

**PUBLIC COPY—SEALED MATERIAL DELETED**

Oral Argument Not Yet Scheduled  
Nos. 18-1342 & 19-1018

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**AMERICAN SALES & MANAGEMENT ORGANIZATION, LLC  
d/b/a EULEN AMERICA**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

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

**Intervenor**

---

**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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AMERICAN SALES AND MANAGEMENT ORGANIZATION, LLC d/b/a EULEN AMERICA	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 18-1342 19-1018
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case Nos.
Respondent/Cross-Petitioner	)	12-CA-163435 12-CA-176653
	)	
and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ	)	
	)	
Intervenor	)	

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

**A. Parties and Amici**

Petitioner/Cross-Respondent American Sales and Management Organization, LLC d/b/a Eulen America (“the Company”) was the Respondent before the Board in the underlying proceeding (Board Case Nos. 12-CA-163435 and 12-CA-176653). The Board’s General Counsel was a party before the Board.

Service Employees International Union, Local 32BJ, was the charging party before the Board and is the Intervenor here.

### **B. Rulings Under Review**

The matter under review is a Decision and Order of the Board, issued against the Company on December 4, 2018, and reported at 367 NLRB No. 42.

### **C. Related Cases**

The Decision and Order under review has not previously been before this Court, or any other court.

/s/ David Habenstreit  
David Habenstreit  
Acting Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half Street, SE  
Washington, D.C. 20570

Dated at Washington, D.C.  
this 17th day of June 2019

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## GLOSSARY

Act	National Labor Relations Act (29 U.S.C. § 151, et seq.)
Board	National Labor Relations Board
Br.	Opening brief of Petitioner/Cross-Respondent American Sales & Management Organization, LLC d/b/a Eulen America
Company	American Sales & Management Organization, LLC d/b/a Eulen America
FLL	Fort Lauderdale-Hollywood International Airport
JA	Joint Appendix
NMB	National Mediation Board
RLA	Railway Labor Act (45 U.S.C. § 151, et seq.)
Union	Service Employees International Union, Local 32BJ

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**JURISDICTIONAL STATEMENT**

This case is before the Court on the petition of American Sales and Management Organization, LLC d/b/a Eulen America (“the Company”) to review,

and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued against the Company on December 4, 2018, and reported at 367 NLRB No. 42. (JA1324-40.)<sup>1</sup> The Board found that the Company violated Section 8(a)(3) and (1) of the National Labor Relations Act (29 U.S.C. §§ 151, §158(a)(3) and (1)) (“the Act”) by discharging and refusing to rehire employee Joanne Alexandre because she supported the Service Employees International Union, Local 32BJ (“the Union”) in its campaign to represent the Company’s employees for purposes of collective bargaining.

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce, and its Order is final with respect to all parties. This Court has jurisdiction and venue is proper under Section 10(f) of the Act (29 U.S.C. § 160(f)), which allows an aggrieved party to obtain review of a Board order in this Circuit and the Board to cross-apply for enforcement.

The Company filed its petition for review on December 28, 2018. The Board filed its cross-application for enforcement on January 29, 2019. These filings were timely, as the Act sets no deadline for the institution of proceedings to

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<sup>1</sup> “JA” references are to the Joint Appendix filed on May 8, 2019. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to the Company’s opening brief.

review or enforce Board orders. The Union has intervened on the side of the Board in this proceeding.

### **STATEMENT OF THE ISSUES PRESENTED**

1. Whether the Board properly asserted jurisdiction over the Company, finding that the Company did not show it is an employer subject to the Railway Labor Act.

2. Whether the Board is entitled to summary enforcement of its otherwise uncontested Order.

### **RELEVANT STATUTORY PROVISIONS**

Relevant sections of the Act and the Railway Labor Act (“RLA”) are reproduced in the Addendum to this brief.

### **STATEMENT OF THE CASE**

Acting on a charge filed by the Union, the Board’s General Counsel issued a complaint alleging that the Company unlawfully discharged and refused to rehire employee Alexandre because she engaged in protected union activity. In response, the Company averred that it is not an employer subject to the Board’s jurisdiction, because it performs work traditionally performed by air carriers and is under the control of such carriers, making it a “derivative carrier” covered by the RLA. The Company also denied that its conduct as to Alexandre was unlawful.

Following a hearing, an administrative law judge found that the Company failed to establish that it is under the meaningful control of the air carriers to whom it provides services, as required for RLA jurisdiction. The judge further found that the Company, an employer within the meaning of the Act, committed unfair labor practices as alleged. On exceptions to the Board, the Company pursued only the issue of jurisdiction. Addressing that single contested issue, and applying the National Mediation Board’s well-established test for determining carrier control, the Board affirmed the judge’s conclusion that the Company is not a derivative air carrier subject to the RLA. The Board accordingly asserted jurisdiction, and in the absence of any substantive argument that the judge erred in his unfair-labor-practice findings, affirmed them. The facts underlying the Board’s findings, as well as its Conclusions and Order, are summarized below.

**I. THE BOARD’S FINDINGS OF FACT**

**A. Overview of the Company’s Operations**

The Company contracts with air carriers to provide ground services at airports across the United States. At Fort Lauderdale-Hollywood International Airport (“FLL”), the Company serves six carriers as follows:

WestJet Airlines (Terminal 1)	baggage-handling services cabin-cleaning services counter services (including passenger check-in) janitorial services ramp services
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Delta Airlines (Terminal 2)	cabin-cleaning services checkpoint services
American Airlines (Terminal 3)	checkpoint services janitorial services
Bahamasair (Terminal 3)	baggage-handling services cabin-cleaning services janitorial services ramp services
JetBlue Airlines (Terminal 3)	checkpoint services
Spirit Airlines (Terminal 4)	cabin-cleaning services

Nearly all the carriers maintain their own staff at FLL, including supervisors and managers, who oversee carrier operations and coordinate with company officials. Only WestJet has no permanent staff at the airport. (JA1330-31;JA34-35,214-16,226,230,283-85,297,493-501,505,523,735-36.)

The Company fulfills its contractual duties using its own dedicated staff of about 172 employees and 19 supervisors acting under a company-appointed director, Yasmin Kendrick. Nearly all of the Company's employees at FLL wear uniforms and name tags identifying them as company employees. Only about 12 employees and 2 supervisors, who provide passenger services for WestJet, wear carrier apparel. (JA1332;JA32,53,83,493,595.)

Kendrick works full-time at FLL, mainly from an office in Terminal 2 provided by Delta. That office is physically separated from the rest of Delta's leased space with its own entrance that Delta employees do not use. The Company also maintains an office in Terminal 4, which it directly leases from the airport,

and an office in Terminal 1 leased by absentee carrier WestJet. (JA1331;JA34-35,112-14,457,503-04,523,596.)

As detailed below, the Company independently allocates and manages its staff and resources as it sees fit to provide all contracted-for services to its six clients at FLL. Although individual carriers can and do occasionally assert the right to monitor the Company's activities on their behalf, the carriers generally leave the Company—a highly sophisticated airport service-provider—to determine how best to accomplish the contracted-for service goals. (JA1331-32;JA285-86.)

**1. The Company handles all staffing, scheduling, and supervision of its employees**

The Company determines how to distribute its employees and supervisors to meet its commitments to each airline. Typically, it allocates 50 to 60 employees and supervisors to the Spirit account, about 40 to the Delta account, between 25 and 30 to the WestJet account, and between 10 and 12 each to the JetBlue and American accounts. The Company generates work schedules for its employees and supervisors, to ensure coverage of the various airlines' needs at all times when they are operating at FLL. No carrier is involved in generating a schedule for the Company's workers, nor do carriers have the lesser authority to review, consider, or approve time-off requests, or to assign overtime hours. (JA1331;JA216-19,226,284-88,292-93,513-22,553-54,561-64,568-69,595-97.)

Carrier officials do not supervise the Company's employees. The Company assigns its own supervisors and operations managers to each airline account. Those supervisors and managers direct the work of the Company's employees, ensuring their compliance with the work rules established in the Company's employee handbook, appraising individual employee performance, and recommending or issuing discipline where called for by company policy. Given the Company's designation of its own personnel to supervise employees, the Company does not consider it appropriate for employees to communicate with airline officials about their terms and conditions of employment. (JA1331;JA216-17,222,226,229-30,236-38,288-91,575-77.)

Consistent with these existing arrangements, the American contract provides that although the Company must "follow certain procedures, instructions and standards of service of American," the airline "shall have no supervisory power or control over any [company] employees or agents engaged by [the Company] in connection with its performance" of contractual services. (JA702,709.) The same contract further states that except in certain limited respects specifically provided—none of which involve staffing or scheduling (JA691-709)—the contract is "not intended to limit or condition [the Company's] control over its operations or the conduct of its business as a ground handling company." (JA702.)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Along the same lines,

the JetBlue and Spirit contracts provide that the Company is fully responsible for managing its own personnel, and the Spirit contract expressly states that the Company “will make all decisions as to the supervision” of its employees.

(JA869-71,912-14.)

**2. The Company maintains and enforces its own personnel policies and determines whether to take personnel action**

The Company interviews and hires its own employees.<sup>2</sup> And as the Company’s orientation packet and employee handbook make clear, carriers do not acquire a role in personnel decisions after the Company hires an employee. Thus, the Company alone determines and pays employee wages and benefits, generates employee work schedules, reviews employee requests for time off, and decides matters of discipline or reward. (JA1331;JA222-23,267-70,288-91,530-31,534-41,568,599-690,950-91.)

