NATIONAL MEDIATION BOARD
WASHINGTON, DC 20572

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VIA EMAIL
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National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570-001

Re: NMB File No. CJ-7097
Airway Cleaners, LLC

This responds to your request for the National Mediation Board's (NMB) opinion regarding whether Airway Cleaners, LLC (Airway) is subject to the Railway Labor Act (RLA), 45 U.S.C. §151, *et seq.* On August 23, 2013, the National Labor Relations Board (NLRB) requested an opinion regarding whether Airway's operations are subject to the RLA.

For the reasons discussed below, the NMB's opinion is that Airway's operations and its employees are not subject to the RLA.

I. PROCEDURAL BACKGROUND

This case arose on March 8, 2013, when United Construction Trades and Industrial Employees Union, Local 621 (Local 621) filed a petition with the NLRB seeking an election to become the representative of certain of Airway's employees at JFK International Airport (JFK). Local Union 660 United Workers of America and Local 32BJ, Service Employees International Union (Local 32BJ) intervened. The NLRB directed an election. On July 3, 2013, following the election, Airway submitted a request to the NLRB to reconsider, contending that the NLRB lacks jurisdiction. On August 6, 2013, the NLRB conducted a hearing on the jurisdictional issue and on August 23, 2013 referred the case to the NMB.

On August 29, 2013, the NMB assigned Angela I. Heverling to investigate. Airway and Local 32BJ submitted position statements on September 19, 2013. The NMB's opinion is based on the request and

record provided by the NLRB, including a hearing transcript, as well as the position statements filed by Airway and Local 32BJ.[1]

II. AIRWAY'S CONTENTIONS

Airway contends that it is subject to the RLA. It notes that Airway's employees perform work traditionally performed by air carriers. Airway argues that air carriers play an active role in its daily operations, direct the work being done by its employees, and effectively supervise its employees.

III. LOCAL 32BJ'S CONTENTIONS

Local 32BJ argues that carriers do not control Airway's labor relations or operation to a jurisdictionally significant extent. It contends that Airway cannot provide evidence of carrier control sufficient to establish RLA jurisdiction.

IV. FINDINGS OF FACT

Background

Airway provides cleaning and maintenance service at 14 airports, including JFK, providing services to about 90 air carriers. Airway employed about 300 employees in various terminals at JFK until winning two recent contracts with American Airlines (American). Since being awarded these contracts, Airway hired an additional 130 employees in late 2012 under a contract to clean American's airplanes and 140 employees in March 2013 under a contract to clean the Terminal 8 building. It was these employees who Local 621 was seeking to represent when it filed its petition with the NLRB. This determination addresses Airway's contracts with American and whether the employees who work under these contracts are subject to the RLA.

Airway also has employees at Terminals 1, 4, and 7, as well as in cargo buildings. It cleans airplanes for other airlines (besides American) in Terminal 8. Airway and Local 660 have a collective bargaining agreement (CBA) purported to cover all of its employees at JFK. In the action before the NLRB, Airway and Local 660 argued that the new employees in Terminal 8 are covered by their existing agreement and an election is barred by the NLRB's contract bar rules. Local 621 argued that the new employees constitute a new bargaining unit, while Local

[1] On June 13, 2014, the Service Employees International Union (SEIU) submitted an unsolicited policy brief regarding several jurisdictional determinations before the Board, including this one. The SEIU is not a participant in this case (Local 32BJ is the participant) and the Board did not consider that brief in reaching this decision.

32BJ agreed that an election should go forward but did not take a position on the bargaining unit issue. Local 32BJ did raise the issue of whether Alstate Maintenance employees also belong in the bargaining unit.[2] The NLRB directed an election on June 21, 2013 and held that the new employees under the American contracts made up separate appropriate bargaining units for collective bargaining purposes. Airway's jurisdictional appeal followed, and the ballots from that election were impounded.

Airway's Operations at JFK

Mark DuPont, President of Operations and Business Development, oversees Airway's operations at JFK, ensuring that the contracts are being performed in accordance with carrier requirements. DuPont has been employed by Airway since July of 2012. Prior to his employment with Airway, he was Vice President of Airport Services at American.

The work performed by Airway employees includes cabin cleaning and terminal cleaning. Most of the cleaning supplies brought onboard by Airway employees are provided by the airlines. Cabin cleaners remove trash, clean seats and trays, fold and prepare blankets and pillows, clean restrooms, vacuum, clean windows, and restock supplies. Terminal cleaners clean every part of the American terminal. The cabin and terminal cleaners wear uniforms that identify them as employees of Airway.

Airway provides club staffing, including bartending and cleaning, to various airlines. Some airlines, including American, have their own employees working in the club and employ Airway employees to clean only. The bartending or hosting employees wear uniforms which are designated by the air carriers and do not indicate that they are Airway employees. Club cleaners wear the same uniforms as Airway's other cleaners.

Contracts with American

In the summer of 2012, Airway won a contract to clean American's aircraft in Terminal 8. In March of 2013, it began providing janitorial service in Terminal 8 through another contract with American.

