

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572



(202) 692-5000

45 NMB No. 32
August 22, 2018

Susan Leverone
Associate Solicitor
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570-0001

Re: NMB File No. CJ-7174
NLRB Case 02-RC-186447
PrimeFlight Aviation

This responds to your request for the National Mediation Board's (NMB or Board) opinion regarding whether PrimeFlight Aviation (PrimeFlight or Employer) at the Westchester County Airport (HPN) is subject to the Railway Labor Act (RLA), 45 U.S.C. §151, *et seq.* On May 23, 2017, the National Labor Relations Board (NLRB) requested an opinion regarding whether PrimeFlight's operations at HPN are subject to the RLA.

For the reasons discussed below, the NMB's opinion is that PrimeFlight's operations and employees at HPN are subject to the RLA.

I. PROCEDURAL BACKGROUND

On October 19, 2016, the International Brotherhood of Electrical Workers, Local 1430 (Local 1430) filed a petition with the NLRB to represent baggage handlers, wheelchair agents, and line queue agents employed by PrimeFlight at HPN. The NLRB held a hearing on October 27, 2017 on the issue of jurisdiction. At that hearing, the parties stipulated to the evidence presented in *Prime Flight*

Aviation Services, Inc., NLRB Case No. 2-RC-15821, involving an election with the same employees at HPN in 2015,¹ and presented no additional evidence.

Following the hearing, the NLRB's Regional Director rejected PrimeFlight's assertions that it was subject to RLA jurisdiction and its request that the matter should be referred to the NMB for a jurisdictional determination and directed an election. Following the election, PrimeFlight filed a Request for Review with the NLRB on December 12, 2016. On May 23, 2017, the NLRB referred the matter to the NMB for an advisory opinion on the jurisdiction issue. The NMB assigned Maria-Kate Dowling to investigate. PrimeFlight and Local 1430 each submitted position statements and replies.

The NMB's opinion is based on the request and the record provided by the NLRB, as well as these position statements.

II. FINDINGS OF FACT

Background

PrimeFlight provides ground services to air carriers at airports around the country. At HPN, PrimeFlight contracts with JetBlue Airways (JetBlue) and AFCO AvPORTS Management (AvPORTS).² Under its most recent contract with JetBlue, PrimeFlight provides skycap, wheelchair, and baggage services. PrimeFlight and JetBlue have a general terms agreement covering all PrimeFlight locations where PrimeFlight provides services for JetBlue.³ PrimeFlight and JetBlue are also parties to an amendment to the general terms. The most recent amendment was dated December 22, 2014. PrimeFlight's contract with AvPORTS, the firm that manages the airport for Westchester County, covers curbside baggage handling, wheelchair services, and security monitoring for the other airlines serving the airport, including Delta Air Lines (Delta), American

¹ Following a hearing in that case, the Regional Director issued a decision and direction of election finding NLRB jurisdiction. Local 431 lost the subsequent election. The record provided by the NLRB also indicates that in 2015, the NLRB found that PrimeFlight's operations at Luis Munoz Airport, San Juan, Puerto Rico was subject to the NLRA. NLRB Case No. 12-RC-113687.

² According to its website, www.avports.com, AvPORTS is a company that offers comprehensive management for commercial (14 CFR part 139), general, and "military and special" airports. AvPORTS has provided airport management at HPN since 1977.

³ In addition to HPN, these locations include Baltimore-Washington International Airport, Charlotte Douglas International Airport, LaGuardia International Airport, Richmond International Airport, and Rochester International Airport.

Airlines (American), and United Airlines (United). Under both contracts, PrimeFlight is paid based on the hours of service provided. The contracts set the maximum daily number of service hours to be provided based on the travel season. The Employer must get permission from both JetBlue and the AvPORTS before exceeding this maximum number of hours. AvPORTS provides PrimeFlight with an office at the airport. AvPORTS has a key and is free to enter the space.

PrimeFlight's Day-to-Day Operations

PrimeFlight's contracts with JetBlue and AvPORTS specifically require that PrimeFlight provide supervisors to supervise its employees. At the 2015 hearing, the parties stipulated that JetBlue coordinates with PrimeFlight's supervisors on a daily basis to ensure that the contracted-for wheelchair and baggage services are provided. The parties further stipulated that the PrimeFlight supervisors are expected to ensure that work is accomplished according to the terms of the contracts with JetBlue and AvPORTS and that the work meets their expectations.

Both JetBlue and AvPORTS have reported problems with the performance of PrimeFlight's supervisors in the past. PrimeFlight took steps to address the identified issues and improve supervisor performance. JetBlue and AvPORTS also address concerns with the employee performance with PrimeFlight managers rather than directly with PrimeFlight employees. Previously, a JetBlue manager attended PrimeFlight's staff meetings and spoke about workplace practices. The current JetBlue managers, however, no longer attend the meetings.