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<sup>2</sup> Although the Company’s contract with American purports to give that airline the right to participate in the hiring process, the airline has never sought to exercise that right. (JA1331;JA291,509-12,595.)

Although some of the carriers, by contract, have a right to demand removal of a specific employee from providing services, this right is seldom invoked. Moreover, removal from contractual work for one carrier does not necessarily affect employment status or translate into discipline. It may simply mean a transfer from one carrier contract to another. (JA1331;JA116-17,222-25,227,290-91,522,529,564-67,709.)

Overall, carriers seldom contact the Company to discuss or complain about specific employees, and have made specific personnel recommendations on only two occasions to recommend positive actions. Delta recommended that the Company hire a Delta employee for part-time work that would accommodate his Delta duties. On another occasion, Bahamasair recommended that the Company promote a “lead” company employee to a supervisory position. In all events, the Company does not act reflexively based on carrier feedback, but conducts its own inquiry and reaches its own conclusions as to any appropriate personnel action. (JA1331-32;JA223-27,236-38,314-15,509-12,522,557-60,568.)

**3. The Company trains its own employees using its exhaustive safety and training manual or carrier materials largely mirroring the content of the manual and federal requirements**

In keeping with its commitment to provide clients with a highly trained workforce, the Company has established detailed competence requirements and training materials for its employees. The Company maintains a 900-page safety

and training manual, setting forth information specific to each service job that an employee may perform for the Company, as well as safety information that all employees must learn. The Company uses its own training materials in preparing its employees to work for carriers, like American, that do not impose specific training requirements on contractor employees. (JA1332;JA428-29,430-31,467-69,475-76,597,709,1155-89.)

Some of the carriers with whom the Company contracts at FLL maintain their own training materials for contractor employees. Where those materials encompass the same content as the Company's manual, the Company uses the carrier's materials and follows their "training path." (JA468-77,482-83.) Where, on the other hand, the Company's training standards are higher than those of the carrier, the Company seeks the carrier's permission to substitute its training material for that of the carrier. For example, when the Company's manual provided more stringent standards for ramp agents than conveyed in Delta's training material, the Company requested and received permission from Delta to train employees on the Company's higher standards.<sup>3</sup> The Company has also assisted one carrier, Bahamasair, in developing training material based on the

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<sup>3</sup> In other respects, the Company follows Delta's training path, which in turn mostly follows federal regulations governing airport personnel. (JA1332;JA438-49.)

Company's manual and accumulated training expertise. (JA 1332;JA462,468-77,482-83.)

A few of the carriers at FLL require the Company to administer additional training to employees on limited matters specific to their operations. For example, Spirit requires that the Company administer an annual computer-based training to employees on Spirit's cabin-cleaning expectations. The Company collaborates with the individual carriers to ensure that its supervisors and managers can impart each carrier's specific service requirements. (JA1332;JA227-29,241-42,433-40,444-54,457-59,465-66,467-69,481-83.)

#### **4. Carriers conduct limited audits to spot-check the Company's performance of contractual services**

The Company's contracts with the carriers permit varying degrees of auditing to ensure the Company's compliance with contractual commitments. In practice, the carriers do not elect to audit the Company closely or frequently. Spirit and Delta audit the Company's cabin-cleaning performance between one and three times a week. The Spirit audit takes the form of a checklist, simply indicating what employees have or have not done on randomly selected aircraft on a given day. Less frequently—about once a month—American and JetBlue conduct audits of the Company's security-checkpoint services, and they report any findings to Kendrick informally. Kendrick ultimately determines, sometimes in

consultation with her staff, how to address any issues raised by a carrier audit.

(JA1332;JA217-18,220,226,239-41,293,304,313-14,522-25,567-68,698-99,870.)

**5. The Company uses its own equipment and supplies in performing contractual services, with limited substitutions based on carrier preference**

The Company uses its own equipment and supplies—for example, vacuum cleaners, gloves, mops, cleaning solutions, and garbage bags—in performing services for the various carriers at FLL. American specifically requires the Company to procure and maintain all equipment and supplies it needs. There are limited exceptions to this practice. Delta requires the Company to use three Delta vehicles to remove waste from its aircraft. Both Delta and Spirit specify and provide certain cleaning products to be used on their respective planes, and certain passenger amenities that must be replenished, as part of regular cabin-cleaning. Bahamasair, meanwhile, provides the Company with passenger amenities for its planes, but otherwise requires the Company to use its own supplies in cabin-cleaning. The Company stores all such carrier-provided items with its own supplies, in storage closets within the Company's offices. And as with its own supplies, the Company is responsible for monitoring inventory and requesting additional items as necessary. (JA1332;JA501-09,555-57,579,697-98,737.)

**B. The Union Begins an Organizing Campaign; Employee Joanne Alexandre Participates in Two Strikes; the Company Fails To Give Her Customary Notice of Steps Necessary To Renew Her Airport Access Badge, and Discharges and Refuses To Rehire Her Once the Badge Expires**

For several years, the Union has attempted to organize employees working for contractors at FLL, including the Company's 172 employees. In 2015 and 2016, as part of an escalation of organizing activity, the Union called one-day strikes among the targeted workers. About 35 company employees participated in the first strike on November 18, 2015, and about 70 participated in the second strike on March 30, 2016.<sup>4</sup> (JA1334;JA120-22,137-39.)

Joanne Alexandre, who cleaned Spirit aircraft cabins for the Company on the overnight shift, participated in both one-day strikes and joined with other employees in marching outside the airport on the strike days. In March 2016, the Union posted photographs from the November 2015 strike, and Alexandre was among those pictured. (JA1334;JA84,88-89,136,165-66,374-80.)

When Alexandre returned to work after the March 30, 2016 strike, her supervisor, Wilner Baptiste, commented to Alexandre and others in her cabin-cleaning crew that he did not appreciate having to clean all of the Spirit planes by

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<sup>4</sup> The Union gave the Company notice just before each strike and, at the conclusion of each one, submitted unconditional offers to return to work on behalf of the striking employees. (JA1134;JA130-35.)

himself overnight. He made a similar statement to Union Organizer Harris Harrigan, while also complimenting Harrigan on the impressive turnout for the March 30 strike. (JA1334;JA144-45,411-12.)

Within one week of that strike, on April 5, 2016, Alexandre began the process of renewing her security badge, which was set to expire on April 20. Like all company employees, Alexandre needed to maintain a badge issued by the Broward County Aviation Department (“Aviation Department”) to access the secure airport areas where the Company performs its work. Customarily, a renewal proceeds by the following steps: the Company provides necessary signatures on the employee’s renewal application; the employee files the application with the Aviation Department; that entity informs the Company when the application has been approved; and then the Company instructs the employee to appear at the Aviation Department’s office to complete a few final steps and receive a renewed badge. (JA 1332-33;JA32-35,37,80,84-86,168-69,389-401,997-1000.)

Alexandre secured the necessary company signatures and filed her renewal application with the Aviation Department on April 5. Less than one week later, on April 11—well in advance of the April 20 expiration date on Alexandre’s existing badge—the Company received notice that the Aviation Department had approved Alexandre’s renewal application. Notwithstanding receipt of this notice, the

Company did not timely inform Alexandre of the approval as it usually did, either by calling her personal phone number or conveying the message through her supervisor. (JA1333;JA171-73,419-20.)

Around April 15, Alexandre asked her supervisor, Baptiste, whether he had heard anything about her renewal application. Baptiste responded that he had not. When Alexandre checked in again on April 19, Baptiste told her not to report for her overnight shift that day, because her badge was scheduled to expire at midnight. (JA1333;JA173-78.)

Alexandre continued to call Baptiste after her badge expired, to see if he had heard anything about her renewal application. On April 27, Baptiste called her and said that her application had been approved. Upon receiving this information, Alexandre proceeded as she had in the past and appeared at the Aviation Department's office to complete the final steps for her renewed badge. When she did so, however, officials at that office told her that her badge could not be renewed anymore because it had already expired. They then confiscated her expired badge, telling her that she would have to start an application for an entirely new one. (JA 1333;JA177-79.)

Alexandre went to the Company's office the same day and attempted to start an application for a new badge as suggested, but the Company refused to collaborate in any such effort. Specifically, Operations Manager Aurea Mendez

told Alexandre that she could no longer help her because Alexandre ceased being an employee when her badge expired. When Alexandre asked if she could file an application to be rehired, Mendez responded that there was no vacancy.

Alexandre's termination notice, which she received after her conversation with Mendez, cited the expiration of her badge as the reason for her termination and asserted that the Company had "made all possible attempts" to contact her about completing the final steps for renewal. (JA996.) The notice further indicated that Alexandre was not eligible for rehire. Despite this absolute refusal to rehire Alexandre, the Company has taken the opposite approach with other employees whose security credentials have lapsed, specifically marking in their termination notices that they are "eligible for rehire." (JA1333-35;JA49-51,56,60-63,63-65,178-79,996,1257,1261-62,1264-74.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

On the foregoing facts, the Board (Chairman Ring and Member Kaplan; Member McFerran concurring) found that the Company "is an employer within the meaning of Section 2(2) of the Act and subject to the Board's jurisdiction." (JA1324.) In so finding, the Board specifically considered and rejected the Company's claim that it is controlled by the carriers to whom it provides services at FLL and therefore an employer covered by a different statutory scheme, the RLA. (JA1325-27.) The Board concluded that the Company "is not directly or

indirectly controlled by a carrier,” as required for coverage under the RLA.

