

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

PRIMEFLIGHT AVIATION SERVICES, INC.,
Respondent,

and

**Case Nos. 29-CA-191801
29-CA-196327**

**SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 32BJ,**
Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWER
TO RESPONDENT'S EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. PROCEDURAL HISTORY OF THE CASE

(A) Respondent's History of Unfair Labor Practices in Prior and Related Litigation¹

In a prior unfair labor practice case, Case Nos. 29-CA-177992, 29-CA-179767, and 29-CA-184505, the General Counsel issued a Complaint and an Amended Consolidated Complaint alleging that Respondent violated Sections 8(a)(1) and (5) of the Act by:

- Refusing to recognize the Union as the exclusive collective bargaining representative of the bargaining unit² employees;
- Unilaterally implementing changes to employee work schedules and hours without providing to the Union prior notice and an opportunity to bargain;
- Unilaterally implementing changes to pay deductions pertaining to paid break time without providing to the Union prior notice and an opportunity to bargain; and
- Failing to provide the Union with information that is necessary for and relevant to the Union's performance of its duties as the exclusive collective bargaining representative of the bargaining unit.

Jt. Ex. 2. The General Counsel also alleged that Respondent violated Section 8(a)(1) of the Act by threatening employees with discharge because of their support for the Union. Jt. Ex. 2.

Prior to the administrative hearing in Case No. 29-CA-177992 et al, on September 26, 2016, the General Counsel petitioned the Eastern District of New York for temporary injunctive relief requiring Respondent to cease and desist from engaging in conduct in violation of the Act, including refusing to recognize the Union as the exclusive collective bargaining representative of the bargaining unit employees and refusing to meet and bargain with the Union. On October 6,

¹ The prior and related case described herein is directly relevant to the instant proceeding because, pursuant to a joint stipulation, the parties agreed that two threshold issues – Respondent's status as an employer within the meaning of Section 2(2) of the Act, and Respondent's status as a *Burns* successor – were fully litigated in the prior case and need not be relitigated in the instant proceeding. Jt. Ex. 1. Additionally, the preliminary injunction issued in the prior case must be summarized because Respondent attempts to use its terms as a shield to defend against the instant unilateral change allegations.

² All full-time and regular part-time employees employed by Respondent at JFK Airport excluding confidential employees, office clericals, guards and supervisors as defined by the Act.

2016, Judge Brian Cogan of the EDNY conducted a hearing in which the Counsel for the Regional Director argued for injunctive relief, and Respondent attempted to show cause why such injunctive relief should not issue. On October 24, 2016, Judge Cogan issued a Preliminary Injunction against Respondent, as well as an accompanying Memorandum, Decision and Order, in which he found that the Regional Director had reasonable cause to believe Respondent violated the Act by refusing to recognize and bargain in good faith with the Union. R. Ex. 2, G.C. Ex. 7. As a result, in the instant proceeding, Respondent “admits that it is obligated to recognize and bargain in good faith with [the Union] pursuant to [the Preliminary Injunction] issued by the Eastern District of New York, subject to certain conditions imposed by the Court.” Jt. Ex. 1, ¶8.

On October 18, 19 and 20, 2016, after the District Court hearing, Associate Chief Administrative Law Judge Landow presided over an administrative hearing in which she received evidence and heard witness testimony regarding the unfair labor practices alleged in Case No. 29-CA-177992 et al. Jt. Ex. 2. Based on that record evidence, on March 9, 2017, Judge Landow issued a Decision in which she found that since May 23, 2016, Respondent violated the Act by failing and refusing to recognize and bargain in good faith with the Union, unilaterally implementing changes to terms and conditions of employment (including employees’ work schedules and hours), failing and refusing to provide information to the Union, and threatening employees with discharge because of their support for the Union. *Id.* Notably, Judge Landow held that Respondent’s statutory bargaining obligation attached on May 23, 2016 and continues to date. *Id.* After Judge Landow issued her Decision, Respondent filed exceptions with the Board, and Counsel for the General Counsel filed an answer to those exceptions. *Id.* The Board has not yet ruled on Respondent’s exceptions. *Id.*

B. Respondent's Repeated Unfair Labor Practices Result in the Instant Unfair Labor Practice Litigation.

In the instant case, on January 9, 2018, Judge Chu issued a decision in Case Nos. 29-CA-191801 and 29-CA-196327 (“ALJD”), in which he found that Respondent committed various violations of the Act. As a preliminary matter, Judge Chu agreed with Judge Landow that Respondent is an employer within the meaning of section 2(2) of the Act, and that Respondent is a *Burns* successor that is obligated to recognize and bargain in good faith with the Union as the exclusive collective bargaining representative of Respondent’s bargaining unit employees. *See NLRB v. Burns Security Services*, 406 U.S. 272 (1972). In arriving at these conclusions, Judge Chu relied on the administrative record developed before Judge Landow, as well as her finding on the same issues, as the parties agreed by way of a joint stipulation. Jt. Ex. 1.

Then, much like Judge Landow had previously found that Respondent unlawfully made unilateral changes to employee work schedules and hours in September 2016, Judge Chu found that Respondent again made unilateral changes to employee work schedules and hours in January 2017, in violation of Sections 8(a)(1) and (5) of the Act. In arriving at this conclusion, Judge Chu relied on the undisputed fact that Respondent made changes to employee work schedules and hours on or about January 20, 2017, the undisputed fact that Respondent did not provide to the Union advance notice and an opportunity to bargain over those changes, and the uncontroverted documentary evidence showing that Respondent’s changes affected approximately 93% of its bargaining unit employees. Judge Chu rejected Respondent’s argument that certain restrictions placed on bargaining in Judge Cogan’s Order privileged its unilateral action.

Finally, much like Judge Landow had previously found that Respondent unlawfully threatened employees with discharge because of their activities in support of the Union in June 2016, Judge Chu found that Respondent threatened employees with more strict enforcement of a work rule because of their activities on behalf of the Union in April 2017, in violation of Section 8(a)(1) of the Act. In arriving at this conclusion, Judge Chu relied on the undisputed documentary evidence, including an email in which Respondent explicitly threatened employees with discriminatory discipline because they attend bargaining in support of the Union, as well as testimony from Respondent's agent in which he admitted that his intention in writing the email was to bootstrap an "ordinary attendance infraction" into a more serious charge of insubordination.³

II. FACTUAL OVERVIEW

(A) **Respondent's Operation At JFK Airport and Its Statutory Obligation to Recognize and Bargain With the Union As the Exclusive Collective-Bargaining Representative of Respondent's Employees At JFK Airport**

Since May 9, 2016, the Employer has provided the terminal services in JFK Airport's Terminal Five pursuant to a contract with JetBlue Airlines. Respondent provides four types of terminal services in Terminal Five: line queue, baggage handling, skycap services (similar to baggage handling except at a curbside location), and wheelchair assistance.

