be skipping work to be there. Stejskal was under the belief that certain employees from Newark and LaGuardia might have failed to attend their shifts without calling in to advise PrimeFlight they would be absent. Stejskal correctly concluded that missing work for that purpose without advance notice would be an unexcused absence from work in violation of PrimeFlight attendance policy. His April 25, 2016 statement was a directive to such employees that they should be at work.

In analyzing this statement, ALJ Chu made two significant and obvious errors: (1) concluding that not showing up or calling in for scheduled work shifts in order to attend union bargaining was protected activity, and (2) equating skipping one's work shift to attend union bargaining with striking one's employer. Regarding the former, it is obvious that simply attending

a union bargaining session, standing alone, likely constitutes protected activity under the Act. The inquiry here is more complex, however, in that Stejskal's statement was expressly directed to employees who had *intentionally skipped work* without prior notice to attend the union bargaining session.

In this very case, SEIU 32BJ and PrimeFlight both recognized that employees cannot simply skip their job assignments to attend union bargaining, even when that bargaining relates to their own bargaining unit. The Union and PrimeFlight made specific arrangements for JFK employees of PrimeFlight to be released from their shifts ahead of time so that they could attend. If they could simply skip their shifts with no fear of discipline, there would be no need for such advance planning.

These actions are consistent with basic premise, long established under Board precedent, that employees cannot simply abandon their work because they would rather go to a union meeting. In *GK Trucking Corp.*, 262 NLRB 570 (1982), the Board approved the ALJ's findings that employees who absented themselves from work to attend a union meeting were lawfully terminated despite their claim that the absence was in protest of working conditions. *Id.* at 572-74. The conduct was unprotected because the employees participated in a "transitory usurpation of working time," rather than a strike designed to obtain concessions from the employer. The Board's Division of Advice reached the same conclusion in finding that a union organizing meeting on the employer's premises did not involve protected activity where employees attended the meeting without permission during working time. *See Headwaters Resources, Inc.*, 36 NLRB Advice Mem. Rep. 119 (March 31, 2009 No. 27-CA-20922). As the *Headwaters* memorandum succinctly states:

There is no question that attending a union meeting constitutes protected concerted activity under the Act. However, the Board has long held that missing work without permission to participate in Section 7 activities *is not protected*.

*Id.*, slip op. at 4 (emphasis supplied). See also *Michigan Lumber Fabricators, Inc.*, 111 NLRB 579 (1955) (termination of employees upheld; stopping work in middle of shift to attend grievance meeting not protected); *Gulf Coast Oil Co.*, 97 NLRB 1513 (1945) (employee termination upheld; employees attending organizing meeting not protected where they skipped work without permission to do so).

In other words, employees cannot use otherwise protected activity as an excuse to violate facially neutral attendance policies. ALJ Chu's conclusion is no different than saying an employee could fail to show up for work for a few days because he wanted to attend pro-labor union rallies in another city. Despite the protection the employee might enjoy in attending a pro-labor demonstration, the employer still has the right to insist on the employee's pre-scheduled attendance at his job. While employees outside a bargaining unit might engage in protected activity under the Act by attending union negotiations for other employees, ALJ Chu made a critical error in concluding that they can simply skip their scheduled shifts to do so.

ALJ Chu's statement analogizing such employee attendance at a union meeting to going on strike – and thereby excusing the employee from providing any notice – is truly mystifying, because ALJ Chu's ultimate conclusion must be that an employee can simply walk off the job any time he feels like it, as long as he is doing so to engage in protected activity. After all, this logic goes, if an employee can walk off the job to engage in a strike, then he must be able to do so for any other kind of protected activity.

The absurdity of ALJ Chu's statement is apparent when one considers how many different types of protected activity there are. For example, unions and employers go to great difficulty negotiating for union stewards to have time off from their scheduled shifts to attend Weingarten meetings, grievance meetings, and arbitration hearings; participation in all of those activities is

plainly protected under the Act.<sup>11</sup> According to ALJ Chu, there is no need for such discussions between union and employer – because the grievance meetings and arbitrations are protected activities, the union stewards can simply walk off the job to attend, with no repercussions. This is clearly not the case.