(JA1327.) The Board further found that the Company, an “employer” within the meaning of the Act, violated Section 8(a)(3) and (1) (29 U.S.C. § 158(a)(3) and (1)) “by discharging and refusing to rehire employee Joanne Alexandre because she engaged in union activity.” (JA1327.)

The Board’s Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (JA1327.) Affirmatively, the Board’s Order requires the Company to: offer Alexandre full reinstatement to her former job or a substantially equivalent position; make her whole for any loss of earnings or other benefits suffered as a result of the discrimination against her; compensate her for the adverse tax consequences, if any, of receiving a lump-sum backpay award; remove from its files any reference to the discrimination against Alexandre, and notify her that this has been done; and post a remedial notice. (JA1327-28.)

### **STANDARD OF REVIEW**

This Court affirms findings of the Board unless they are “unsupported by substantial evidence in the record considered as a whole,” or unless the Board “acted arbitrarily or otherwise erred in applying established law to facts.” *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1282 (D.C. Cir. 1999) (internal quotation

marks and citations omitted). “Substantial evidence” consists of “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” See 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Accordingly, the Board’s findings, insofar as they are based on facts in the record, “[are] to be reversed only if the record is ‘so compelling that no reasonable factfinder could fail’ to find” to the contrary. *Steelworkers Local 14534 v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 484 (1992)).

Moreover, as the Supreme Court has emphasized, “courts must respect the Board’s judgment [in interpreting the Act] so long as its reading is a reasonable one.” *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996). The Board’s expertise in labor relations and its congressionally mandated role in interpreting the Act lend weight to its application, in the labor context, of the National Mediation Board’s (“NMB’s”) multi-factor test for whether an employer is controlled by, or under the common control of, a carrier or carriers. See *Allied Aviation Serv. Co. of New Jersey v. NLRB*, 854 F.3d 55, 63-64 (D.C. Cir. 2017) (upholding the Board’s findings under the NMB’s multi-factor test as supported by substantial evidence).

## **SUMMARY OF ARGUMENT**

**I.** The Board reasonably asserted jurisdiction in this case because the Company failed to show it is an employer subject to the RLA. Specifically, the

Company failed to establish that it is controlled by its carrier-clients, as required for coverage as a “derivative carrier” under the RLA. Applying the NMB’s well-established six-factor test for carrier control, the Board found at the outset that no carrier controls the manner in which the Company conducts its business on a day-to-day basis (factor 1). The Company allocates its staff and sets employee schedules as it deems appropriate to meet the needs of all six carriers it serves at FLL. The Company also procures, maintains, and uses its own equipment and supplies in the performance of services for the carriers, with limited substitutions of carrier items upon a carrier’s request. For example, the Company uses only three pieces of carrier equipment at the airport, for the limited purpose of removing waste from Delta planes, based on that carrier’s preference.

Further, the Company establishes all terms and conditions of employment for its employees, including work hours, compensation, benefits, and work rules. The Company’s primacy in these matters is established by stipulation and further demonstrated by the Company’s handbook and other material circulated to employees. The record demonstrates that the Company does not reflexively adopt carrier recommendations or assessments about employees but makes its own determinations after consideration of the relevant facts (factor 3) with only two isolated instances where carriers have recommended specific personnel actions.

In addition, the Company has its own corps of on-site supervisors and managers who assign and direct the work of the Company's employees on a daily basis, and who determine all matters of employee discipline and reward based on their own assessments and written company policies (factor 4). And the Company controls the training of its own employees, using an exhaustive 900-page manual that governs what employees must know depending on their specific position (factor 5). The carriers may supplement the Company's training requirements, to provide specific guidance on their particular service standards, but they do not displace the Company's independent requirements. Indeed, the record shows the opposite: where the Company's requirements are more stringent than those of a carrier, the Company has requested and received permission to impose its more stringent requirements. Moreover, on a daily basis, the overwhelming majority of company employees are visibly identified by uniforms and badges as company employees rather than carrier employees (factor 6).

Considering all of the evidence, the Board reasonably concluded that all but one of six carrier-control factors (factor 2) favors a finding that the Company is not a derivative carrier covered by the RLA. In challenging this conclusion, the Company erroneously claims that the Board ignored contract provisions purporting to grant the carriers greater authority over the Company's daily operations. But the Board did not ignore such provisions; it merely found them unpersuasive in the

context of the record as a whole, which includes party stipulations and the testimony of the Company's facility director and carrier officials as to how the contracts are applied in practice.

Contrary to the Company's additional claim, it is not entitled to vacatur of the Board's jurisdictional determination based on a purported inconsistency with the recent finding that PrimeFlight Aviation Services, Inc., is a derivative carrier subject to the RLA. The Company had the opportunity to timely raise its claim before the Board, but failed to do so. In any event, *PrimeFlight* does not mandate a different result here.

**II.** Because the Board's jurisdictional determination is supported by substantial evidence in the record, and because the Company does not contest the unfair labor practices found in this case, the Board is entitled to summary enforcement of its Order.

## **ARGUMENT**

The Company largely conceded before the Board (JA1324n.4), and does not contest on appeal (Br.1n.4), that if it is subject to the Act, it violated Section 8(a)(3) and (1) by discharging and refusing to rehire employee Alexandre. Accordingly, the present case turns on a question of jurisdiction. If, under the NMB's well-established test set forth below, the Company is not an employer subject to the RLA, the Board is entitled to summary enforcement of its Order

corresponding to the uncontested findings that the Company unlawfully discharged and refused to rehire Alexandre. *See Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 347 (D.C. Cir. 2011) (granting summary enforcement as to uncontested violations).

**I. THE BOARD PROPERLY ASSERTED JURISDICTION, FINDING THAT THE COMPANY DID NOT SHOW IT IS AN EMPLOYER SUBJECT TO THE RLA**

**A. Principles of Board Jurisdiction and the NMB’s Test for Whether a Non-Airline Employer Is Subject to the RLA**

The Supreme Court “has consistently declared that in passing the . . . [Act], Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause.” *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963). The term “employer” in the Act excludes “any person subject to the Railway Labor Act.” 29 U.S.C. § 152(2). The term “employee” in the Act excludes “any individual employed by an employer subject to the Railway Labor Act.” 29 U.S.C. § 152(3). In cases discussing the statutory definition of “employee,” the Supreme Court has made clear that Congress tasked the Board with construing the Act’s definitions. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984); *see also Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999) (noting that “the Board must guard against construing [an exception to the Act’s coverage] too broadly to avoid unnecessarily stripping workers of their [statutory] rights”).

The burden of proving the applicability of the RLA exemption falls on the party asserting it. *See Allied Aviation*, 854 F.3d at 62 (upholding “the Board’s decision that [the employer] failed to establish” a portion of the test conferring RLA jurisdiction). The applicable rule of statutory construction states that the party claiming the benefit of such an exception must demonstrate its applicability. *See FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); *accord U.S. v. Regenerative Sciences, LLC*, 741 F.3d 1314, 1322 (D.C. Cir. 2014). And in the context of the Act, in determining the burden of proof for exemptions from the definition of employee, the Supreme Court has applied “the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.” *NLRB v. Ky. River Community Care, Inc.*, 532 U.S. 706, 711 (2001) (quoting *Morton Salt*, 334 U.S. at 44-45). This conclusion is reinforced by the Company’s natural advantage in adducing proof as to its operations and contracts. *See, e.g., NYU Med. Ctr. v. NLRB*, 156 F.3d 405, 413 (2d Cir. 1998).

The Board has the statutory authority to resolve jurisdictional matters without referral to the NMB. *Allied Aviation*, 854 F.3d at 62; *United Parcel Serv., Inc. v. NLRB*, 92 F.3d 1221, 1225 (D.C. Cir. 1996); *accord Dobbs Houses, Inc. v. NLRB*, 443 F.2d 1066, 1072 (6th Cir. 1971). The NMB does not have “primary jurisdiction” over resolving jurisdictional issues, nor is there a hierarchy placing

the NMB in front of the Board in resolving jurisdictional questions. *UPS*, 92 F.3d at 1225.

When an employer is not a rail or air carrier engaged in the transportation of freight or passengers, the NMB applies a two-part test to determine whether the employer is subject to the RLA. First, the NMB considers whether the nature of the work performed is the type of work traditionally performed by employees of rail or air carriers. Second, the NMB determines whether the employer is directly or indirectly controlled by, or under common control with, a carrier or carriers. *See* 45 U.S.C. § 151 (extending RLA jurisdiction to entities “directly or indirectly controlled by or under common control” of common carriers). “Both parts of the test must be satisfied for the NMB to assert jurisdiction.” *Air Serv Corp.*, 33 NMB 272, 284 (2006).

To determine whether there is carrier control over an employer under the second prong of the test, the NMB looks to six factors: (1) the extent of the carrier’s control over the manner in which the employer conducts its business; (2) access to the employer’s operations and records; (3) the carrier’s role in personnel decisions, including hiring, firing, and discipline; (4) degree of carrier supervision of the employer’s employees; (5) control over employee training; and (6) the extent to which the employer’s employees are held out to the public as carrier

employees. *ABM-Onsite Servs.*, 45 NMB 27, 28 (2018); *Signature Flight Support*, 32 NMB 214, 224 (2005).<sup>5</sup>

As the NMB has emphasized in applying these factors, “[t]he RLA does not apply to every independent contractor performing work for a carrier.” *ABM-Onsite*, 45 NMB at 34. The salient question is whether the carrier or carriers “effectively exercise a significant degree of influence” in the ways indicated. *Id.* Plainly, employer acquiescence to carrier requests in isolated instances will not suffice to establish the “significant degree of influence” necessary to support RLA jurisdiction. *Id.*; see *Ogden Aviation Servs.*, 23 NMB 98, 103, 106 (1996) (isolated instances of carrier influence over employer hiring decisions not jurisdictionally significant).

