

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

PrimeFlight Aviation Services, Inc.,

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

Respondent,

and

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

Charging Party.

**CHARGING PARTY SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 32BJ's BRIEF OPPOSING RESPONDENT'S EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. INTRODUCTION

Charging Party SEIU Local 32BJ (the “Union”) opposes Respondent PrimeFlight Aviation Services, Inc. (the “Employer” or “PrimeFlight”) exceptions to Administrative Law Judge Kenneth W. Chu’s Decision and Order (ALJD). Specifically, the Employer claims that the District Court’s Sec. 10(j) injunction privileged it to alter schedules and reduce hours unilaterally. However, the Employer is obligated to provide notice and an opportunity to bargain with the Union concerning shifts and hours of work as a *Burns* successor. *NLRB .v Burns Int’l Sec. Servs.*, 406 U.S. 272 (1972). Judge Chu correctly determined that nothing in the District Court’s order prevented the Employer from bargaining over the schedule and hours changes. The Employer also asserts that its agent Bill Stejskal did not unlawfully threaten employees when he said that an unexcused absence to attend bargaining “may not be treated as an ordinary attendance infraction.” The Employer argues that unexcused absences are not protected activity. However, Judge Chu correctly concluded that a threat to impose harsher discipline because the reason for the absence was to attend bargaining violates Sec. 8(a)(1).

II. STATEMENT OF THE CASE

The Union accepts and adopts the General Counsel’s Statement of the Case. The Union will not address the Employer’s defenses that it is not under NLRA jurisdiction and that it is not a *Burns* successor since the parties agreed that they would be bound by the resolution of those issues in Case No. 22-CA-177992.

III. STATEMENT OF FACTS

In Case No. 29-CA-177992, the General Counsel alleged that PrimeFlight had violated Section 8(a)(5) of the Act by refusing to bargain with the Union. Jt. Ex. 2. Prior to hearing, the General Counsel sought preliminary injunctive relief in federal court. On October 24, 2016

Judge Brian Cogan of the Eastern District of New York issued a preliminary injunction ordering PrimeFlight to immediately recognize the Union as the interim representative of a bargaining unit of Prime Flight employees at JFK.¹ Res. Ex. 2. The preliminary injunction stated that PrimeFlight must immediately commence bargaining in good faith with the Union. However, the order to bargain was subject to two conditions: 1) 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; and 2) 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 (the "Shift Limitation"). Res. Ex. 2, p. 2.

On or around the end of January 2017, JetBlue provided PrimeFlight with a “daily station departures” list detailing the number of flights anticipated for the month of February. Res. Ex. 1 F. This list did not dictate staff levels nor provide any work hours or shift requirements. *Id.* On or around the end of January 2017, the Employer posted new employee schedules. G.C. Ex. 6; Tr. at 68. The schedules came into effect on or around the beginning of February 2017. *Id.* The Employer did not provide notice to or an opportunity for the Union to bargain concerning the schedule changes.

These new schedules altered employee work days and regularly scheduled hours. PrimeFlight representative Josh Heady conceded that between 10 and 15 percent of employees experienced a schedule change. Tr. at 66. PrimeFlight Wheelchair Attendant Irene Rodgers testified that, at the beginning of December 2016, she was scheduled to work 20 hours per week. Tr. at 39. She worked from 12 pm to 4 pm, five days a week, with Mondays and Tuesdays off. *Id.* At the end of January 2017, PrimeFlight changed her regular schedule to seven hours a day,

¹ The Second Circuit affirmed the injunction without modification. Case No. 16-3877 Dkt. 177, 2/5/18.

five days a week. Tr. at 41. She then switched with another worker so that she could work a schedule with six hours a day, five days a week. Tr. at 41. Rodgers now works 30 hours a week. She is scheduled from 12pm to 6pm, five days a week, with Wednesdays and Thursdays off. PrimeFlight Wheelchair Attendant Yolie Jean Benoit testified that, at the beginning of December 2016, her regular schedule was from 3:30 pm to 11:00 pm, five days a week, or 37.5 hours per week. Tr. at 47. She had Monday and Tuesday off. *Id.* In January 2016, PrimeFlight changed Jean Benoit's regular schedule. She now works only 30 hours per week. She is scheduled to work from 6:00 pm to 12:00 pm, five days a week. Tr. at 48. She has Sundays and Mondays off.