In 2014 and 2015, both JetBlue and AvPORTS raised concerns that PrimeFlight was failing to provide contractually required reports or adequate staff, neglecting to clean equipment, and that PrimeFlight employees were speaking on their cell phones while on duty. In response to these concerns, PrimeFlight's regional manager and general manager created a chart outlining the concerns and the corrective actions to be taken. PrimeFlight's general manager was responsible for addressing each concern and communicating with JetBlue and AvPORTS to ensure that each entity was aware of the Employer's efforts to improve its performance.

Staffing and Scheduling

Like most of companies that contract with air carriers, PrimeFlight's employee work schedules are governed by flight schedules and daily lists provided by the airlines. According to a stipulation in the record, JetBlue and AvPORTS provide PrimeFlight with the flight schedules on a bimonthly basis, with the exception of the summer season when they provide a flight schedule for the entire summer. The airlines, JetBlue, Delta, American and United, also give PrimeFlight a daily list, showing the number of passengers who will need wheelchair assistance for each flight throughout the day. With respect to JetBlue, PrimeFlight has limited access to certain computers owned by JetBlue that allow it to retrieve information about passengers who will need wheelchair assistance. The Employer in turn uses the flight schedules and the wheelchair assistance information to create employee work schedules and assign particular employees to provide the required services. JetBlue instructs PrimeFlight daily about the number of work hours it needs from PrimeFlight employees. PrimeFlight must seek permission from JetBlue before exceeding the contractual maximum daily service hours worked by its employees. On occasion, JetBlue and AvPORTS will request that the Employer provide additional hours of work under the contracts to provide service during busy travel times or to adjust to the airlines' varying schedules.

Carrier Access to Records and Audits

Both JetBlue and AvPORTS have the right to audit PrimeFlight's records when the audit is related to services provided. Under its contract with JetBlue, PrimeFlight is required, upon request, to provide copies of records related to workplace accidents and injuries, employee grievances, and employee disciplinary actions. PrimeFlight is also required to provide JetBlue with regular reports showing the number of wheelchair "transactions." PrimeFlight is also contractually required to maintain records related to training and JetBlue and AvPORTS have the right to review those records upon request. Neither JetBlue nor AvPORTS have access to PrimeFlight's personnel files.

Hiring, Firing, Discipline, and other Personnel Matters

PrimeFlight interviews and hires its employees. With regard to promotions, PrimeFlight General Manager Albert Tejada testified that JetBlue and AvPORTS were involved in his decision to promote PrimeFlight employees to

supervisors after PrimeFlight initially secured the contract with AvPORTS. According to Mr. Tejada, the airlines requested that PrimeFlight have supervisors because there was more work. He stated that the airlines “gave me the names who they requested and that’s who I gave the position to.” Mr. Tejada further stated that he discussed the names of the individuals under consideration and asked JetBlue and AvPORTS for feedback on those individuals. According to Mr. Tejada, no one had to apply for the promotion. Mr. Tejada interviewed about nine people on that list and selected five for promotion.

PrimeFlight independently determines wage rates and does not offer benefits to its employees. JetBlue allows PrimeFlight employees to travel on JetBlue flights using its “buddy pass” program, which is a privilege extended to the employees of all of Jet Blue’s business partners at various airports. PrimeFlight also approves vacation and sick leave requests.

The PrimeFlight employee handbook also contains a “problem resolution” provision that encourages employees to raise workplace concerns with their supervisor, a manager, or PrimeFlight’s human resources department. The PrimeFlight employee handbook also sets forth PrimeFlight’s policies on attendance, personal appearance, workplace etiquette, and discipline. The handbook includes a progressive discipline provision but also provides examples of behavior that may result in immediate termination such as threatening a co-worker or customer, sleeping on the job, or accepting bribes or money in connection with job duties.

Article 18.1.5 of the General Terms Agreement for Services between PrimeFlight and JetBlue provides in part the following:

JetBlue reserves the right to require removal by [PrimeFlight] from JetBlue’s aircraft or airport facilities of any [PrimeFlight] employee unacceptable to JetBlue, provided, however, that JetBlue will not exercise this right on unlawful grounds.

PrimeFlight Division Vice President, Matthew Barry, testified about two situations he was aware of in which JetBlue exercised this right. In 2013, Mr. Barry received an email from JetBlue General Manager, Anthony LoCastro, indicating that he was demanding that PrimeFlight “terminate” an employee who made a threat to a JetBlue employee. Mr. Barry consulted with PrimeFlight General Manager Tejada, and asked him to process the termination with the Human Resources department. Mr. Tejada also testified that he terminated the

employee after talking with Mr. Barry. The termination occurred the morning after Mr. Barry received the email from Mr. LoCastro.