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<sup>5</sup> In 2018, the NMB expressly reaffirmed this traditional six-factor test in light of the Court’s decision in *ABM Onsite Services-West, Inc. v. NLRB*, 849 F.3d 1137, 1144-45 (D.C. Cir. 2017), which noted that between 2013 and 2017, the NMB deviated from the traditional test without adequate explanation. Soon after the NMB issued its opinion reaffirming the traditional test, the Board adopted the reaffirmed test and overruled previous cases in which it had followed NMB opinions applying a different test. *ABM Onsite Services-West, Inc.*, 367 NLRB No. 35, 2018 WL 6119243, at \*6 nn.5-6 (2018). Here, the Company does not question the appropriateness of the NMB’s traditional six-factor test to resolve the jurisdictional question.

**B. The Board Correctly Determined that the Company Is an Employer Within the Meaning of the Act Because It Is Not Under the Significant Influence of Any Carrier**

Applying the first part of the test for carrier control, the Board accepted the parties' representations that "the [Company's] employees perform work that air carriers have traditionally performed." (JA1326,1331&n.5;JA27.) The Board found, however, that the Company failed to establish the second part of the test—that it is meaningfully controlled by the six carriers using its services at FLL. (JA1326-27.) In reaching this conclusion, the Board carefully weighed the evidence relevant to the six factors traditionally considered in determining whether an employer who is not a carrier itself is nonetheless under the control of a carrier or carriers and covered by the RLA for that reason. The Board concluded that "five of the six factors . . . support a finding that the [FLL] carriers do not exercise a significant degree of influence over the [Company's] operations and employees, and the [Company] is therefore subject to the Board's jurisdiction." (JA1326.) As shown below, this jurisdictional finding is well supported by the record evidence, including the parties' extensive stipulations as to the Company's operations at FLL.

**1. The carriers at FLL do not exert significant influence over how the Company performs its work**

Substantial evidence supports the Board's finding that no carrier at FLL controls "how the [Company] fulfills its contractual obligations or how the

[Company's] employees perform their services.” (JA1326.) The Company maintains a comprehensive employee handbook regulating how its employees do their work and addressing every aspect of their terms and conditions of employment. (JA1331;JA599-690.) Moreover, the Company determines for itself how it will allocate its employees across six contracting carriers to complete all contracted-for services. To be sure, as the Company elaborately explains (Br.12-16,21-22,30-33), it must consider each carrier's specific needs and schedules in making staffing and employee scheduling decisions. But the ultimate decisions on such matters—like nearly all the details of *how* the work is done—unquestionably belong to the Company. As American General Manager Gayle Defrancesco aptly put it, “[o]nce [the Company is] awarded the bid [to provide services], they come up with their own way of getting things done.” (JA286.)

Consistent with this representation, Defrancesco testified that although American retains the Company for checkpoint and janitorial services and specifies the scope of those services by contract, the airline does not influence how the Company deploys its staff to provide the necessary services. (JA1331;JA284-88.) Thus, American leaves the Company to make its own staffing, scheduling, and other operational decisions. Likewise, Spirit Ramp and Operations Station Manager William Rose testified that “Spirit does not dictate the staffing numbers” for the cabin-cleaning services that the Company provides to Spirit, nor does that

airline influence the scheduling of particular employees assigned by the Company.<sup>6</sup> (JA1331;JA216.) Not surprisingly, given the “unequivocal[]” testimony of Defrancesco and Rose, the record discloses no evidence that any carrier at FLL participates in the Company’s scheduling and staffing decisions. (JA1331.) *Cf. Air Serv Corp.*, 33 NMB 272, 285 (2006) (carrier control over business operations suggested by control over staffing levels and scheduling).

The Company’s suggestion to the contrary (Br.30-32) is supported only by contract provisions, but there is no evidence that any airline has in fact exercised the reserved rights reflected in those provisions. *See also* below p. 31 n.8 (collecting contract provisions cited at Br.12-16). Moreover, the provisions cited from the American and Spirit contracts are in obvious tension with the testimony of American General Manager Defrancesco and Spirit Ramp Operations Manager Rose, discussed above, that their respective airlines have no role in scheduling the Company’s employees. The Company makes no effort to reconcile its view of the various carrier contracts with the carrier-provided testimony in the record.

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<sup>6</sup> A company dispatcher sits in Spirit’s operations center at FLL to collect and disseminate real-time information about Spirit’s flight schedule, so that the Company can dispatch individual employees for cabin-cleaning as needed. As Rose testified, however, Spirit does not supervise or influence the dispatcher’s activities. It merely provides a forum for the dispatcher to collect and disseminate information needed for the Company to fulfill its contractual cleaning obligations. (JA223-26.)

The Company is also largely independent of the FLL carriers in determining the physical means by which it will complete contracted-for services. Thus, the Company uses its own equipment as necessary to perform: janitorial services for American; bag-room, cabin-cleaning, janitorial, and ramp services for Bahamasair; cabin-cleaning for Spirit; and bag-room, cabin-cleaning, janitorial, and ramp services for WestJet. (JA504-05,555-57,579.) The Company uses carrier-provided equipment only in performing cabin-cleaning for Delta. Specifically, the Company uses a Delta-provided lavatory truck, garbage truck, and a connected “tug” to tow garbage away from Delta planes. (JA508-09.) Nevertheless, inside the plane, as with the other airlines, the Company uses its own equipment including vacuum cleaners. (JA501-02,504-05.) The Company likewise uses its own equipment to perform janitorial services for Delta. *See Ogden Aviation*, 23 NMB at 102, 106 (finding lack of carrier control in part because employer owned and maintained “most of the equipment it use[d]” in providing services to carriers and used only one carrier’s forklifts, loaders, and dollies in handling cargo for that carrier).

Along the same lines, the Company maintains and uses its own supplies, such as cleaning solutions, in all its work except cabin-cleaning for Delta and Spirit. Even as to that work, however, the Company stores the airline-specific supplies within its own, separate office space and orders additional supplies as it

deems appropriate.<sup>7</sup> Similarly, the Company relies on the carriers to furnish certain cabin items (e.g., blankets) that company employees must periodically replenish in cleaning cabins, but the Company stores all such items in its own office space and, as with its own supplies, monitors inventory and requests additional items as necessary. Overall, therefore, the evidence amply supports the Board’s conclusion that the Company controls “the manner in which [it] does business” at FLL. *See Signature Flight Support*, 32 NMB 214, 224-25 (2005) (no carrier control over manner in which employer did business where employer, rather than carrier, determined how employees would perform contractual services).

In an effort to undermine this conclusion, the Company points to various contractual provisions purportedly establishing that the carriers have “significant influence” over the manner in which the Company conducts its day-to-day operations. (Br.12-16,19-22.) But the cited provisions merely elaborate on the obvious: that the Company must provide certain well-defined services to the

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<sup>7</sup> The Company maintains office spaces in three terminals at FLL—Terminals 1, 2, and 4. (JA512-13.) The Company’s office on Terminal 4 is not controlled by any carrier. And contrary to the Company’s suggestion based on contractual provisions (Br.19-20), there is in fact no carrier presence within the Company’s office space in Terminals 1 and 2 (located within spaces leased, respectively, by WestJet and Delta). WestJet has no personnel at FLL to use the Terminal 1 office space, other than those provided by the Company. Delta personnel have their own spaces on Terminal 2 that are physically separated from the office space granted to the Company. (JA34-35,457,512-13,523.)

contracting carriers at times convenient for the carriers.<sup>8</sup> Such provisions plainly leave the Company with considerable latitude to determine *how* it will meet each carrier’s service specifications, and as the above evidence shows, the Company in fact exercises its autonomy to make a number of critical operational choices—relating to staffing, scheduling, and equipment, for example—entirely on its own. *See Miami Aircraft Support*, 21 NMB 78, 81 (1993) (finding employer “control[led] its own daily operations,” even though “its carrier clients do have a substantial role in determining what those operations are”).

Moreover, as a matter of law, the Company is mistaken in contending that a mere requirement to “provide services in accordance with a carrier’s contractual

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<sup>8</sup> *See, e.g.*, JA 921 ¶ 1, 936 (WestJet agreement, referring generally to “grooming task cards” that the Company must complete to confirm compliance with minimum cleaning standards); JA 911 ¶ 1.1, 917-19, 1030-32 (Spirit agreement, itemizing required cleaning and storage services); JA 736 ¶ 1.1, 1062-69 (Bahamasair agreement, itemizing a variety of required ground services); JA 903, 906-09 (JetBlue agreement, itemizing required cleaning services); JA 691-92, 708-09, 718-25, 728-32 (American agreement, setting forth general expectations and itemizing required janitorial services); [REDACTED]

JA 915 ¶ 14.2 (Spirit agreement, stating that in the event “aircraft ground times are reduced due to flight delays,” Spirit will notify the Company of the time available for cleaning the aircraft, and the Company “will attempt to complete as much of the scope of work contained in the [] cleaning specifications as possible,” giving priority to lavatories, then galleys, and finally the cabin). *But see* JA 301-04 (testimony from American General Manager Defrancesco that some services and procedures detailed in the American contract are not enforced at FLL).

service specification is indicative of carrier control.” (Br.13n.10.) Indeed, if the mere inclusion of service specifications in a contract were sufficient to satisfy the first factor of the carrier-control analysis, every contract for services would qualify. But the NMB has never embraced such a sweeping conclusion. *See, e.g., Ogden Aviation*, 23 NMB at 106 (carrier-imposed service requirements held not suggestive of carrier control where they were “in the nature of those necessary to ensure the carriers’ efficient operations rather than an imposition of control over [the employer’s] operations”).