³ In addition, Judge Chu erroneously concluded that Respondent did not violate Sections 8(a)(1) and (5) of the Act when it refused to meet and bargain with the Union from about January 25, 2017 until about April 4, 2017, unless the Union removed certain members from its bargaining committee. Counsel for the General Counsel is filing cross-exceptions separately to this erroneous finding and conclusion of law. However, facts related to the refusal to meet and bargain allegation are developed below, inasmuch as it provides necessary context in evaluating the meritorious allegations at issue here.

On May 23, 2016, the Union demanded that Respondent recognize the Union as the exclusive collective bargaining representative of the bargaining unit, based on the Union's collective bargaining relationship with Respondent's legal predecessor, a company called Air Serv. In her March 9, 2017 Decision, Judge Landow found that Respondent violated Sections 8(a)(1) and (5) of the Act by refusing to recognize and bargain in good faith with the Union because, "since May 23, 2016, and at all times material thereafter the Union has been, and is now, the exclusive collective bargaining [representative] of Respondent's employees in the above-described unit, within the meaning of Section 9(b) of the Act." Jt. Ex. 2, Landow ALJD at 19. Respondent, Charging Party and Counsel for the General Counsel agree that Judge Chu properly relied on Judge Landow's Decision in this regard. Jt. Ex. 1, ¶16.

(B) District Court Proceedings and Respondent's Obligation to Recognize and Bargain With the Union Pursuant to a Preliminary Injunction

In addition to Respondent's statutory bargaining obligation since May 23, 2016, Judge Cogan, in the October 24, 2016 Preliminary Injunction, ordered Respondent to recognize and bargain in good faith with the Union. R. Ex. 2. The Preliminary Injunction states, *inter alia*:

1. PrimeFlight shall immediately recognize the Service Employees International Union, Local 32BJ (the "Union") as the interim collective-bargaining representative of its employees in the following bargaining unit: all full-time and regular part-time employees employed by PrimeFlight at Terminal Five at JFK Airport, excluding confidential employees, office clericals, guards, and supervisors, as defined by the National Labor Relations Act ("NLRA");
2. PrimeFlight shall immediately commence bargaining in good faith with the Union, subject to the following conditions:
 - a. [...]

- b. 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. Ex. 2 at 2. Thus, in addition to the Act's statutory requirement, the Preliminary Injunction also requires Respondent to bargain in good faith with the Union. The only relevant limitation on the court ordered bargaining obligation is a very narrow one, providing only that an agreement between the parties should not include "minimum shift or employee requirements." *Id.* Except for the narrow limitation found in Paragraph 2(b), the Preliminary Injunction does not curtail the bargaining relationship or subject matter in any other way.⁴

Concurrently with the Preliminary Injunction, Judge Cogan issued a Memorandum, Decision and Order, in which he explained his reasoning and provided context in which to interpret Paragraph 2(b) of the Preliminary Injunction. G.C. Ex. 7. In the Memorandum, the Judge wrote,

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 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. G.C. Ex. 7 at 22 (emphasis added).

Thus, the Preliminary Injunction and the explanatory Memorandum share a common thread: the parties must engage in good faith collective bargaining in all respects, but are merely limited regarding shift or staffing minimums.

⁴ It should be noted that Paragraph 2(a) of the Preliminary Injunction states, "Any agreement reached between PrimeFlight and the Union is subject to termination if the NLRB determines that PrimeFlight is not subject to the NLRA or did not violate any provisions therein." *Id.* This provision is not relevant to the instant allegations, and does not alter the parties' current bargaining obligations.

Although Respondent now takes the position that the Preliminary Injunction imposes more severe limits on its bargaining obligation, Respondent admitted in a District Court filing that the Injunction only imposes a limit regarding shift or staffing minimums, and otherwise requires full-fledged good faith collective bargaining. Shortly after the Preliminary Injunction issued, on November 21, 2016, the Regional Director filed with the Eastern District of New York an Emergency Motion to Amend Judgment Pursuant to Federal Rule of Civil Procedure 59(e), in order to clarify the bargaining obligations imposed on the parties, and out of concern that Respondent might adopt an improperly broad view of the Preliminary Injunction's prohibition on shift or staffing minimum bargaining. R. Ex. 3. The Motion served two purposes: first, the Motion satisfied the procedural prerequisite to filing an appeal with the Second Circuit Court of Appeals; second, the Motion sought to persuade Judge Cogan to eliminate the prohibition on shift or staffing minimums because it tips the playing field of the bargaining process in Respondent's favor. *Id.* at 7.

In an attempt to persuade Judge Cogan to eliminate the prohibition on shift or staffing minimums, the Motion shed light on and emphasized language in Judge Cogan's October 24, 2016 Memorandum that could conceivably be read to prohibit not only shift or staffing minimums, but all bargaining connected to the subjects of shifts and staffing. Counsel for the Regional Director wrote:

By requiring that 'PrimeFlight will determine the shifts and staffing levels,' the Court forces the Union to concede to Respondent the sole discretion to determine those vital subjects that would otherwise be resolved by the parties through the collective bargaining process.

Id. at 6 (citations omitted). While the prohibition on shift or staffing minimums does not on its face prohibit all bargaining over employee work schedules and hours, Counsel for the Regional

Director emphasized the broadest possible reading in order to persuade Judge Cogan to eliminate the prohibition on shift or staffing minimums, or alternatively, to prompt Judge Cogan to clarify that Paragraph 2(b)'s limitation on bargaining is to be read narrowly. *Id.*

In response to the Regional Director's Motion, on December 1, 2016, Respondent filed with the Eastern District of New York a Memorandum in Opposition. G.C. Ex. 8. This filing is instructive in that it adopts a reasonable interpretation of Paragraph 2(b)'s limitation on bargaining – an interpretation that Respondent has now repudiated. In an attempt to persuade Judge Cogan to retain the Preliminary Injunction's prohibition on shift and staffing minimums, Respondent acknowledged that the limitation on the court ordered bargaining is a narrow one that prohibits only shift and staffing minimums, and does not otherwise limit bargaining over shifts and staffing. Specifically, Respondent wrote:

At various times, Petitioner unconscionably mischaracterizes the Court's preliminary injunction as prohibiting all bargaining on the subject or as giving PrimeFlight sole discretion to determine hours and shifts. However, the Court at no point forbade PrimeFlight and SEIU 32BJ from bargaining over the general subject matter of employee shifts, employee assignments, or the nature of the employee complement employed by PrimeFlight. Rather, the Court made narrow exceptions from those general subjects for minimum shift requirements and minimum employees assigned to work so that PrimeFlight would not be confronted with the prospect of being required to assign employees and shifts when they are not needed by JetBlue. [...] The Court's preliminary injunction properly acknowledges [JetBlue's expressed employment needs and external business conditions] and does not grant "sole discretion" or unfettered management rights to Primeflight [...] *The Court's limitation is narrow – no agreement on staffing minimums to the extent such matters relate to JetBlue's requirements of PrimeFlight – and does not cause further harm to the employees or make other bargaining impossible.*

Id. at 8-9 (emphasis added). Thus, in its District Court filing, Respondent admitted that, while the Preliminary Injunction prohibits shift or staffing minimums, it also requires Respondent to engage in good faith collective bargaining over employees' work hours and the specific schedules that employees are assigned to work.