The Employer walked out of bargaining on January 25, 2017 because the Union bargaining team included PrimeFlight employees employed at LaGuardia and Newark Liberty airports.² After a number of e-mails back and forth between Brent Garren, Union lead negotiator, and Bill Stejskal, PrimeFlight lead negotiator, the Employer agreed to return to bargaining even if employees from outside the bargaining unit were present. In his April 4, 2017 e-mail agreeing to bargain, Stejskal warned Garren that employees attending bargaining may face harsher discipline, stating, “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.” *Id.*

On April 25, 2017, the parties met for a third bargaining session. At the beginning of this session, PrimeFlight Representative Stejskal alerted the non-bargaining unit employees that they should return to work immediately if they were scheduled to work. Tr. at 148.

² The Employer's refusal to bargain is the subject of the General Counsel's cross-exceptions.

IV. PRIMEFLIGHT UNLAWFULLY UNILATERALLY IMPOSED CHANGES IN SHIFTS AND REDUCED HOURS

PrimeFlight argues that the Preliminary Injunction’s Shift Limitation allowed PrimeFlight to unilaterally impose the Schedule Change. ER Brief, 19-25. First, it argues that the Preliminary Injunction (“PI”) is the sole source of its bargaining obligation. Then, it asserts that the PI did not require bargaining on shifts. Finally, it claims that the scheduling changes were to accommodate its customer, JetBlue so that they were protected by the Shift Limitation. None of these arguments help the Employer.

A. The Employer Violated Its Bargaining Obligation

The Employer claims that its “bargaining obligation to SEIU 32BJ stems entirely from the Preliminary Injunction issued by Judge Cogan on October 24, 2017.” Respondent’s Brief (“ER Brief”) at 19. Indeed, it asserts that the scope of the PI is “exclusively and conclusively determinative of whether PrimeFlight violated the Act by making changes without bargaining with the Union.” *Id.*

This argument is specious. The Employer’s bargaining obligation stems from its status as a *Burns* successor. *NLRB v Burns Int’l Sec. Servs.*, 406 U.S. 272 (1972). The Employer continued the operations of a unionized employer without significant change and its workforce was comprised of a majority of former union-represented employees at the time at which the Union requested recognition. While the Employer contests its successor status in Case No. 22-CA-177992, the parties agreed not to retry that issue in this case and to rely on the outcome on this issue from Case No. 22-CA-177992. Associate Chief Judge Landow correctly concluded in Case No. 22-CA-177992 that PrimeFlight was a *Burns* successor for its JFK operations. Hence, the NLRA requires the Employer to recognize and bargain in good faith with the Union, whether or not there was a Preliminary Injunction.

The Employer changed employees' schedules, including their days off, and reduced their hours of work. It did so without providing notice and an opportunity to bargain. Good faith bargaining includes bargaining over schedules and shifts. Work schedules are a mandatory subject of bargaining. *Timken Roller Bearing Co.*, 70 NLRB 500 (1946); *NLRB v. Katz*, 369 NLRB 736, 747 (1963); *Palm Beach Metro Transportation, LLC*, 327 NLRB 180 (2011). 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.” *Carpenters Local No. 1301*, 321 NLRB 30, 31 (1996), quoting *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965). Hence PrimeFlight violated the Act.

B. The Preliminary Injunction Does Not Prohibit PrimeFlight From Bargaining Over Changes in Shifts, Schedules and Hours

1. PrimeFlight Must Show That the Preliminary Injunction Prohibits Bargaining over the Schedule Change

PrimeFlight attacks the ALJD because it found that the PI permitted bargaining over shifts, schedules and hours. ER Brief, 19-22. While the Employer's argument is far from clear, apparently it asserts that the proper question is whether the PI compelled the Employer to bargain. The Employer argues that the PI does not because the PI contemplated giving PrimeFlight complete unilateral power over any and all matters relating to shifts, schedules and hours.