The three cases on which the Company relies for this proposition embraced no such blanket statement. In *ABM Onsite Services-West, Inc.*, 367 NLRB No. 35, 2018 WL 6119243, at \*3-4 (2018), the Board found that a consortium of carriers controlled the manner in which the employer conducted its business where the consortium did not simply impose contractual service standards, but created a comprehensive operating manual to govern the employer’s conduct of its baggage-handling business at the airport, reviewed the work schedules of the employer’s employees, determined whether they would receive wage increases, and dictated holiday staffing. *See also ABM-Onsite*, 45 NMB at 31-33. Likewise, in *Swissport USA, Inc.*, 35 NMB 190, 193-95 (2008), the NMB found carrier control over the manner in which the employer conducted its business where the employer’s contracts with carriers “dictate[d] nearly all aspects of the employer’s operations,”

including staffing and supervisory levels, and other evidence showed that the carriers actually exercised their contractual rights through daily contact with employer representatives, including on scheduling matters. And in *Globe Aviation Services*, 28 NMB 41, 46 (2000), the NMB found that two carriers exercised substantial control over the manner in which a contractor’s employees did their jobs where the carrier contracts not only specified necessary cleaning services but also detailed “how [those services] are to be performed.”<sup>9</sup>

The present case is also distinguishable from the cases cited by the Company (Br.16n.14) in which carriers had the power to influence the employer’s day-to-day operations through close or frequent audits. See *ABM Onsite*, 367 NLRB No. 35, 2018 WL 6119243, at \*3-4 (carrier audited employee work schedules after periodically reviewing proposed schedules, audited employee compensation,

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<sup>9</sup> The Company fares no better in its similar argument that a “requirement to provide services in accordance with a carrier’s policies, procedures, or manuals is indicative of carrier control.” (Br.15n.13.) Again, the cases that the Company cites do not stand for this exceedingly broad proposition. See above and *Bradley Pacific Aviation, Inc.*, 350 NLRB 583, 583 (2007) (finding substantial carrier control over employer operations where, *inter alia*, carrier manual provided “specific” procedures to be followed in fueling, including “recordkeeping procedures for receiving, storing, and dispensing fuel”); *Integrated Airline Servs., Inc.*, 29 NMB 196, 198 (2002) (finding carrier control where testimony showed contractor employees perform work in accordance with carrier’s “very specific instructions on ramp operations” and are held accountable for following those instructions). Cf. *Miami Aircraft Support*, 21 NMB at 81-82 (finding insufficient evidence of carrier control where carrier provided “specific instructions” for loading and unloading aircraft, but employer’s supervisors presided over implementation of instructions).

reviewed proposed wage increases and held veto power over such increases); *Bradley Pacific Aviation*, 350 NLRB at 583 (carriers conducted periodic, sometimes unannounced, audits of employer records and held right to inspect all equipment and to review all proposed new equipment purchases).

Here, unlike in the cited cases, the Company's Facility Director admitted that auditing of the Company's operations at FLL is for the most part informal and infrequent. (JA522-25,567-68.) Specifically, Kendrick testified that Delta and Spirit conduct audits of the Company's cabin-cleaning performance just a few times a week. (JA522.) The Spirit audit, moreover, consists of a simple checklist on which Spirit officials mark whether necessary cleaning has been performed inside the cabin. (JA239-40.) As Kendrick further testified, on a monthly basis, American "may" have one of its supervisors observe Company employees serving at security checkpoints, and "[an American official] may call or send an email saying if there's any issues or [passing on] . . . kudos to the staff." (JA523.) Similarly, Kendrick testified that JetBlue conducts audits of the Company's checkpoint services "not often"—"about once a month." (JA523-24.) And as with American, there is no formal report from such audits, but usually a phone call commenting on any issues noted. (JA523-24.) Kendrick alone determines, sometimes in consultation with her own staff, how to address any issues noted in a carrier audit. (JA524-25.)

Thus, notwithstanding the Company's copious citation to various reserved auditing rights in the carrier contracts in evidence (Br.16-19), the record establishes that the carriers at FLL do not in fact attempt to influence the Company's day-to-day operational choices through close or frequent auditing. Instead, as shown above, the record establishes that the Company's carrier-clients use audits in a limited manner to spot-check the quality of service provided by the Company in certain areas (notably, cabin-cleaning and checkpoint).<sup>10</sup> *See Talgo, Inc.*, 37 NMB 253, 260 (2010) (holding no carrier control; despite contractual auditing rights, requests to audit were "in practice . . . limited").

**2. The carriers at FLL have access to the Company's operations and business records**

As shown above, notwithstanding the substantial autonomy that the Company enjoys in its day-to day operations, the carriers at FLL engage in some measure of auditing "to ensure [the Company's] performance of its contractual obligations." (JA1326.) The Board therefore reasonably found that the factor of access to the Company's operations and business records was the sole factor that "weighs in favor of a finding of RLA jurisdiction." (JA1326.)

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<sup>10</sup> Although the Company places great emphasis on WestJet's various reserved auditing rights (Br.17-18), the suggestion that WestJet closely audits the Company's operations is entirely untenable. Company Facility Director Kendrick admitted that, to date, WestJet's auditing team has not visited FLL or otherwise audited the Company's day-to-day operations. (JA523.)

**3. The carriers' involvement in the Company's personnel decisions is insufficient to establish meaningful control**

Turning to the third factor in the analysis—the degree of carrier involvement in personnel decisions—substantial evidence supports the Board's finding that “this factor weighs against a finding of RLA jurisdiction.” (JA1326.) The record including the parties' stipulations—conveniently ignored by the Company here—firmly establishes that the Company directly hires its own employees, determines and pays their wages and other compensation including overtime, controls their schedules, including requests for time off, and handles all disciplinary decisions. (JA1331.)

[REDACTED]

[REDACTED]

[REDACTED] And although the American contract purports to give that airline the right to interview and approve the Company's station management and employees, the Board correctly noted based on the record here that American “has never exercised its reserved contractual right.” (JA1331.)

As the Board further found, given the carriers' lack of interest in directly managing the Company's workforce, the Company fully occupies that role. Thus, the Company develops and distributes its own new employee orientation packet and employee handbook comprehensively describing its personnel policies,

including its policy as to discipline. (JA1331;JA592-93,595,599-690,950-991.)

The record amply supports the Board’s finding that the Company administers its personnel policies for the most part without carrier involvement.<sup>11</sup>

In particular, as the Board found, the record shows that on the infrequent occasions when a carrier has complained about a specific employee, the Company has “conduct[ed] its own investigations into allegations of employee misconduct,” and determined for itself “the appropriate response to carrier feedback regarding employees’ performance.” (JA1326.) Thus, when a Bahamasair official complained that a company-provided janitor (Hermogenes Vasquez Ramos) used profanity and was loud and disrespectful in front of customers, the Company made its own assessment as to the severity of the incident and how best to respond. (JA1276-77.) The Company issued Vasquez Ramos a written warning and transferred him to service a different airline, even though it recognized that his conduct was “completely unacceptable” and was in itself “ground[s] for

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<sup>11</sup> Thus, there is no merit to the Company’s claim that “certain carriers dictate employee hourly pay rates, holiday rates . . . and overtime,” and require prior authorization of overtime. (Br.22-23.) As counsel for the Company acknowledged at the underlying hearing, the contracts merely specify “the rate of reimbursement to Eulen” for its claimed labor costs (JA305-06), and the conditions under which the Company may charge the carriers a premium for unusual services. Nowhere do the contracts purport to “dictate” what the Company may choose to pay its employees based on its overall profit margin, or when individual company employees can receive overtime pay. *See, e.g.*, JA 737 ¶ 2.1 (Bahamasair agreement, listing allowable hourly *charges to the carrier*, including for overtime or “out of scope” work).

termination.” (JA1276.) In taking this approach despite the extreme behavior described by the carrier, the Company explained that it “believe[d] [i]n giving our employees a second opportunity.” (JA1276.)

Later, when American complained about the same employee (Vasquez Ramos), alleging unacceptable behavior on two occasions, the Company again conducted its own investigation. The Company’s investigation included an interview with Vasquez Ramos and a report detailing his version of the relevant events. As in the earlier incident, the Company elected not to summarily discharge Vasquez Ramos, despite the carrier’s concerns about his behavior. (JA1199-1200.)

Similarly, the Company chose not to summarily discharge employee Alesia Greenaway despite a carrier’s complaints that she had been rude, had argued with carrier officials, and had refused to leave the carrier’s office even after a carrier supervisor repeatedly instructed her to do so. (JA1254-56.) The Company instead issued Greenaway a final written warning and suspended her pending further investigation of the incident, noting that her discourteous conduct towards the Company’s client “violated *company* policy.” (JA1254 (emphasis added).)