**B. Stejskal’s E-Mail to the Union’s Counsel Regarding Employee Absences Was Also Not a Threat of Reprisal for Protected Activity.**

Although Judge Chu did not address the issue of whether Stejskal’s statement to Garren could be an “imputed” threat to Respondent’s employees, Region 29 suggested throughout the proceedings below that PrimeFlight had made a threat to employees through Stejskal’s e-mail to Garren, just as if Stejskal had made the statement directly to employees. Region 29 posits that a vague statement by Stejskal to Garren, relating to employees not represented by the Union, could somehow constitute a threat of retaliation to those employees. Unlike Judge Chu, Region 29 concedes that, where an employee fails to attend work as scheduled in order to attend union bargaining, the absence from work is not itself protected activity. Region 29 contends, however, that Stejskal threatened the employees with elevated disciplinary consequences for such absences, using Garren as a proxy, and that this violated Section 8(a)(1) of the Act. Neither the law nor the content of Stejskal’s statement to Garren supports such a conclusion.

**1. Board Precedent on “Imputed” Threats to Employees Does Not Apply to a Remote Statement about Plainly Unprotected Activity, Made to an Agent of a Union That Does Not Represent the Employees.**

Under extremely limited and factually inapposite Board precedent, Region 29 has previously asserted in this litigation that a threat communicated to a union official by an manager

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<sup>11</sup> It is true that in most cases employees need not give advance notice of a strike – yet a strike is entirely different from other types of protected activities in that the entire point of a strike is to withhold one’s labor from the employer to enforce employee demands. Here, the employees made no demands and there was no indication they were withholding their labor from PrimeFlight. They simply did not attend work when they were scheduled to do so, similar to the situation in *GK Trucking*.

may be considered as having been made directly to employees. See *Capital Medical Center*, 364 NLRB No. 69 (Aug. 12, 2016); *Schrock Cabinet Co.*, 339 NLRB 182 (2003); *Timberline Energy Corp.*, 258 NLRB 292 (1981). These precedents do not resemble the instant case, however, and application of their principles to this situation would not further any legitimate policy goal under the Act.

In *Capital Medical Center*, the Board held that a hospital violated Section 8(a)(1) by forbidding picketing on the hospital's premises during a contract dispute between the hospital and the union representing the employees. 364 NLRB No. 69, slip op. at 1. Hospital officials viewed the picketing as unlawful and advised both the union's lawyer and union officials that the hospital would discipline or seek prosecution of employees picketing on hospital premises. *Id.* at 2. It is plain from the Board's recitation of the facts that hospital officials also communicated threats of discipline directly to the employees: The hospital's security director told an employee, Arland, that "she should not be there" and "she, not the Union, could get in a lot of trouble." In addition, another employee, Durfey, overheard the security director "mention calling the police." *Id.* at 2. Thus, *Capital Medical Center* involved a case of squarely protected union activity (picketing), with threats of severe consequences (criminal prosecution) made by employer officials directly to employees, with such employees being represented by the union in question.

In *Schrock Cabinet Co.*, an employer manager, Gifford, told a union business agent, Throop, that Gifford intended to launch a phony disciplinary campaign against an employee named Denise Stephenson as retaliation for Stephenson's complaint about shift call-offs violating the union contract. 339 NLRB 182-83. In addition to this statement to the union official, Gifford met with the employees, including Stephenson, and repeated his threat to play "hardball" by enforcing the union contract more strictly. He ended this meeting by saying "he

would make the employees' lives miserable," *referring specifically to Stephenson* – “especially you, Denise.” *Id.* at 183. Gifford followed through by imposing discipline on Stephenson for ticky-tack rules violations in retaliation for her protected activity of grieving contractual violations. *Id.* Thus, *Schrock Cabinet Co.*, involved a case of squarely protected union activity (insistence on honoring union-bargained terms of employment), with threats of severe consequences (a dishonest campaign to fire the complaining employee) made directly to the employee as well as to union officials, with the employee being represented by the union.

In *Timberline Energy Corp.*, a company owner and plant manager facing a union organizing campaign responded with a campaign of strict rules enforcement to allow the company to fabricate excuses to terminate pro-union employees. 258 NLRB at 293. The company owner also began preparing an unusually timed April layoff, though “In the past, no layoffs occurred in the spring.” *Id.* The layoff was conducted in May. *Id.* at 294. Supervisory employees advised pro-union employees not to talk about the union in the plant. *Id.*

The Steelworkers Union then filed a petition to represent the employees. *Id.* at 295. Immediately prior to filing the petition, the union sent a letter to the company owner asking for recognition. *Id.* In response, the company owner told a union official in a telephone conversation that “before allowing union organization of the plant, he would move his operation out of state.” *Id.* at 295-96. Thus, *Timberline Energy Corp.* involved a case of squarely protected union activity (attending union meetings and signing pro-union cards and petitions), with threats of severe consequences (plant closure) combined with (1) a series of layoffs of which the employees were obviously well aware, and (2) comments from supervisors to employees in the work place making known the employer’s hostility to the union.