According to Mr. Barry, there was little internal discussion on how to proceed with the allegations because he believes PrimeFlight is required to comply with a customer's request to terminate an employee. He stated that "the conversation is usually very short and very sweet because of the language that we have in our agreements with our customers. We don't have the option to . . . make our own decision when it comes to this. If the customer specifically states that they want an employee terminated and not to be working for them any longer, we really have no choice." Mr. Barry further testified that PrimeFlight does not conduct an investigation when a customer requests that an employee be terminated. When pressed about whether PrimeFlight could move such an employee to another contract, Mr. Barry stated that at that time, JetBlue was its only contract in the airport.

On another occasion, PrimeFlight terminated a curbside check-in employee after JetBlue provided photographs of him offering a JetBlue customer a discount and pocketing a cash payment for an overweight bag. PrimeFlight has also terminated an employee upon request by AvPORTS. PrimeFlight did not investigate the matter and terminated the employee after AvPORTS sent a photo of him sleeping on the job.

While neither JetBlue nor AvPORTS evaluates or disciplines PrimeFlight employees, both entities address concerns with employee performance to PrimeFlight managers. JetBlue management has often addressed concerns with PrimeFlight through phone calls or emails. Mr. Barry testified that he created a corrective action plan in response to operational concerns that came directly from JetBlue management in White Plains. The action plan was provided to JetBlue's local management and corporate contracts department. The first operational concern related to staffing levels and the hiring of additional supervisors. The second operational concern was regarding communication. Daily briefings and wheelchair reporting to JetBlue occur under the action plan. PrimeFlight also receives emails from AvPORTS when they are concerns. AvPORTS frontline supervisors and senior leadership have regular conference calls with Mr. Barry and Mr. Tejada to discuss whether the operational concerns are being addressed.

Equipment, Training and Uniforms

AvPORTS provides PrimeFlight with an office at the airport and retains a key to that office. AvPORTS is free to enter PrimeFlight's office to perform repairs and maintenance. JetBlue does not have access to PrimeFlight's office. An amendment to the General Terms Agreement dated December 22, 2014, states that JetBlue will provide equipment, including wheelchairs, baggage tags, and boarding pass stock, at its own cost to PrimeFlight for use at HPN.

At the 2015 hearing, the parties stipulated that PrimeFlight is required to provide its employees with "all necessary initial and recurrent training, including familiarization with JetBlue policies." Some of this training is mandated by the Federal Aviation Authority (FAA) as well as the Transportation Security Administration (TSA). PrimeFlight is also contractually responsible for providing training that complies with standards set by the Department of Transportation. PrimeFlight is responsible for the cost of training its employees. JetBlue trained one of PrimeFlight's employees who then trains other PrimeFlight employees working on the JetBlue contract. PrimeFlight pays the costs related to training its employees.

The employees at issue wear uniforms with the PrimeFlight logo. PrimeFlight's contract with JetBlue specifically states that PrimeFlight employees will not be held out or construed to be employees of JetBlue.

III. DISCUSSION

Applicable Legal Standard

When an employer is not a rail or air carrier engaged in the transportation of freight or passengers, the NMB has traditionally applied a two-part test in determining whether the employer and its employees are subject to the RLA. First, the NMB determines whether the nature of the work is that traditionally performed by employees of rail or air carriers. Second, the NMB determines whether the employer is directly or indirectly owned or controlled by, or under common control with, a carrier or carriers. Both parts of the test must be satisfied for the NMB to assert jurisdiction.

PrimeFlight does not fly aircraft and is not directly or indirectly owned by an air carrier. PrimeFlight and Local 1430 stipulated that the work performed by the PrimeFlight employees at issue is work traditionally performed by

employees in the airline industry. Therefore, to determine whether PrimeFlight is subject to the RLA, the NMB must consider the degree of direct or indirect control exercised over its operations by its Carrier customers.

In *ABM Onsite Services*, the Board found that,

the rail or air carrier must effectively exercise a significant degree of influence over the company's daily operations and its employees' performance of services in order to establish RLA jurisdiction. No one factor is elevated above all others in determining whether this significant degree of influence is established. These factors include: extent of the carriers' control over the manner in which the company conducts its business; access to the company's operations and records; role in personnel decisions; degree of supervision of the company's employees; whether the employees are held out to the public as carrier employees; and control over employee training. *Air Serv Corp.*, 33 NMB 272 (2006); *Aircraft Serv. Int'l Group, Inc.*, 33 NMB 258 (2006); *Signature Flight Support*, 32 NMB 214 (2005).