Even in those instances where the Company took more serious and final action against an employee, the Company’s records reflect that it made its own assessments as to the severity of the incidents complained of and the appropriate response. For example, in discharging employee Willard Delancy for tardiness and

absenteeism, Company Facility Manager Kendrick did not rest on the carrier's complaint that Delancy, a bag room employee, did not show up for work on one specific date. (JA1201.) Kendrick instead observed that Delancy had a history of tardiness and had previously been advised that his tardiness was "affecting his co-workers." (JA1201.) She also relied on her own investigation of his company attendance records, which showed that he was either late or absent every Saturday for the previous three months. (JA1201.) Along the same lines, in discharging Dwayne Perrin for failure to follow instructions, Kendrick did not rely exclusively on the specific incident reported by a carrier, but took into account her own assessment that Perrin had exhibited an unacceptable pattern of not following instructions.<sup>12</sup> (JA1203.)

Overall, as the Board correctly found, the record reveals no evidence that the Company ever acted on any carrier recommendation of specific disciplinary action or discharge. *See Signature Flight Support*, 32 NMB 214, 222, 225 (2005) (carrier complaints about specific employees not suggestive of control where no carrier

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<sup>12</sup> Kendrick also acted independent of carrier complaints to discharge or discipline employees as information about employee failures came to her attention. Thus, she discharged two employees and a supervisor after a carrier audit revealed suspicious transactions suggesting that the employees may have been stealing. (JA539-41,1206-08.) She also disciplined an employee when the Company's own internal audit of cabin-cleaning performance revealed that the employee had not emptied all trash from passenger seat pockets as required by company policy. (JA1209-10.)

demanded specific personnel action and employer alone determined whether to transfer an employee in response to complaints); *Andy Frain Servs., Inc.*, 19 NMB 161, 163 (1992) (carrier request for removal of an employee not suggestive of control where employer determines any resulting job action). Moreover, there were only “two isolated incidents” in which carriers recommended other forms of personnel action.

Specifically, Kendrick testified that “an assistant manager at [Bahamasair] recommended that ramp lead Brian Bolt be promoted” when a supervisory position became available on the Bahamasair account. (JA1331.) Kendrick also testified that “Ginella Alvarez of Delta management recommended the hiring of John Vixamar” for a part-time position with the Company that would allow him to continue working for Delta for part of the day. (JA1332.) Kendrick ultimately followed both recommendations. Nevertheless, the Board reasonably found that two isolated instances in which the Company made carrier-recommended personnel decisions do not establish that carriers exert “significant influence” over such decisions generally, particularly given the abundant record evidence discussed above, affirmatively showing the Company’s independence in the handling of its personnel. *See Ogden Aviation Servs.*, 23 NMB 98, 103, 106 (1996) (no significant influence over employer’s personnel decisions where carrier only participated in two hiring determinations); *cf. Quantem Aviation Servs.*, 37

NMB 209, 223-24 (2010) (significant influence found where employer “generally” conferred with putative carrier about discipline, and requests for employer to remove an employee from the contract always translated into discharge).

**4. The carriers at FLL do not supervise company employees**

Substantial evidence likewise supports the Board’s finding that the carriers at FLL have no role in the supervision of the Company’s employees. As the Board found, four out of the six carrier contracts in evidence expressly “stat[e] in one way or another that [the Company] is solely responsible for the assignment, supervision and direction of its employees and how they perform their work.”<sup>13</sup> (JA1331.) *See* above pp. 7-8. And the carrier representatives who testified at the underlying hearing confirmed that the supervisors employed by their respective airlines “have no supervisory role over [the Company’s] employees, including assignments, direction, authorization of overtime, or discipline.” (JA1331;JA216-38,284-93.)

Far from contradicting the unequivocal testimony of these carrier representatives, Company Facility Manager Kendrick admitted that as a matter of company policy, employees working for the Company do not communicate

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<sup>13</sup> Although the contracts for WestJet and Bahamasair are silent as to whether those carriers have any supervisory authority over the Company’s employees, the record establishes that WestJet has no presence at FLL independent of the personnel provided by the Company. Accordingly, WestJet, at least, is not able to independently supervise the Company’s employees.

directly with airline personnel about their terms and conditions of employment—for example, their schedules or compensation. (JA576-77.) Further, the parties stipulated below that the Company’s supervisors generate and publish employee work schedules and have sole authority to review and approve employee requests for time off. Finally, Kendrick admitted that airline officials seldom contact her to discuss individual employees. (JA522.)

Consistent with Kendrick’s latter admission, American General Manager Defrancesco recalled only one instance in which she wrote to Kendrick to complain about a company employee (Hermogenes Vasquez Ramos). (JA314-15.) In that instance, she did not recommend any disciplinary action, but merely asked that a company official speak to him. Similarly, Spirit Ramp Operations Manager Rose recalled only one occasion when he complained about a company dispatcher, but he made no recommendation as to how the Company should handle that employee. (JA223-27,236-38.) *See Air BP, A Div. of BP Oil*, 19 NMB 90, 92 (1991) (no carrier control where employer had “sole authority over its employees and the carriers ha[d] no direct supervisory authority over [the employer’s] employees”).

Notwithstanding the substantial evidence thus supporting the Board’s finding that no carrier exerts supervisory authority over the Company’s employees, the Company argues (Br.28-29), again relying solely on provisions in various

carrier contracts, that the FLL carriers necessarily influence employee supervision by establishing service standards, and by determining when services can or should be provided. But the Company cites no precedent establishing that such remote carrier power—the power to define the scope of the work to be done by the employer— qualifies as “supervision” of the employer’s employees. *See Ogden Aviation*, 23 NMB at 106 (carrier-imposed service requirements not suggestive of carrier control where they were “in the nature of those necessary to ensure the carriers’ efficient operations rather than an imposition of control over [the employer’s] operations”); *see also ABM-Onsite Servs.*, 45 NMB 27, 34 (2018) (“The RLA does not apply to every independent contractor performing work for a carrier.”).

**5. The carriers’ limited involvement in training company employees is insufficient to establish meaningful control**

Substantial evidence similarly supports the Board’s finding that the Company “is principally responsible for training its employees and the carriers play a limited role in employee training.” (JA1326-27.) As noted above pp. 36-37, the Company develops and distributes its own new employee orientation packet and employee handbook, both of which address employment policies. In addition, as the Board found, the Company is “solely responsible for training employees on safety matters” and carries out this responsibility in part using its

own detailed safety and training manual of over 900 pages. (JA1332;JA1155-89 (table of contents and Chapter 1).) Where the Company's safety standards are more stringent than those of a carrier, the Company has requested and received permission to impose its standards, effectively displacing the carrier's different safety standards. (JA1332.)

The Company employs a Director of Safety and Corporate Compliance (John Foster) to “oversee [the Company's] training program and [to] mak[e] sure [the Company is] in compliance with the training program's guidelines.” (JA430-31.) In his role, Foster also administers discrete training modules required by some of the carriers. Thus, Foster oversees new-hire training and related tests for prospective assignees to the WestJet account. He also oversees an annual computer-based training for cabin-cleaners assigned to the Spirit account, focusing on Spirit's cleaning specifications. Similarly, Foster oversees mostly computer-based trainings on various topics for employees assigned to the Delta account. Crediting Foster's testimony, the Board found that most of Delta's training modules (“probably 60 percent”) follow directly from federal regulations and accordingly are “mandated by various Federal agencies, as opposed to [] Delta's own requirements.” (JA1332;JA438-41.) *See, e.g., Ogden Aviation*, 23 NMB at 103, 106-07 (no carrier control where employees received “general on-the-job

training” from employer and, from carriers, a limited amount of training “necessary to satisfy security and safety requirements”).

As the Board additionally found, at least one carrier (American) relies exclusively on the Company to adequately train those who will work on its account. (JA1332.) And a second carrier (Bahamasair) lacked its own training for ramp agents until Foster developed a training program for the carrier, using the Company’s extensive existing manual. (JA1332.)

Considering all of the above evidence, the Board reasonably concluded that it is primarily the Company, not any carrier, that is responsible for training the Company’s employees. Contrary to the Company’s claims, the Board’s conclusion does not “ignore[.]” the specific on-the-job training requirements of Delta, Spirit, and WestJet. (Br.33-38.) Indeed, as discussed above p. 44, the Board fully acknowledged that some of the carriers at FLL—including Delta, Spirit, and WestJet—require the Company to administer trainings on carrier-specific service requirements and other subjects as dictated by federal law. (JA1326,1332.)

Nor did the Board err, as the Company suggests (Br.33-40), in its assessment that the carriers’ role in employee training is limited as compared to that of the Company. As Foster admitted, the Company’s 900-page safety and training manual establishes comprehensive competence and training requirements that fall

away *only* if already “covered under [a] client’s training.”<sup>14</sup> (JA469,483.)

Accordingly, at all times, the content of the Company’s manual is controlling, and the Company takes affirmative steps to either train employees on that content or ensure that they learn the necessary content through a carrier-specific training. The Company ignores its own extensive safety and training manual, as well as Foster’s critical testimony about the practical effect of that manual. (Br.33-40.) Its selective treatment of the evidence plainly fails to establish that the Board’s findings are unsupported by substantial evidence. *See Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 771 (D.C. Cir. 2012) (agency findings cannot be supplanted “merely by identifying alternative findings that could be supported by substantial evidence” (internal quotation marks and citation omitted)).