Region 29 seeks an extreme extension of the foregoing doctrine to cover conduct not remotely similar to the virulent anti-union actions and comments in the three cited cases. Stejskal made a single comment about general employee conduct to a union lawyer in an e-mail. Stejskal's words were not repeated to the employees by anyone in management, nor was any employee singled out or affected by actual discipline. The comment related to employee conduct all parties agree would not be protected, *i.e.*, missing work without excuse. The union did not represent the employees at the time.

One can understand the need to protect employees from second-hand threats in cases like *Capital Medical Center*, *Schrock Cabinet*, and *Timberline Energy*. In all three cases, the employees had engaged in core Section 7 conduct such as picketing, submitting grievances about terms and conditions of employment, and petitioning for representation. In all three cases, the employees' jobs were directly threatened by management statements. In all three cases, the employees learned of anti-union comments by management directly from the employer's supervisors. In two of the three cases, *Capital Medical Center* and *Schrock Cabinet*, the union already represented the affected employees, and so the union official receiving the threat was the lawful bargaining agent of the employees. In the third case, *Timberline Energy* – decided 36 years ago – the union had filed an active representation petition at the time of the threat.

In sum, the doctrine of threat-to-union-official-as-proxy was plainly designed to protect employees from anti-union animus in contexts of severe anti-union activity by employers putting employees' livelihoods and well-being under serious threat. None of those factors is present here, and Region 29 should not be rewarded for attempting to use a serious policy doctrine to aid in the Union's frivolous allegations.

**2. Stejskal's Comments About Disciplinary Action Related to Plainly Unprotected Conduct in the Form of Unexcused Employee Absences.**

Even assuming the above doctrine could apply on these facts, however, Region 29 wishes to extend it on yet another distinguishable ground – Region 29 wishes to apply the doctrine to a case where only a strained interpretation of the manager's words could even apply the alleged threat to protected activity. Stejskal plainly was not threatening to find petty ways to punish employees for union activity. No one disagrees that employee absences, as discussed by Stejskal with Garren, would have been unprotected as attendance infractions (with the exception of ALJ Chu, as discussed above). The only question appropriately at issue is whether Stejskal meant to threaten a higher level of discipline because of the protected purpose of the unexcused absence, *i.e.*, attending union negotiations for another bargaining unit. Stejskal made clear, however, that his concern was with an employee using an unexcused absence to attend a pre-scheduled event where the employee could readily give notice to the employer of the employee's absence. (Tr. 133-34.) This is not an instance where an employee has car trouble, is stuck in traffic, or suffers a severe and unexpected illness – all instances where an absence might be anticipated to be unexcused but where the employee has no alternative but to miss work with little or no notice to the employer.

In contrast, Region 29 relies on the slender reed of interpreting Stejskal's comments to imply harsher discipline because of the *reason* for an unexcused absence, as opposed to the plainly reasonable basis for Stejskal's repeated objections: that he had concerns about employees missing work without notice for an absence for which they could give notice and for which PrimeFlight would make arrangements to excuse them from work. Region 29 simply assumes, without a single aggravating fact, that PrimeFlight might threaten employees with harsher discipline because of the reason for an absence. That is far afield from any Board precedent.

## CONCLUSION

As established in the prior litigation before ALJ Landow, PrimeFlight has no bargaining relationship with Charging Party, because PrimeFlight is not subject to the NLRA, nor was PrimeFlight a successor employer for the bargaining unit in question. Therefore, PrimeFlight could not possibly violate Section 8(a) of the NLRA by refusing to bargain with Charging Party or by allegedly threatening PrimeFlight's employees relating to Charging Party.

In any event, however, PrimeFlight honored the terms of Judge Cogan's preliminary injunction, which Judge Cogan himself stated was a broad exception to PrimeFlight's bargaining obligation. Nor did PrimeFlight make unlawful threats to non-bargaining-unit employees relating to their presence at union bargaining, either directly or by proxy.

For all of the foregoing reasons, the Board should reverse the ALJ and dismiss the Complaint against Respondent in its entirety.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on May 15, 2017, a copy of the foregoing Respondent's *Brief in Support of its Exceptions to the Decision of the Administrative Law Judge and its Request for Oral Argument* has been filed via electronic filing with:

Executive Secretary  
National Labor Relations Board  
1099 14th Street N.W.  
Washington, DC 20570

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