On December 13, 2016, Judge Cogan issued a Memorandum, Decision and Order, in which he clarified that the narrow reading of the Preliminary Injunction’s prohibition on shift and staffing minimums is the correct reading. R. Ex. 4 (“I limited bargaining between PrimeFlight and the [Union] to exclude negotiations over ‘minimum number of shifts per employee or minimum staffing levels per shift.’”) *Id.* at 2. Judge Cogan also made clear that the prohibition on shift and staffing minimums is not meant to give Respondent the sole discretion to determine employee work schedules and hours, but “to avoid a situation where bargaining obligations would require PrimeFlight to pay for unnecessary staffing,” and to avoid “requiring PrimeFlight to pay for unworked hours.” *Id.* at 2, 9.

Thereafter, in accordance with the Preliminary Injunction, the parties endeavored to begin collective bargaining with the clear understanding that bargaining was only limited with regard to shift and staffing minimums, and Respondent’s bargaining obligation was otherwise not limited.

(C) **The Record Evidence Regarding the Parties’ First Bargaining Session On December 13, 2016: Respondent Did Not Provide Notice to the Union That It Intended to Implement Any Changes to Employee Work Schedules or Hours.**

During the first week of November 2016, Respondent and the Union corresponded by e-mail in order to schedule their first bargaining session. R. Ex. 6. The parties agreed to meet at the Union’s office in New York City on December 13, 2016. R. Ex. 6. The Union, by Deputy General Counsel Brent Garren, informed Respondent that the Union’s employee committee would not attend the first bargaining session. R. Ex. 6.

The parties' first bargaining session took place as planned at the Union's office on December 13, 2016. Tr. 26. Present on behalf of the Union were Brent Garren (Union Deputy General Counsel), Olivia Singer (Union Law Fellow), Michael Cassaday (Union Organizer), and Rob Hill (Union Vice President). Tr. 26. Present on behalf of Respondent were William Stejskal (Senior Vice President of Human Resources for Respondent's parent company, SMS Holdings Corp.), and Matt Barry (Respondent Northeast Mid-Atlantic Division Vice President). Tr. 26. Other than Stejskal and Barry, no employee of Respondent attended the December 13, 2016 meeting. Tr. 26.

The record evidence establishes that Respondent did not raise and the parties did not discuss any changes to employee work schedules or hours during the December 13, 2016 bargaining session. Despite having testified at length, and having testified in detail about the December 13, 2016 bargaining session, Stejskal did not testify that Respondent told the Union that Respondent intended to change employees' work schedules or hours. Tr. 124-27. Consistent with Stejskal's testimony, Union representative Singer testified that she does not remember any discussion pertaining to changes to employee work schedules during the bargaining session. Tr. 27.

(D) **Following the December 13, 2016 Bargaining Session, The Parties Corresponed by E-mail in Order to Schedule The Second Bargaining Session, and to Arrange for Bargaining Unit Employees to be Released From Work.**

Following the December 13, 2016 bargaining session, the parties corresponded by email to schedule the next bargaining session. R. Ex. 7, 8, 9. After some back and forth, the parties agreed to meet for the second bargaining session on January 25, 2017. Additionally, the Union

provided the names of certain bargaining unit employees, and requested that they be released from work in order to attend bargaining. R. Ex. 7. Stejskal confirmed by e-mail that he would forward the Union's request for release time to Respondent's management at JFK Airport, and did so. R. Ex. 9. These email communications are devoid of any reference to intended changes to employees' schedules and hours.

(E) **There Is No Dispute That On or About January 20, 2017, Respondent Unilaterally Implemented Changes to Employee Work Schedules and Hours, Without Providing to the Union Notice and an Opportunity to Bargain Over Those Changes.**

(i) **Director of Operations Josh Heady Admitted That Respondent Implemented Changes to Employee Work Schedules.**

Josh Heady, Respondent's Director of Operations at JFK Airport, admitted that around the end of January 2017, Respondent posted a new work schedule, General Counsel's Exhibit 6, in its office for employees to see. Tr. 70. Heady further testified that the new schedule went into effect two weeks later, in the beginning of February 2017, and that it changed the work schedules for employees in three of the four job classifications: wheelchair, line queue and baggage (but not skycap). Tr. 68-69. Heady further admitted that the schedule change affected ten to fifteen percent of employees, but Respondent's documents conclusively establish that this estimate is far too low. Tr. 66. Rather, Respondent's documents reveal that the actual impact was 93% of unit employees. G.C. Ex. 5, 6. Agents of Respondent (Stejskal) and the Union (Singer) both testified that the parties did not discuss any changes to work schedules during the prior bargaining session on December 13, 2016, and the record is devoid of evidence that Respondent provided any advance notice of opportunity to bargain over the changes. Tr. 27, 124-27.

A close analysis of General Counsel’s Exhibit 6 reveals that the new schedule changed both the particular hours and days that employees worked, as well as the total weekly hours that employees worked, as compared to the prior schedule that had been in effect since November 2016, General Counsel’s Exhibit 5. Attached to this brief is a comprehensive analysis, which compares the two schedules and shows which employees’ schedules Respondent changed in the end of January 2017.⁵ In sum, out of the 330 employees who appear in both the pre-change and post-change schedules, Respondent changed the schedule of approximately 308 employees (over 93%) in some way, either in terms of the particular days or hours on the schedule, or the total weekly hours on the schedule.⁶ Out of the 330 employees who appear in both schedules, Respondent reduced the hours of 79 employees (approximately 24%).⁷ Except for two employees,⁸ Respondent decreased all 79 employees’ weekly scheduled hours by at least 2.5 hours per week. Respondent reduced the scheduled work hours of some employees by as many as ten hours per week.⁹

⁵ Changes to the particular hours that employees worked can be seen by comparing the “Shift (Nov)” column with the “Shift (Feb)” column. Employees are grouped by their February shifts, making it obvious that a great many employees were assigned to work a different shift than they had worked according to the schedule that had been in effect since November 2016. Changes to the particular days that employees worked can be seen by comparing the “Days off (Nov)” column with the “Days off (Feb)” column. Each employee whose days off were changed appears in bold font. Changes to the total weekly hours can be seen in the “Difference in scheduled hours per week” column, which compares the “Scheduled hours per week (Nov)” column with the “Scheduled hours per week (Feb)” column.

⁶ The pre-change schedule, G.C. Ex. 5, and the post-change schedule, G.C. Ex. 6, list 377 distinct employees. Of those 377 employees, 330 employees appear in both schedules. Of those 330 employees, Respondent changed the schedule of 308 employees (45 out of 59 baggage employees, all 193 out of 193 wheelchair employees, 39 out of 47 line queue employees, and all 31 out of 31 lead employees).