**6. There is insufficient evidence establishing that company employees are held out as carrier employees**

As the Board found, the sixth factor weighs against RLA jurisdiction because company employees are not held out to the public as carrier employees. (JA1327.) The NMB traditionally considers external markers—such as uniforms,

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<sup>14</sup> Foster specifically testified as follows: Q. And . . . there’s 18 chapters to this manual, correct? A. I believe that’s correct. Q. And you are responsible for the contents of this manual? A. Yes. Q. And you, in fact, work on the revisions to it, as needed? A. Yes. Q. And this is the content that Eulen, that you require your Eulen employees to learn, then to be responsible for, depending on their job classification, correct? A. If it’s not covered under our client’s training, yes. (JA469.)

badges, identification cards, and business cards—in its evaluation of this factor. *See Signature Flight Support*, 32 NMB at 219. Under NMB precedent, moreover, the weight of the evidence on this factor does not favor a finding of carrier control where, as in this case, “[m]ost of the [employer’s] employees . . . wear [employer] uniforms and are identified as [the employer’s] employees.” *Ogden Aviation*, 23 NMB at 107 (specifically considering how employees are held out to the public in determining that employer “is not controlled by a carrier or carriers”).

As the Company’s Facility Director admitted, of the approximately 172 employees and 19 supervisors (JA1331) who work for the Company at FLL, nearly all “wear [company] uniforms and name tags.” (JA1332;JA506-08,555,1290-92.) Only 14 company personnel who perform passenger services for WestJet wear carrier apparel. (JA1332;JA506-08,555.) Thus, “about 90 percent of the [Company’s] employees wear the [Company’s] uniforms and badges.” (JA1327.) Given that the overwhelming majority of the Company’s employees are visibly identified with the Company, rather than any carrier, the Board reasonably found that the Company failed to carry its burden of proving that its employees are “held out to the public as carrier employees.” (JA1327.)<sup>15</sup>

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<sup>15</sup> While accusing the Board of not considering carrier-imposed grooming and behavioral standards, the Company fails to explain how such standards have any bearing on the question of whether employees are held out to the public as carrier employees. (Br.42.) In particular, the Company fails to explain how employee compliance with the cited standards of appearance and behavior would readily

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Consistent with the discussion above, the Board ultimately found that all but one factor in the NMB’s traditional test favored a finding that the Company is not “controlled by, or under common control with a carrier or carriers” for purposes of RLA jurisdiction. (JA1325,1327.) As to the single factor favoring a finding of RLA jurisdiction (carrier access to contractor operations and records), the Board correctly noted that “the NMB has historically found that carriers’ access to a contractor’s records is typical in subcontractor relationships and, as such, is insufficient to confer RLA jurisdiction.” (JA1327, citing *Air BP*, 19 NMB at 91-93.) *See also ABM-Onsite*, 45 NMB at 34-35 (holding that in applying the six-factor test for carrier control, “[n]o one factor is elevated above all others in determining whether [a] significant degree of [carrier] influence is established”). Accordingly, the Board reasonably found that the weight of the evidence on the remaining five factors warranted a finding that the Company “is not directly or

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identify them to the public as carrier employees, despite their company uniforms and badges. Along the same lines, the Company cites no precedent to support its idiosyncratic view that its employees are held out to the public as carrier employees because one person—Facility Director Kendrick—represents WestJet’s interests, as well as the Company’s, at meetings of the Broward County Aviation Department. (Br.41.) In any event, there is no evidence to support the Company’s suggestion that Kendrick demonstrates her role on behalf of WestJet *to the public* through such meetings, and not merely to fellow airport personnel.

indirectly controlled by a carrier,” and thus favored a finding of Board jurisdiction.<sup>16</sup> (JA1327.)

**C. The Board’s Assertion of Jurisdiction Is Consistent with Its Application of the NMB’s Test in *PrimeFlight Aviation Services*, and the Company’s Claim to the Contrary Is Not Properly Before the Court**

Although it presented no such argument to the Board, the Company argues (Br.43-53) that the Board’s assertion of jurisdiction over it must be overturned because it is at odds with the finding in a recent case that a different airline service provider at a different airport is under meaningful carrier control and therefore subject to RLA jurisdiction. *See PrimeFlight Aviation Servs., Inc.*, 367 NLRB No. 83 (Jan. 31, 2019) (following NMB opinion published at 45 NMB 140 (Aug. 22, 2018)). The Court should reject the Company’s argument, both because it is not properly before the Court and because it lacks substantive merit.

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<sup>16</sup> Because this case, as shown above, did not involve a close or unusual factual scenario, there is no merit to the Company’s passing suggestion (Br.5) that the Board should have referred the case to the NMB for an advisory opinion. As this Court has acknowledged, the Board is not “legally compelled” to certify questions of jurisdiction to the NMB. *United Parcel Serv., Inc. v. NLRB*, 92 F.3d 1221, 1222 (D.C. Cir. 1996). Moreover, in a reasonable exercise of its policy discretion, the Board has determined that it “will not refer a case that presents a jurisdictional claim in a factual situation similar to one in which the NMB has previously declined jurisdiction.” *Spartan Aviation Indus.*, 337 NLRB 708, 708 (2002). Here, as explained above, the Board followed settled NMB precedent in finding that five out of the six factors in the NMB’s carrier-control analysis did not favor a finding of RLA jurisdiction.

**1. The Company could have, but did not, raise its argument to the Board**

As the Supreme Court has explained, “[s]imple fairness to those who are engaged in the tasks of administration” requires that “as a general rule . . . courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.” *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). Here, the Company essentially asks the Court to overturn a Board determination based on an allegedly conflicting determination that was already well known, but not raised, while the present case was pending before the Board. *Tucker Truck Lines* plainly precludes a party from bypassing the agency in this manner and instead “ensures that [the agency] will have the opportunity to develop [its] position[] and correct [its] errors *before* an appeal.” *Village of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 655 (D.C. Cir. 2011) (emphasis added).

The *PrimeFlight* decision on which the Company relies (Br.43-54) followed directly from an NMB advisory opinion issued in August 2018, after the Board referred that case to the NMB for an opinion on the issue of RLA jurisdiction.<sup>17</sup>

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<sup>17</sup> As noted above, the Board is not obliged to refer RLA-based challenges to its jurisdiction to the NMB. *See* above pp. 23-24. Nevertheless, where the Board elects to refer a case and the NMB provides an opinion, the Board as a matter of policy accords substantial deference to that opinion. *See DHL Worldwide Express, Inc.*, 340 NLRB 1034, 1034 (2003).

*See* 45 NMB 140 (2018). When the NMB’s precedential opinion finding RLA jurisdiction in *PrimeFlight* issued, the present case was pending before the Board on the parties’ exceptions and briefs.

If, as the Company now claims, *PrimeFlight* and the present case are substantially the same (Br.43) in their jurisdictional facts, the Company had all the information it needed to make that argument while this case was before the Board. The facts supporting the finding of RLA jurisdiction in *PrimeFlight* were already known, based on the NMB’s published opinion. Indeed, the Board, in subsequently finding *PrimeFlight* subject to RLA jurisdiction, relied on key facts from the NMB’s opinion, and followed the NMB’s analysis, consistent with the Board’s usual practice following referral.

Accordingly, the Company could have, and should have, raised any alleged implications of *PrimeFlight* to the Board. For instance, the Company could have promptly done so in a letter to the Board pursuant to *Reliant Energy*, 339 NLRB 66 (2003). In *Reliant Energy*, the Board established a policy that permits parties in unfair-labor-practice and representation cases to “submit postbrief letters, not to exceed 350 words, for the purpose of calling to the Board’s attention ‘pertinent and significant authorities.’” *United Bhd. of Carpenters & Joiners of Am., Local Union No. 623*, 351 NLRB 1417, 1417 n.2 (2007) (quoting *Reliant Energy*, 339 NLRB at 66 (establishing new procedure “modeled after Rule 28(j) of the Federal

Rules of Appellate Procedure’’)). The Company also could have filed a motion for reconsideration after the Board issued its Decision and Order, to raise the NMB’s allegedly conflicting finding of RLA jurisdiction in *PrimeFlight*. See, e.g., *NLRB v. Chipotle Servs., LLC*, 849 F.3d 1161, 1162 n.3 (8th Cir. 2017) (noting these same options to inform Board of a decision issued while case was pending before it and finding the argument not properly before the court on review).

Having failed to avail itself of either avenue, the Company should not be able to secure court consideration of those arguments in the first instance. See *Spectrum Health–Kent Community Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011) (“to preserve objections for appeal a party must raise them in the time and manner that the Board’s regulations require’’).

**2. In any event, the Company’s argument regarding *PrimeFlight* would fail on the merits**

Even if the argument were properly before the Court, which it is not, the Company would not be able to rely on a change in the law—whether characterized as a change in the carrier-control test or its application by either the NMB or the Board—because there has been no such change. In each case, the Board applied the same totality-of-the-circumstances test to the relevant record evidence. Here, the Board determined that five of six factors favored its jurisdiction, whereas in *PrimeFlight* the Board determined that five of six factors favored RLA jurisdiction. The difference in outcomes is based on the significantly different

records presented in the two cases. *See Seattle Opera v. NLRB*, 292 F.3d 757, 761 (D.C. Cir. 2002) (noting the Board’s expertise in evaluating facts to resolve a dispute over the Act’s coverage); *Air Serv Corp.*, 39 NMB 450, 455-56 (2012) (determination as to RLA jurisdiction must be keyed to the particular record in the case); *John Menzies PLC*, 30 NMB 463, 474 (2003) (distinguishing earlier carrier control finding as to same employer based on different record facts).