This argument disintegrates upon examination. Even assuming for the sake of argument that the PI is the source of PrimeFlight's bargaining obligation, the PI orders PrimeFlight to immediately “commence bargaining in good faith with the Union.” Res. Ex. 2, p. 2. The Board,

of course, has authority to enforce the Act, not the Preliminary Injunction. But even under the PI, Judge Chu analyzed the issue correctly in determining that the Employer had to bargain over shifts and schedules unless the PI clearly prevented it from doing so.

2. The PI Permits Bargaining Over The Schedule Change

The PI states: “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.” *Id.*

In his memorandum decision supporting the PI, Judge Cogan writes that the parties may not include “any provisions regarding minimum number of shifts per employee or minimum staffing levels per shift.” G.C. Ex. 7, p. 22.

The purpose of the Staffing Limitation was to ensure that PrimeFlight would comply with JetBlue’s “expressed employment needs” and not be forced to employ more staff than needed. Judge Cogan wrote that PrimeFlight would determine shifts and staffing levels “when JetBlue provides notice of its staffing and shift needs . . .” G.C. Ex. 7, p. 22. The goal was that “PrimeFlight will not be forced to needlessly staff and pay employees when there is no need to staff them.” *Id.*

The PI’s Shift Limitation permitted bargaining over the Schedule Change. JetBlue did not set staffing levels or specify a number of employee hours needed. JetBlue provided only a list of the number of flights for the month. Res. Ex. 1. PrimeFlight determined the number of staff hours necessary to adequately man JetBlue's flights. Tr. at 106. Nothing in the Shift Limitation’s plain language or purpose prevents negotiations and agreement over PrimeFlight's decision concerning the total number of staff hours needed.

Even more clearly, nothing in the plain language or rationale of the Shift Limitation prevents agreements over how a reduction in hours would be implemented. PrimeFlight was clearly obligated to bargain over the extent to which a reduction in hours would occur through layoffs as opposed to reducing hours. It had to bargain over whose schedules would be reduced and the extent of the reduction, e.g. would all employees receive equal cuts in hours or would some receive greater and others lesser reduction in hours? Indeed, PrimeFlight unarguably could bargain over whether the reduction in hours should be implemented in reverse order of seniority as Judge Cogan specifically noted that the Union had the ability to bargain “regarding a host of terms” including “seniority.” Res. Ex. 4, p. 5. Would the reductions occur among only wheelchair employees or would the pain be spread more widely among the different job classifications? Would full time employees be protected while part-timers felt the brunt of the reductions? Were employees’ needs taken into account when their days off were changed? Were desirable days off awarded based on seniority? The PI’s Staffing Limitation manifestly did not preclude bargaining on these and many other questions related to the Schedule Change.

The Employer argues that the General Counsel's Motion to Amend the Judgment is relevant to determining the scope of the injunction. Res. Ex. 3. It is not. How the GC’s briefs characterized the injunction does not alter either the plain language of the injunction or the judge's explanation of the injunction. The language of the injunction is clear on its face. To the extent further interpretation is called for, the only relevant interpretation is that authored by Judge Cogan himself. *See Salazar v. Buono*, 559U.S. 700, 762 (2010) (“The construction given to an injunction by the issuing judge is entitled to great weight.”) (internal citations and quotation marks omitted). As Judge Cogan stated the limitation applied only to agreements regarding “a minimum number of shifts per employee or minimum staffing levels per shift.” Res. Ex. 2, 4;

G.C. Ex. 7. As Judge Chu correctly concluded, the Employer was obligated to bargain over the multitude of issues surrounding the schedule change other than “the minimum number of shifts per employee or minimum staffing levels per shift.”

3. The Preliminary Injunction Did Not Exempt The Schedule Change From Bargaining Simply Because It Reflected JetBlue’s Flight Schedule

PrimeFlight argues that its schedule change was in response to changes in JetBlue’s flight schedules so it fell within the scope of the Shift Limitation. ER Brief 23-24. It sets up a straw man, asserting that General Counsel must prove that PrimeFlight implemented the Schedule Change for reasons unrelated to JetBlue’s flight schedule. But bargaining over the allocation of the reduction of hours among the employees and bargaining over which employees are assigned to which shifts and schedules does not implicate Judge Cogan’s concerns. It would not require PrimeFlight to provide more total hours of work than was deemed necessary to perform the services. Hence, the PI does not prevent bargaining over it.