⁷ Four out of 59 baggage employees, 37 out of 193 wheelchair employees, 20 out of 47 line queue employees, and 18 out of 31 lead employees

⁸ Respondent reduced the weekly scheduled work hours of Wheelchair employee Jeremiah Belcher and Line Queue employee Marquerite Marigny-Lilroy by 2 hours per week.

⁹ Halley, Roylston (10 hours per week); Francis, Tessa (7.5 hours per week) Ramlal Davis, Angela (7.5 hours per week); Kaur, Harmanpreet (7.5 hours per week); Sarabdiyal, Hemewante (5 hours per week); Alexis-Whittington, Tristan (5 hours per week).

(ii) Respondent Changed Wheelchair Assistant Yolie Jean Benoit's Schedule and Reduced Her Hours.

One such employee, Wheelchair Assistant Yolie Jean Benoit, testified that in January 2017, the Employer changed her work schedule and reduced her work hours. During December 2016, Benoit worked 37.5 hours per week according to the following schedule: seven and a half hours per day (3:30 PM to 11:00 PM) and five days a week, with Monday and Tuesday off. Tr. 47.

Then, when Respondent posted the new schedule in January 2017, Benoit was scheduled to work only 30 hours per week: six hours per day (6:00 PM to 12:00 midnight) and five days per week, with Sunday and Monday off. Tr. 48. Thus, in January 2017, the Employer changed the particular days and hours that Benoit worked, and reduced her overall weekly hours.

(iii) Respondent Changed Wheelchair Assistant Irene Rodgers' Schedule and Increased Her Hours.

Another employee, Wheelchair Assistant Irene Rodgers, testified that in January 2017, the Employer changed her work schedule. At the beginning of December 2016, Rodgers worked 20 hours per week according to the following schedule: four hours per day (noon to 4:00 PM) and five days per week, with Mondays and Tuesdays off. Tr. 39. After working extended "holiday season hours" in late December 2016 and early January 2017, Rodgers returned to her pre-holiday schedule in the second week of January 2017. Tr. 40.

Then, since Respondent posted the new schedule around the end of January 2017, Rodgers has been scheduled to work 30 hours per week according to the following schedule: six hours per day and five days per week, with Wednesdays and Thursdays off. Tr. 41. Thus, when

Respondent posted the new schedule around the end of January 2017, Respondent changed the particular days and hours that Rodgers worked, and increased her overall weekly hours.

(F) **Respondent Admits That On January 25, 2017, Respondent Walked Out Of a Bargaining Session Because the Union’s Bargaining Committee Included Non-Bargaining Unit Employees of Respondent.**

The record evidence conclusively establishes – and Respondent’s key witness William Stejskal admits – that after implementing changes to employee work schedules without providing any notice to the Union, Respondent walked out of the January 25, 2017 bargaining session and refused to bargain with the Union because Respondent objected to the Union’s chosen bargaining representatives, which included non-bargaining unit employees employed by Respondent at LaGuardia and Newark Airports. Stejskal admitted that he said, in reference to the approximately eight non-unit employees who were present at the bargaining session, “either they leave or I leave,” and admitted, “otherwise I wasn’t going to bargain.” Tr. 152.

(G) **By E-mail Correspondence Between January 25, 2017 and April 4, 2017, Respondent Continued to Refuse to Meet With the Union’s Designated Bargaining Committee, Unless the Union Removed Non-Bargaining Unit Employees.**

The record evidence establishes that Respondent continued to refuse to meet and bargain with the Union over the following months. During the period from Respondent’s January 25, 2017 walk out until April 4, 2017, the Union repeatedly asked Respondent to resume bargaining with the Union’s designated bargaining committee, including non-bargaining unit employees. Respondent repeatedly refused to confirm that it would do so. While Respondent eventually agreed, on April 4, 2017, to resume bargaining in the presence of non-unit employees , the

parties did not actually resume bargaining until April 25, 2017, three months after Respondent's walk out. G.C. Ex. 2.

(H) **On April 4, 2017, Respondent Finally Acquiesced to Meet With the Union's Designated Bargaining Committee, and Simultaneously Threatened Employees With More Strict Enforcement of A Work Rule Because of Their Activities in Support of the Union.**

Following approximately ten weeks of back-and-forth e-mail correspondence, by e-mail dated April 4, 2017, Stejskal finally agreed that Respondent would be willing to meet with the Union's designated bargaining committee, including non-bargaining unit employees. However, the undisputed record evidence establishes that in the very same e-mail, Stejskal also informed the Union that Respondent would treat any resulting absences more harshly than an ordinary attendance infraction. Stejskal wrote:

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.*

G.C. Ex. 2 at 1 (emphasis added). Stejskal's written statement, that Respondent would retaliate against employees by treating their absences for the purpose of attending bargaining more harshly than an "ordinary attendance infraction," was a clear rejection of Garren's earlier written statement that "we [the Union] understand that your usual attendance policies would apply to anyone who is not released to attend the bargaining." G.C. Ex. 2 at 1.

When asked to explain his purpose for sending the April 4, 2017 email, Stejskal admitted that his intention was to communicate how he would “use” any employee’s unexcused absence for purposes of attending bargaining. Stejskal stated that he would be “using it more as an insubordination issue,” rather than treating unexcused absences as an attendance issue. Tr. 143. Stejskal went on to explain his plan to bootstrap run-of-the-mill unexcused absences into more serious cases of insubordination:

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.

Tr. 144 (emphasis added). When the Union continued to refuse to provide the names of non-unit employees who would attend bargaining, Stejskal put his plan into action when the parties actually met for the April 25, 2017 bargaining session.

(I) **On April 25, 2017, Three Months After Respondent Walked Out of A Bargaining Session, the Parties Finally Resumed Bargaining, and Stejskal Followed Through On His Plan to More Strictly Enforce a Work Rule Because of Employees’ Activities in Support of the Union.**

According to Stejskal’s testimony, the parties resumed bargaining on April 25, 2018 in the presence of “quite a few” non-unit employees of Respondent employed at Newark and LaGuardia airports. Tr. 144-46. At the beginning of the bargaining session, Stejskal followed through on his plan to bootstrap employees’ unexcused absences into insubordination by directing employees to report to work. In accordance with the threat that he made by email on

April 4, 2017, Stejskal admits that he told the employees “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. 148. As Stejskal testified, this direct order was the precursor to treating employees’ run-of-the-mill unexcused absences as a more serious case of insubordination. Tr. 143-44.