45 NMB 27, 34-35 (2018).

Carrier Control over PrimeFlight and Its Employees

The record provided by the NLRB in the instant case establishes that JetBlue exercises substantial control over PrimeFlight's HPN operations.⁴ JetBlue's schedule dictates the scheduling of PrimeFlight's employees. JetBlue instructs PrimeFlight daily regarding the number of work hours needed from PrimeFlight employees. On a daily basis, JetBlue supervisors coordinate with PrimeFlight's supervisors to ensure the required wheelchair and baggage services are provided. PrimeFlight must seek permission from JetBlue before exceeding the maximum daily service hours set forth in the contract. JetBlue reports performance problems to PrimeFlight supervisors and managers. PrimeFlight's General Manager Barry is responsible for addressing JetBlue's concerns and communicating the steps taken to remedy the problems. Under

⁴ While AvPORTS contracts with PrimeFlight as part of its comprehensive airport management services at HPN, there is no record evidence that AvPORTS is indirectly or directly owned or controlled by airlines. For purposes of its decision and direction of election in NLRB Case No. 2-RC-186447, the NLRB's Regional Director assumed that AvPORTS like JetBlue was a carrier. The NMB finds it unnecessary to reach the issue since there is sufficient control exercised over PrimeFlight by JetBlue, a common carrier by air.

its contract with JetBlue, PrimeFlight is required, upon request, to provide copies of records related to workplace accidents and injuries, employee grievances, and employee disciplinary records. PrimeFlight must also provide JetBlue with regular reports documenting the number of wheelchair “transactions.” JetBlue also retains the right to audit records related to the training of PrimeFlight employees.

PrimeFlight interviews and hires its employees. It has directly sought JetBlue’s input regarding promotions. JetBlue retains the contractual right to require the removal of PrimeFlight employees it finds unacceptable, and the record indicates it has exercised this right. On one occasion, JetBlue requested the termination of a PrimeFlight employee who threatened a JetBlue employee. On another occasion, JetBlue provided photographs of a PrimeFlight employee offering a JetBlue customer a discount and pocketing a cash payment for an overweight bag, and PrimeFlight terminated the employee. While the behavior in both instances also warranted immediate termination under PrimeFlight’s employee handbook, Mr. Barry testified that PrimeFlight does not conduct an investigation when a customer requests termination of an employee because the language in their contracts leaves them “no choice.” JetBlue also provides PrimeFlight employees the benefit of travel on JetBlue flights under its “buddy pass” program.

JetBlue provides equipment, including wheelchairs, baggage tags and boarding pass stock. While PrimeFlight is required to provide training and pay the costs associated with that training, JetBlue trains a PrimeFlight employee who then trains the other PrimeFlight employees working on the JetBlue contract. PrimeFlight employees wear uniforms with the PrimeFlight logo and are not held out or identified as JetBlue employees.

The Board’s opinion that PrimeFlight’s employees at HPN are subject to the RLA are consistent with its previous decision in *PrimeFlight Aviation Services, Inc.*, 34 NMB 175 (2007). In that case, the NMB found sufficient carrier control over PrimeFlight’s skycap employees at LaGuardia to warrant RLA jurisdiction based on record evidence that carriers’ schedules dictate the staffing levels and shift assignments of PrimeFlight employees; carriers regularly make changes in daily assignments; carriers required maintenance of and access to employee training records; carriers trained PrimeFlight employees who, in turn, train other PrimeFlight employees; and carriers requested reassignment of PrimeFlight employees and PrimeFlight complied with those requests. *PrimeFlight Aviation Services*, supra, at 182-183.

In sum, the record shows that JetBlue exercises sufficient control over PrimeFlight's operations at HPN to establish RLA jurisdiction

CONCLUSION

Based on the record in this case and the reasons discussed above, the NMB's opinion is that PrimeFlight's operations and its employees at HPN are subject to the RLA.

BY DIRECTION OF THE NATIONAL MEDIATION BOARD



Mary L. Johnson
General Counsel

Copies to:
Christopher Coxson, Esq.
Jordan El-hag, Esq.
Samuel Gonzalez
Dylan Wiley
Terence Schoone-Jongen, NLRB
Katherine Lesesne, NLRB

Member Puchala, dissenting.

Contrary to my colleagues, I would not find that PrimeFlight's operations and employees at HPN are subject to the RLA. For the reasons set forth in my dissent in *ABM Onsite Services*, 45 NMB 27, 36 (2018), I would require that a company asserting RLA jurisdiction establish the exercise of a meaningful degree of control over personnel decisions as described in *Airway Cleaners*, 41, NMB 262 (1014). In my view, the record in this case fails to establish that significant

level of control. Each of the three PrimeFlight employees terminated after their misconduct was reported by JetBlue or AvPORTS had committed misconduct that warranted immediate termination under PrimeFlight's own progressive discipline system.