V. PRIMEFLIGHT THREATENED TO RETALIATE AGAINST EMPLOYEES FOR UNION ACTIVITY

A. Stejskal Threatened Harsh Discipline for Engaging in Union Activity

The Employer violated Section 8(a)(1) by threatening to enforce the Employer’s attendance policy more strictly against employees missing work to attend bargaining sessions.

On April 4, 2017, Stejskal stated:

Any PrimeFlight employee who considers skipping work without management permission to attend bargaining as your Observer needs to understand that such an

unexcused absence may not be treated as an ordinary attendance infraction. G.C.

Ex. 2.

Stejskal testified that he was seeking to set employees up so they could be disciplined for insubordination, a far more serious offense than missing a day of work. Tr. at 143. This statement threatens employees with harsher discipline simply because they engaged in union activity and is therefore unlawful, as the ALJD cogently discusses. ALJD at 20.

B. Stejskal Made the Threat To Employees

The Employer argued in its post-hearing brief that Stejskal did not communicate his threat to the employees. Stejskal's threat communicated to Garren is the legal equivalent of a direct threat to PrimeFlight employees. *See Capital Medical Center*, 2016 NLRB LEXIS 589,364 NLRB No. 69, at *79 (2016) (citing *Schrock Cabinet Co.*, 339 NLRB 182 (2003)). In *Capital*, union representatives and employees were performing an informational picket. An employer representative took two union representatives aside and told the union representatives that the employees would be disciplined if they continued to participate in the picket. The Board found a violation of Section 8(a)(1) based on this threat. Similarly, in *Schrock Cabinet Co.*, 339 NLRB 182, 185 (2003), the Board found a violation of Section 8(a)(1) where an employer representative told a union representative that he would enforce rules more harshly against a member if she filed a grievance. In *Timberline Energy Corp.*, 258 NLRB 292, 296 (1981), in response to a letter seeking recognition, an employer representative told a union representative that he would relocate the plant before allowing union organization. The Board found that “Since [the employer representative]’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.” *Id.*

In addition to conveying this threat to Garren, Stejskal also confirmed the Employer's position through statements to the bargaining committee at subsequent bargaining sessions. At the beginning of both the April 25, 2017 and May 31, 2017 bargaining sessions, Stejskal warned the employees that if they had not been excused from work, they should return to work immediately or face discipline. Tr. at 148.

C. Defense That Missing Work Is Not Protected Is Unavailing

The Employer argues that Stejskal's threat was lawful because leaving work to attend bargaining is not protected activity. But PrimeFlight does not successfully distinguish the cases cited by the ALJD at 20. PrimeFlight does not even attempt to argue that it is treating employees who missed work to attend bargaining the same as employees who missed work for other reasons. It is unlawful to punish more harshly those engaged in protected activity. *Camaco Lorain Mfg Plant*, 356 NLRB 1182 (2011) (discharge of an employee engaged in protected, concerted activity purportedly for "bad attitude" and low productivity was unlawful because it was far harsher punishment than that imposed on another employee for more serious offenses of a similar nature).

VI. CONCLUSION

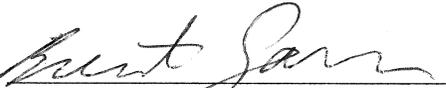
The Employer unlawfully unilaterally imposed the Schedule Change. It was obligated to bargain as a *Burns* successor, the schedule change involved substantial changes to terms and conditions of employment, and nothing in the Preliminary Injunction permitted PrimeFlight to impose the Schedule Change without bargaining at least over the allocation of work hours and assignments of shifts and schedules. The Employer unlawfully threatened disparate treatment of those engaged in union activity when it threatened to treat unexcused absences to attend

collective bargaining more harshly than absences for other reasons. For these reasons, the cogent findings of Judge Chu should be affirmed.

Dated: March 26, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of **CHARGING PARTY SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ's BRIEF OPPOSING RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**, was served on this 30th day of March, 2018 via electronic mail on the following parties:

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