III. ARGUMENT

(A) **Pursuant To the Parties’ Joint Stipulation, the Judge Correctly Relied On ALJ Landow’s Decision In Finding That Respondent Is An Employer As Defined By the National Labor Relations Act, and That the Act Requires Respondent to Recognize and Bargain in Good Faith With the Union as a *Burns* Successor (Exceptions 1, 2, 3, 4, 5).**

In the prior case, Case No. 29-CA-177992, et al, Judge Landow rejected Respondent’s arguments that (1) Respondent is not an “employer” within the meaning of Section 2(2) of the Act because it is under the control of an air carrier and therefore subject to the Railway Labor Act, and (2) the Act does not require Respondent to recognize and bargain in good faith with the Union because Respondent is not a *Burns* successor. In a joint stipulation between Counsel for the General Counsel, Respondent, and the Union, all parties agreed that Judge Chu properly relied on the prior record evidence and Judge Landow’s findings with regard to these two issues. Jt. Ex. 1.

While Respondent excepts to Judge Chu’s findings with regard to the jurisdiction issue and the successorship issue, these exceptions are merely a procedural formality necessitated by the fact that Respondent’s exceptions in Case No. 29-CA-177992, et al, are still before the Board. There is no dispute that, in Respondent’s words, “all parties agreed to be bound by the Board’s decision” in Case No. 29-CA-177992, et al, once an Order issues. R. Br. at 18. Thus, in

the event that the Board concludes that Respondent is not an employer as defined by the Act, the instant proceeding would become moot in its entirety. In the event that that the Board concludes that Respondent is an employer as defined by the Act, but is not a *Burns* successor, then all 8(a)(5) allegations in the instant proceeding would become moot, while the Board would need to address Respondent's exceptions with regard to the 8(a)(1) allegations in the instant matter. Finally, in the event that the Board agrees with Judge Landow and Judge Chu, and concludes that Respondent is an employer within the meaning of the Act, and is a *Burns* successor, then the Board would need to address all of Respondent's exceptions in the instant matter. For the following reasons, all of Respondent's exceptions are without merit.

(B) The Record Evidence and Well-Settled Board Law Overwhelmingly Support the Judge's Finding That Respondent Failed and Refused to Bargain in Good Faith With the Union When It Unilaterally Changed Employee Work Schedules and Hours, Without Providing to the Union Notice and an Opportunity to Bargain, in Violation of Sections 8(a)(1) and (5) of the Act (Exception 8).

Judge Chu ably applied well-settled Board Law to the undisputed facts in finding that Respondent unilaterally changed employee work schedules and hours, in violation of Sections 8(a)(1) and (5) of the Act. Respondent's flawed attack on this finding relies entirely on a distorted view of the Preliminary Injunction and does not cite to any other legal authority. R. Br. 19-25. While Respondent brazenly asserts that "the analytical framework consists entirely of the Preliminary Injunction and Memorandum Decisions issued by Judge Cogan of the Eastern District of New York," Respondent cannot escape the strictures of the Act simply by pretending that it does not exist. *Id.* at 19. The correct analysis under the Act is succinctly stated in controlling precedent from the Board and the Supreme Court.

Section 8(a)(5) of the Act prohibits an employer from unilaterally changing mandatory subjects of bargaining without providing to the union notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S.736, 747 (1962). Board law is clear that employee schedules and work hours are mandatory subjects of bargaining, which an employer may not unilaterally change. *TD Barton Foods, LLC dba C-Town Supermarket*, 358 NLRB 436 (2012) (recess appointment) (employer violated 8(a)(5) by reducing unit employees' hours by five to ten hours per week due to declining sales); *Palm Beach Metro Transp., LLC*, 357 NLRB 180 (2011) (employer violated 8(a)(5) by reducing hours in response to fluctuations in available work); *Illiana Transit Warehouse Corp.*, 323 NLRB 111 (1997) (employer violated 8(a)(5) by reducing hours); *Dickerson-Chapman, Inc.*, 313 NLRB 907 (1994) (employer violated 8(a)(5) by changing employees' shift start and end times and reducing hours). "Similarly, the 'particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain.'" *Millwrights, Conveyors and Machinery Erectors Local Union No. 1031*, 321 NLRB 30, 31 (1996) (quoting *Meat Cutters Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965)).

Here, Respondent Director of Operations Josh Heady admitted that on or about January 20, 2017, Respondent posted a new schedule that changed employee work schedules and hours. The record evidence conclusively demonstrates that these changes affected nearly all bargaining unit employees, including by changing their days off, changing their start and end times, and/or reducing their weekly hours. Furthermore, the evidence establishes that Respondent failed to provide the Union with any notice or opportunity to bargain over these changes, despite the fact that the parties had attended a bargaining session approximately one month earlier, on December

13, 2016, and regularly communicated thereafter in preparation for the second bargaining session on January 25, 2017. Rather, Respondent Senior Vice President of Human Resources William Stejskal testified to the parties' discussion during the December 13, 2016 bargaining session, and notably, did not mention that Respondent notified the Union that it was considering changes to the schedule. Tr. 124-27. In Stejskal's account, Respondent did not discuss employee schedules at all. *Id.* Corroborating Stejskal's testimony, Union Law Fellow Olivia Singer consistently testified she had no memory of any discussion pertaining to changes to employee work schedules during the bargaining session. Tr. 27. Furthermore, the parties' e-mail correspondence in the weeks preceding the December 13, 2016 bargaining session, R. Ex. 6, as well as between the December 13, 2016 and January 25, 2017 bargaining sessions, R. Ex. 7, 8, 9, confirms that Respondent did not notify the Union before implementing the changes.

In sum, the record evidence unequivocally shows that Respondent unilaterally changed employee work schedules and hours, which are mandatory subjects of bargaining, without providing to the Union notice and an opportunity to bargain over those changes, in violation of Sections 8(a)(1) and (5) of the Act. Respondent presents three flawed arguments in opposition. First, Respondent erroneously argues that the Judge incorrectly interpreted Respondent's bargaining obligation in light of the limitations imposed by the Preliminary Injunction. R. Br. at 19. Second, Respondent incorrectly argues that the General Counsel "bore the burden of proving that [Respondent] made unilateral changes to employee hours or schedules for reasons other than JetBlue's support needs." R. Br. at 23. Third, Respondent argues without any factual support that its unilateral changes are privileged by its well-established past practice. R. Br. at 24. All of Respondent's arguments are without merit.

(1) The Judge Correctly Interpreted the Clear Language of the Preliminary Injunction, and Did Not Find that Respondent Must Bargain Over Permissive Subjects of Bargaining (Exceptions 6, 7).

Respondent attempts to evade its statutory bargaining obligation by ignoring the controlling Board law and instead attempting to shield itself behind a distorted view of the Preliminary Injunction. Essentially, Respondent argues that the Preliminary Injunction's narrow limitation on bargaining, which only prohibits the parties from agreeing to "provisions regarding a minimum number of shifts per employee or minimum staffing levels per shift," privileged Respondent to unilaterally change employees' schedules and hours, as long as it made those changes in order to address JetBlue's asserted business needs. Judge Chu correctly saw through this blatant attempt to sidestep the Act and rejected Respondent's argument.