In *PrimeFlight*, the record revealed intensive carrier involvement in PrimeFlight’s day-to-day operations. Thus, PrimeFlight met with its carrier-clients for daily operations meetings, “to go over operations for the day and upcoming week,” and for additional daily safety meetings. 45 NMB at 143. Further, twice each day, PrimeFlight submitted written summaries of its operations to the carriers. And the carriers occasionally gave PrimeFlight employees “daily direction in the course of their job performance.” *Id.* at 143, 149.

Moreover, in its daily operations, PrimeFlight relied heavily on carrier-provided equipment including wheelchairs, scanners, skycap podiums, computers, tablet computers, printers, telephones, and trucks to perform aircraft services. *Id.* at 147. One carrier, JetBlue, further obligated PrimeFlight to provide electronic tracking of “all JetBlue wheelchairs at all times” and “all customer wait times and complaints,” and to submit its tracking technology to JetBlue for review upon request. *Id.*

Here, there are no such facts in the record that would establish any such extensive carrier involvement in the Company's day-to-day affairs. Unlike in *PrimeFlight*, the record affirmatively shows that the Company conducts its day-to-day operations without close oversight from the carriers. Thus, the carriers audit the Company's work performance at most only a few times a week, and they report any findings mostly informally to Company Facility Director Kendrick, who determines in collaboration with her own staff whether and how to respond to carrier feedback.

Likewise, on the infrequent occasions when carriers complain about specific employees, the Company independently investigates the matters complained of and determines how best to address the situation. Contrary to the record in *PrimeFlight*, which showed that the employer there summarily discharged an employee based on a carrier complaint (*see* 45 NMB at 146), the record here shows that time after time the Company has elected *not* to discharge employees despite serious carrier concerns about them—confirming that the Company, not any carrier, exercises control over personnel decisions.

Finally, and critically, the record here shows that the carriers retain less control over training than in *PrimeFlight*, where the carriers not only trained PrimeFlight's trainers but also, in some instances, trained PrimeFlight's employees directly. 45 NMB at 150. There was no evidence in *PrimeFlight* approaching the

Company’s comprehensive 900-page training manual dictating what employees must know in order to perform their jobs. And although, in this case, the carriers require supplemental trainings run by company officials, for example on carrier-specific service expectations, those trainings do not displace the Company’s training requirements. Just the opposite: on at least one occasion, the Company’s training requirements have displaced a carrier’s less stringent requirements. And far from following the lead of any carrier on matters of training, the Company has helped at least one carrier to develop a training program where it previously had none, using the Company’s manual as a basis.

Accordingly, the Company is mistaken that the present case is so similar to *PrimeFlight* on its facts that it demands precisely the same jurisdictional result as in that case.<sup>18</sup> The Board properly applied the same test as in *PrimeFlight*—a test the Company does not challenge—to the record facts in this case and concluded that the Company is not controlled by a carrier or carriers, and thus is not subject to RLA jurisdiction.

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<sup>18</sup> Additionally, in *PrimeFlight*, the Board noted that NMB had previously asserted jurisdiction over the same PrimeFlight operations at the same airport “based on many of the factors that were present in this case.” 367 NLRB No. 83, 2019 WL 414224, at \*4 (citing *PrimeFlight Aviation Servs.*, 34 NMB 175 (2007)); *see also PrimeFlight*, 45 NMB at 150 (noting consistency with both its 2007 assertion of jurisdiction over operations at LaGuardia Airport and its 2018 jurisdictional decision regarding PrimeFlight’s operations at Westchester County Airport).

## II. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNFAIR-LABOR-PRACTICE ORDER

Before the Board, the Company cursorily excepted to the administrative law judge's finding that it had violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging and refusing to re-hire employee Joanne Alexandre.<sup>19</sup> (JA1308-09,1321.) The Company, however, made no argument in support of the relevant exceptions, as required by the Board's Rules and Regulations. *See* 29 C.F.R. § 102.46(a)(1)(i)(D). The Board accordingly disregarded the Company's "bare" exceptions, consistent with its rules and settled precedent. (JA1324n.4, citing 29 C.F.R. § 102.46(a)(1)(ii), and *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 n.1 (2005), *enforced*, 456 F.3d 265 (1st Cir. 2006).)

On appeal, the Company expressly states that it does not contest the underlying finding that it unlawfully discharged and refused to rehire Alexandre because she exercised her statutorily protected right to support the Union's

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<sup>19</sup> Section 8(a)(3) of the Act makes it an unfair labor practice for an employer, "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Conduct that violates Section 8(a)(3) derivatively violates Section 8(a)(1) of the Act, which prohibits employers from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in section 7 [of the Act]." 29 U.S.C. § 158(a)(1); *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983). As relevant here, Section 7 guarantees employees the right to "form, join, or assist labor organizations." 29 U.S.C. § 157.

organizing campaign. (Br.1n.4.) Nor does the Company take issue with the Board's refusal to consider its bare exceptions.

Given the Company's forfeiture of any challenge to the unfair labor practices found in this case, there is nothing left for the Court to consider. Under the Court's "longstanding rule," the Board is entitled to summary enforcement of its Order corresponding to such uncontested violations. *Carpenters & Millwrights, Local Union 2471 v. NLRB*, 481 F.3d 804, 808 (D.C. Cir. 2007); *see CC1 Ltd. P'ship v. NLRB*, 898 F.3d 26, 35 (D.C. Cir. 2018) (granting summary enforcement as to portions of order where employer forfeited any challenge to the underlying violation); *Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 735-36 (D.C. Cir. 2015) (same; employer had "expressly abandoned" any challenge).

## CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

/s/ Amy H. Ginn

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National Labor Relations Board

June 2019

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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AMERICAN SALES AND MANAGEMENT )  
ORGANIZATION, LLC d/b/a EULEN AMERICA )

Petitioner/Cross-Respondent )

Nos. 18-1342  
19-1018

v. )

NATIONAL LABOR RELATIONS BOARD )

Respondent/Cross-Petitioner )

Board Case Nos.  
12-CA-163435  
12-CA-176653

and )

SERVICE EMPLOYEES INTERNATIONAL UNION, )  
LOCAL 32BJ )

Intervenor )

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that the foregoing contains 12,965 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

/s/ David Habenstreit

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Dated at Washington, DC  
this 17th day of June 2019

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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AMERICAN SALES AND MANAGEMENT ORGANIZATION, LLC d/b/a EULEN AMERICA	)	
	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 18-1342 19-1018
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	Board Case Nos. 12-CA-163435 12-CA-176653
	)	
and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ	)	
	)	
	)	
Intervenor	)	

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 17, 2019, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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Dated at Washington, DC  
this 17th day of June 2019

# **ADDENDUM**

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AMERICAN SALES AND MANAGEMENT ORGANIZATION, LLC d/b/a EULEN AMERICA	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 18-1342 19-1018
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case Nos. 12-CA-163435 12-CA-176653
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ	)	
	)	
Intervenor	)	
	)	

**STATUTORY ADDENDUM**

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**Relevant provisions of the National Labor Relations Act,  
29 U.S.C. §§ 151-60:**

**Definitions.** [§ 152.] When used in this subchapter—

(2) The term “employer” includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

**Sec. 7. [§ 157.]** Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

**Sec. 8. [§ 158.]** (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

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(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

**Sec. 10. [§ 160.]** (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding

provision of this Act [subchapter] or has received a construction inconsistent therewith.

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(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

**Relevant provisions of the Railway Labor Act,  
45 U.S.C. §§ 151, 181:**

**Definitions. [§ 151.]** When used in this chapter and for the purposes of this chapter—

**First.** The term “carrier” includes any railroad subject to the jurisdiction of the Surface Transportation Board, any express company that would have been subject to subtitle IV of Title 49, as of December 31, 1995, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such “carrier”: *Provided, however,* That the term “carrier” shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Surface Transportation Board is authorized and

directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term “carrier” shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

**Application of subchapter I to carriers by air. [§ 181.]**

All of the provisions of subchapter I of this chapter except section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

**NLRB Rules and Regulations,  
29 C.F.R. § 102.46(a):**

**Sec. 102.46(a)** Exceptions and brief in support. Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to § 102.45, any party may (in accordance with Section 10(c) of the Act and §§ 102.2 through 102.5 and 102.7) file with the Board in Washington, DC, exceptions to the Administrative Law Judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of the exceptions. The filing of exceptions and briefs is subject to the filing requirements of paragraph (h) of this section

(1) Exceptions.

(i) Each exception must:

(A) Specify the questions of procedure, fact, law, or policy to which exception is taken;

(B) Identify that part of the Administrative Law Judge's decision to which exception is taken;

(C) Provide precise citations of the portions of the record relied on; and

(D) Concisely state the grounds for the exception. If a supporting brief is filed, the exceptions document must not contain any argument or citation of authorities in support of the exceptions; any argument and citation of authorities must be set forth only in the brief. If no supporting brief is filed, the exceptions document must also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document is subject to the 50–page limit for briefs set forth in paragraph (h) of this section.

(ii) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(2) Brief in support of exceptions. Any brief in support of exceptions must contain only matter that is included within the scope of the exceptions and must contain, in the order indicated, the following:

(i) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

(ii) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.

(iii) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page citations to the record and the legal or other material relied on.