The plain language of the Preliminary Injunction requires Respondent to engage in full-fledged good faith collective bargaining with the Union, with one narrow exception: the parties are prohibited from coming to any agreement that includes a minimum number of shifts per employee or minimum staffing levels per shift. Judge Cogan made this exception crystal clear in his October 24, 2016 Preliminary Injunction (see paragraph 2(b) in R. Ex. 2 at 2), in his accompanying Memorandum (see G.C. Ex. 7 at 22), and in his December 13, 2016 Memorandum (R. Ex. 4 at 2). Judge Cogan also made clear that the sole purpose of the prohibition on shift and staffing minimums is to allow Respondent to "assign shifts and employees commensurate with JetBlue's expressed employment needs," and to avoid a situation in which Respondent would be forced to "needlessly staff and pay employees when there is no need to staff them," G.C. Ex. 7 at 22.

As Judge Chu correctly noted, rather than violate the Preliminary Injunction by agreeing to shift or staffing minimums, the parties could have bargained and come to an agreement that

accomplishes Respondent’s goals with input from the Union and within the parameters set by Respondent’s client (JetBlue) and external economic forces. ALJD at 15. Whereas Respondent attempts to misconstrue Judge Chu’s opinion by stating that he “apparently decided that because PrimeFlight could bargain over staffing, PrimeFlight was obligated to do so,” R. Br. at 19, in actuality, Judge Chu aptly observed the difference between bargaining over “staffing,” which the Preliminary Injunction limited to a degree, and bargaining over “scheduling,” which the Preliminary Injunction did not limit, and which is a mandatory subject of bargaining under the Act. To wit, the Judge’s Decision actually listed a number of ways in which Respondent could have fulfilled its statutory bargaining obligation without running afoul of the extremely narrow class of agreements that the Preliminary Injunction carves out.¹⁰ Thus, Judge Chu aptly interpreted the clear meaning of the Preliminary Injunction: quite simply, Respondent “shall immediately commence bargaining in good faith with the Union” but must not agree to “a minimum number of shifts per employee or minimum staffing levels per shift.”

Judge Chu correctly found that because engaging in good faith bargaining would not have required Respondent to violate the Preliminary Injunction, the Injunction does not privilege Respondent’s failure to provide the Union with notice and an opportunity to bargain over changes to employee schedules and hours. Although the Preliminary Injunction’s one narrow exception slightly altered the bargaining obligation that is normally imposed by the Act, the parties would have been able to comply with both the Act and the Preliminary Injunction by bargaining within the parameters set forth by Judge Cogan. For these reasons, Respondent’s

¹⁰ “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. [...] 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..” ALJD at 15.

argument that the Preliminary Injunction privileged its unilateral changes to employees' schedules and hour must be rejected.

(2) ***The General Counsel Does Not Bear the Burden of Proving that PrimeFlight Changed Employee Hours and Schedules For Reasons Other Than JetBlue's Business Needs.***

Respondent's takes its misinterpretation of the Preliminary Injunction one step further when it argues that, "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." R. Br. at 23. This argument finds no support in either the language of the Preliminary Injunction or in Board law.

The Preliminary Injunction explicitly states that agreements providing for a minimum number of shifts per employee or minimum staffing levels per shift are prohibited "so that PrimeFlight is able to assign shifts and employees commensurate with JetBlue's expressed employment needs." The Preliminary Injunction does not say that Respondent may act unilaterally, without providing notice and an opportunity to bargain, as long as its purpose is to meet JetBlue's needs. Respondent fabricates this axiom out of whole cloth. Rather, Judge Cogan explained that the bargaining limitation is only meant "to avoid a situation where bargaining obligations would require PrimeFlight to pay for unnecessary staffing," and to avoid "requiring PrimeFlight to pay for unworked hours." R. Ex. 4 at 2, 9. As explained in the section above, nothing about the collective bargaining process would require Respondent to pay for unworked hours, nor would it prevent Respondent from meeting JetBlue's expressed employment needs.

In addition to the Preliminary Injunction, there is no support in Board law for Respondent's pronouncement that the General Counsel bore the burden of proving that

PrimeFlight made unilateral changes to employee hours and schedules for reasons other than JetBlue's support needs. R. Br. at 23. In fact, even assuming that Respondent proved that it implemented the changes in order to meet its client's needs, this evidence is entirely beside the point. Even where external business conditions require changes to schedules and hours in order to protect the profitability of an employer's business, such conditions do not relieve the employer of the statutory obligation to provide the union with notice and an opportunity to bargain over those changes before implementing them. *Mi Pueblo Foods*, 360 NLRB 1097, 1111-12 (2014) (employer violated 8(a)(5) when it unilaterally implemented changes to employees' schedules, reduced hours, laid off employees, and subcontracted part of its operation, even though employer asserted that changes were necessary to protect profitability of the business). An employer may implement such changes either after reaching agreement with the union, or alternatively, after the parties are unable to reach agreement and arrive at a good faith impasse. *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B.*, 501 U.S. 190, 198 (1991). Because Respondent failed to provide the Union with an opportunity to bargain over the changes, Judge Chu correctly concluded that Respondent's unilateral changes violated Sections 8(a)(1) and (5).

(3) *There is No Evidence that Respondent's Unilateral Changes Are in Accord With Its Well-Established Past Practice.*

Moving on from Respondent's misinterpretation of the Preliminary Injunction, in its closing paragraph on the issue, Respondent makes a half-hearted attempt to argue that the General Counsel failed to meet its burden of proving an 8(a)(5) violation because, according to Respondent's unsupported assertion, the changes that it made to employee schedules and hours are supposedly in line with Respondent's historical practice and seasonal fluctuations. R. Br. 25.

However, the burden of proving a well-established past practice rests not on the General Counsel, but on the party asserting that practice as an affirmative defense. *Eugene Lovine, Inc.*, 328 NLRB 294 fn. 2 (1999), *enfd. mem.* 242 F.3d 366 (2d Cir. 2001) (no past practice where record evidence failed to establish circumstances of hours reductions in past years, and employer merely asserted hours reduction was due to slow work during holiday season and/or principal temporarily providing less work to contractor); *compare Raytheon Network Centric Systems*, 365 NLRB No. 161 (December 15, 2017) (finding past practice where parties stipulated that employer made annual changes to healthcare benefits over twelve year period and record evidence showed that changes did not materially vary in kind or degree from year to year). Here, as Respondent admits, there is absolutely “no evidence” pertaining to its historical assignment and scheduling practices. R. Br. 25. Accordingly, this argument must be dismissed out of hand.

(4) Conclusion: Respondent’s Unilateral Changes Violate Sections 8(a)(1) and (5)

For all of the above reasons, Respondent’s flawed attacks on Judge Chu’s decision must be rejected. As Judge Chu correctly found, Respondent failed and refused to bargain in good faith with the Union when it unilaterally changed employee work schedules and hours, without providing to the Union notice and an opportunity to bargain, in violation of Sections 8(a)(1) and (5).

(C) The Record Evidence and Well-Settled Board Law Overwhelmingly Support the Judge’s Finding That On April 4, 2017, Respondent Threatened Employees With More Strict Enforcement of A Work Rule Because Of Their Activities On Behalf of the Union, in Violation of Section 8(a)(1) of the Act.

Judge Chu ably applied the undisputed facts to well-settled Board law in finding that, on April 4, 2017, Respondent threatened employees with more strict enforcement of a work rule because of their activities on behalf of the Union. ALJD at 19.

When determining if a statement amounts to a threat of retaliation in violation of Section 8(a)(1), the Board applies the test of “whether a remark can reasonably be interpreted by an employee as a threat. The test is *not* the actual intent of the speaker or the actual effect on the listener.” *Smithers Tire*, 308 NLRB 72 (1992) (emphasis original). The “threats in question need not be explicit if the language used by the employer or his representative can reasonably be construed as threatening.” *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). “The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce.” *KSM Industries*, 336 NLRB 133, 133 (2001).

Here, the uncontroverted documentary evidence establishes that after walking out of a bargaining session and refusing to meet and bargain with the Union for over two months, Respondent’s Senior Vice President of Human Resources William Stejskal wrote in an e-mail to the Union:

Any PrimeFlight employee who considers skipping work without management permission to attend bargaining as [the Union’s] Observer needs to understand that such unexcused absence may not be treated as an ordinary attendance infraction.

G.C. Ex. 2. Stejskal wrote this statement despite the Union’s repeated assurances that employees who had not been granted release time to attend bargaining would attend on their own time.¹¹

¹¹ On February 22, 2017, Garren wrote, “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. On March 27, 2017, Garren wrote, “Please confirm that you are offering 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*).” On March 29, 2017, in the e-mail that immediately precedes Stejskal’s threat, Garren wrote, “We are not asking for release time for any PrimeFlight employee who is not in the

On its face, Stejskal’s statement explicitly threatens to treat an unexcused absence resulting from protected Union activity – attending a bargaining session – differently than an “ordinary” unexcused absence that is not connected to Union activity. As Judge Chu noted, Stejskal admitted in his testimony that his statement not only could be interpreted to threaten unusually harsh consequences for an unexcused absence, but that it actually was meant to threaten unusually harsh consequences for an unexcused absence. ALJD at 20 (“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.”); Tr. 143-44 (“... using it more as an insubordination issue ...”). While the declarant’s actual intent is irrelevant to determining whether a threat is unlawful, *see Smithers Tire*, 308 NLRB at 72, Stejskal’s admission conclusively demonstrates that his statement is reasonably construed as threatening.

Based on these facts, Judge Chu properly concluded that Respondent violated Section 8(a)(1) when it threatened employees with more strict enforcement of work rules because of their activities in support of the Union on April 4, 2017. Respondent argues that the Judge erred by improperly according weight to a threat made to employees through the Union, and by examining the circumstances surrounding Respondent’s threat, including Stejskal’s conduct at the January 25, 2017 bargaining session and his testimony on the issue. Respondent’s arguments are entirely without merit.

bargaining unit. *We understand that your usual attendance policies would apply to anyone who is not released to attend the bargaining.*” G.C. Ex. 2 (emphasis added).

(1) *Controlling Board Law Holds That a Threat Communicated to a Union is The Legal Equivalent of a Threat Communicated to an Employee, and Stejskal’s April 4, 2017 Threat Cannot be Excused by the Fact That it Was Made to The Union, and Not to an Employee (Exception 10).*

The Board has clearly stated that “an unlawful threat of discipline communicated to a union representative is the legal equivalent of a threat communicated directly to an employee.” *Capital Medical Center*, 364 NLRB No. 69 at *79 (2016) (employer violated 8(a)(1) by telling union agents that employees would be disciplined and/or arrested if they continued to participate in informational picket). Respondent concedes that an employer can violate Section 8(a)(1) by making a threat to employees through a union agent, but attempts to distinguish the instant facts on the bases that (1) Stejskal’s threat purportedly did not involve protected activity; (2) Stejskal’s statement was purportedly a remote statement unconnected to other anti-union activity; and (3) at the time of the threat, the Union was not the exclusive collective-bargaining agent of the non-unit employees to whom the threat was purportedly directed. In fact, Stejskal’s threat to Respondent’s employees cannot be distinguished on any of these asserted bases.

Despite Respondent’s misguided attempts to divorce Stejskal’s threat from protected activities, there can be no real dispute that participating in the collective bargaining process is squarely protected activity. Threatening to target employees who engage in squarely protected activity with harsher than normal consequences for low-level misconduct, such as “an ordinary attendance infraction,” unlawfully interferes with employees’ Section 7 rights. *See Schrock Cabinet Co.*, 339 NLRB 182, 182-83 (2003) (employer threatened employee through union representative with harsher consequences for low-level infractions in retaliation for protected activity of invoking contractual right). Here, Stejskal plainly testified that he wanted to ensure that employees were aware that they would face disciplinary consequences in retaliation for

calling out sick to attend a bargaining session, and that those consequences would be harsher than “an ordinary attendance infraction” would warrant. If Respondent had carried out Stejskal’s threat, the unusually harsh consequences (disciplinary action) would perfectly fit the definition of unlawful retaliation, just like the threatened discipline for “ticky tack” rules violations that the employer made in *Schrock Cabinet Co.* See 339 NLRB at 182-83. As Stejskal’s email explicitly threatens disparate treatment on the basis of protected activity, no further analysis is necessary.¹²

In addition to attempting to divorce Stejskal’s threat from employees’ protected activity of attending a collective bargaining session, Respondent argues that it should not be liable for its unlawful threat because, in Respondent’s disingenuous view, the threat is purportedly a blip on the radar with no connection to any more widespread anti-union campaign. First, Respondent’s assertion that a threat is only unlawful in the context of a virulent anti-union campaign is incorrect. R. Br. at 30-31. For example, in *Capital Medical Center*, the Board found that an employer attempted to prevent lawful picketing by making an unlawful threat of discipline through union agents, despite the fact that the union and the employer had been parties to a collective bargaining relationship for approximately 14 years, and there were no other alleged unfair labor practices. 364 NLRB No. 69 at *79 (2016) (no analysis regarding anti-union animus where employer violated 8(a)(1) by telling union agents that employees would be disciplined and/or arrested if they continued to participate in informational picket).

Even if Respondent were correct, and employers could only make unlawful threats through union agents if the threat is made in the context of a virulent anti-union campaign, the

¹² Respondent piles on an argument that Judge Chu erred by equating two different types of protected activity – attending a bargaining session and striking (Exception 11). This argument does not warrant an extended response because this part of Judge Chu’s analysis is not dispositive of the result he reached. The issue at hand is whether Respondent threatened employees with stricter enforcement of a work rule because of protected activity, i.e., attending a bargaining session. On its face, Stejskal’s email does exactly that.

facts here show that Respondent is in fact engaged in an unlawful and protracted struggle against the Union. The Union demanded recognition as the collective bargaining agent of Respondent's employees at JFK Airport in May 2016. Respondent has fought tooth and nail to escape its obligations under the Act ever since then, including by:

- In May 2016, refusing to recognize the Union as the exclusive collective bargaining representative of the bargaining unit employees (Jt. Ex. 2.);
- In May 2016, failing to provide the Union with information that is necessary for and relevant to the Union's performance of its duties as the exclusive collective bargaining representative of the bargaining unit (Jt. Ex. 2.);
- In June 2016, threatening employees with discharge because they engaged in activities in support of the Union (Jt. Ex. 2.);
- In August 2016, unilaterally implementing changes to pay deductions pertaining to paid break time without providing to the Union prior notice and an opportunity to bargain (Jt. Ex. 2.);
- In September 2016, unilaterally implementing changes to employee work schedules and hours without providing to the Union prior notice and an opportunity to bargain (Jt. Ex. 2.);
- In January 2017, again unilaterally implementing changes to employee work schedules and hours without providing to the Union prior notice and an opportunity to bargain; and
- From January through April 2017, failing and refusing to bargain with the Union for the purpose of negotiating an initial collective-bargaining agreement, unless the Union removed certain members from the bargaining committee.

In this context, when Respondent observed that its employees at area airports other than JFK Airport had begun to support the Union at the January 25, 2017 bargaining session, the company reacted by refusing to bargain with the Union in the presence of those non-unit employees, and only agreed to resume bargaining in the same April 4, 2017 email in which Respondent threatened to retaliate against employees by treating their absences for the purpose of attending bargaining more harshly than an "ordinary attendance infraction." Far from being a remote blip

on the radar, Respondent's threat is part and parcel of an unlawful anti-Union campaign that has now lasted almost two years.

In addition to arguing that Stejskal's threat is lawful because it is an isolated incident, Respondent argues that it is not liable for the threat because at the time it was made, the Union was not the exclusive collective-bargaining agent of the non-unit employees to whom the threat was purportedly directed. R. Br. at 30-31. Again, Respondent misstates both the law and the facts. Employees' right to "to unionize, to join together to advance their interests as employees, and to refrain from such activity," and to do so free from employer interference, does not turn on whether they are represented by a union. Protecting the rights of unrepresented employees is paramount to the effective administration of the Act. The case cited by Respondent, *Timberline Energy Corp.*, is instructive. In that case, the Board held that the employer had unlawfully threatened union-supporting employees through the union representative, even though the union had neither been certified by the Board nor recognized by the employer. 258 NLRB 292, 296 ("Preslar's threat was communicated to the union representative and agent of those employees signing union cards, it had the same impact as if made directly to the employees.") Here, the Union indisputably represented the bargaining unit employees by way of Respondent's status as a *Burns* successor, and the Union's status as an agent of the non-unit employees rested on a nascent organizing campaign, just like in *Timberline Energy Corp.*

Even if Respondent were correct, and employers could only make unlawful threats through union agents if the union is the exclusive collective-bargaining agent of the employees, the uncontroverted documentary evidence here shows that Respondent's threat encompassed bargaining unit employees who are indisputably represented by the Union. Stejskal wrote:

Any PrimeFlight employee who considers skipping work without management permission to attend bargaining as [the Union's] Observer needs to understand that such unexcused absence may not be treated as an ordinary attendance infraction.

G.C. Ex. 2. (emphasis added). Respondent's attempt to portray Stejskal's threat as targeting only non-unit employees is blatantly false. It must be rejected out of hand.

For all of the above reasons, Judge Chu's finding that on April 4, 2017, Respondent threatened employees with more strict enforcement of a work rule because of their activities in support of the Union, in violation of Section 8(a)(1) should be affirmed.

(2) *The Judge Correctly Considered Stejskal's Statement Made Directly to Employees on April 25, 2017 as a Part of the Totality of the Circumstances Surrounding the April 4, 2017 Threat (Exception 9).*

Respondent attempts to muddy the waters by baldly asserting, without evidence, that Judge Chu did not rule on whether Stejskal's April 4, 2017 statement constituted an unlawful threat, and that Judge Chu instead "found that PrimeFlight executive William Stejskal threatened employees directly at a bargaining session" on April 25, 2017. R. Br. at 25. Respondent's assertion is false. On the contrary, Judge Chu found that "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." ALJD at 19.

In reaching that conclusion, Judge Chu appropriately examined Stejskal's conduct at the April 25, 2017 bargaining session as a part of the "totality of the circumstances," as extant Board law requires. *See KSM Industries*, 336 NLRB at 133. As Respondent itself notes, it is entirely appropriate to examine statements made directly to employees when analyzing an employer's threat communicating through a union agent. R. Br. at 29. For example, in *Capital Medical*

Center, the Board concluded that the employer’s threats, which were communicated to a union representative, violated the Section 8(a)(1). 364 NLRB No. 69 (“[employer agent] Bunting told [union agent] Reed discipline could ensue” if employees continued picketing). Notwithstanding that finding, the Board examined statements that the employer made directly to employees, which echoed the unlawful threat made to the union. *Id.* (“aside from the threat of discipline conveyed through [union agent] Reed, [employee] Arland felt threatened by [employer agent] Bunting, and it is clear that she was repeatedly asked to leave by security”).

Here, the record evidence indisputably shows that Stejskal made a clear threat in his April 4, 2017 email, and then followed up on that threat during the April 25, 2017 bargaining session to ensure that employees received the message. As he plainly testified, his “direction” to employees to leave the bargaining session and return to work was a precursor to carrying out the plan he had previously communicated to the Union, i.e., bootstrapping ordinary attendance infractions into more serious claims of insubordination and, accordingly, more serious and retaliatory discipline. Judge Chu would have been remiss to ignore the statements that Stejskal made directly to employees on April 25, 2017, which echoed his April 4, 2017 threat through the Union. In this regard, Respondent’s attempt to find fault in Judge Cho’s decision must be rejected.

(4) Conclusion: Respondent’s April 4, 2017 Threat Violated Section 8(a)(1)

For all of the above reasons, Respondent’s flawed attacks on Judge Chu’s decision must be rejected. As Judge Chu correctly found, by threatening employees with more strict enforcement of a work rule because of their activities in support the Union, Respondent violated Section 8(a)(1) of the Act.

V. CONCLUSION

For all the reasons discussed above, Counsel for the General Counsel respectfully requests that the Board reject each of Respondent's Exceptions and Respondent's Brief In Support of Exceptions. Except as specified in Counsel for the General Counsel's cross-exceptions, it is further urged that the Board adopt the Administrative Law Judge's Findings of Fact, Conclusions of Law, Remedy and Order, and any other remedy deemed just and proper.

Dated at Brooklyn, New York, March 27, 2018.

/s/ Brady Francisco-FitzMaurice

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