Maurice Guercio was hired as General Manager of the new aircraft cleaning operation in Terminal 8 and he hired additional leadership, none of whom had worked for Airway before. Airway's hiring office hired the cleaners in October and November of 2012. These employees work in crews or teams, cleaning the seats, kitchen areas, and bathrooms in the

[2] The NLRB also referred a jurisdictional case based on employees of Alstate Maintenance which has been withdrawn.

planes. They also restock supplies and are trained to do some security-related tasks, such as looking for weapons while they clean.

All new aircraft cleaning employees receive general training from Airway and special training via an American Airlines training tape. Prior to the start of the contract with American, Airway sent representatives to the Flagship University, the training center for American in Dallas, for several days of training so they could return and train all the other cabin service employees. Upon their return, all of the Airway employees hired to clean American aircraft received classroom and on-the-job training at JFK. American keeps records of training received by Airway employees by providing them with employee numbers tracked in the same system used to track its own employees' training.

Airway employees also receive a security training known as "Secure Identification Display Area" (SIDA), required to gain access to secure areas of the airport. The security clearance that an Airway cabin cleaner on the American contract receives is the same as that received by American employees. Aircraft cleaners testified before the NLRB that they receive their instructions from crew leaders or dispatchers.

Merit Rizzuto was hired as general manager of Airway's janitorial services in Terminal 8. Rizzuto was involved in hiring the employees under this contract. Applicants were screened and recruited by a non-profit group called the Council for Airport Opportunity, but Rizzuto testified before the NLRB that she made the final decisions regarding hiring. Rizzuto testified that the she has the authority to discipline and discharge the employees who she manages. The employees hired to do janitorial work for American in Terminal 8 also receive SIDA training but do not receive the additional training from American that the aircraft cleaning employees receive.

The Master Services Agreement between American and Airway, effective August 8, 2012, defined Airway as an independent contractor. Other relevant sections of the contract include a provision allowing American to audit Airway's business records. The contract provides for American to lease equipment to Airway. Another section of the contract entitled "Employee Specifications" included the following provisions:

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> b. Supplier shall provide notice to American at least thirty days prior to any staffing changes and shall not materially change the composition of its staff without the written consent of the American general manager.

> c. All Supplier personnel shall record the start and end times of shifts actually worked by such employees in accordance with any procedures specified by American at each Station.
>
> d. All Supplier personnel must wear ID badges supplied by American or the airport operator.
>
> e. American shall have the right and option at any time and from time to time to interview and approve Station management and other employees of Supplier.
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> f. Supplier shall provide all uniforms, administrative office space, airport parking, dosimeters (if required), transportation or other fees and expenses that may be required for Supplier's employees or performance of any of the Supplier Services.
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> ***

During the NLRB's jurisdictional hearing, Mark DuPont testified that Airway has its own Human Resources department that does all of its hiring and no one from the airlines is present during the hiring process of its front-line employees. According to DuPont, American recommended the individual who Airway hired to oversee one of the contracts as General Manager. Airway was considering a number of names and a representative of American suggested that one of them would be a good selection because he or she had already done work for American. There were also at least two other individuals recommended by American for positions with Airway who were not hired.

DuPont also testified about one occasion where American requested that Airway retrain an employee. There was damage to the front entrance door of an American 777. According to DuPont, upon direction of an American manager, Airway did not allow the employee involved to open or close an aircraft door until an investigation was completed. An email from the American manager requested an investigation and stated that "I also asked that (the employee) NOT open/close AC doors until we conclude the (investigation) and determine if he needs to be re-trained." There was a joint investigation between Airway and American to determine what caused the damage. DuPont reported that Airway's investigation determined that its employee could not have caused the damage, while American determined that the employee was responsible and required his retraining before he could return to the task. DuPont testified that "[t]hey saw it differently and ultimately we had to comply with what their directive was as far as keeping the employee off and then retraining him."

DuPont testified that he has weekly follow-ups with American management on staffing issues. American has a quality control (CQ) team that comes onboard aircraft to inspect the cleanliness and other issues. Airlines sometimes complain to Airway about the cleanliness of the planes or pass along complaints from passengers. On one occasion, American management complained in an email that restrooms were not being properly cleaned. Airway can be fined for flight delays. In one instance, Airway was fined $436 for its inability to clean flights in a timely manner. American also imposes a $25 fee per each employee whose uniform is out of compliance and $100 per each employee who is not meeting training requirements.

DISCUSSION

Applicable Legal Standard

Airway does not fly aircraft and is not directly or indirectly owned by an air carrier. 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 in determining whether the employer and its employees are subject to the RLA. *See, e.g., Aero Port Services, Inc., 40 NMB 139 (2013); Talgo, Inc., 37 NMB 253 (2010); Bradley Pacific Aviation, Inc.,* 34 NMB 119 (2007). 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. *Aero Port, above; Talgo, above; Bradley Pacific Aviation, above.*

The work performed by Airway under its contract with American, cleaning aircraft and terminals, is work traditionally performed by employees of air carriers. In fact, much of this work was recently performed by American employees. Therefore, the Board must determine whether Airway is directly or indirectly owned or controlled by American to determine whether its employees are subject to RLA jurisdiction.

Carrier Control over Airway and its Employees

To determine whether there is carrier control over a company, the NMB looks to several factors, including the extent of the carrier's 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 employees are held out to the public as carrier employees, and control over employee training. *Air Serv Corp.*, 39 NMB 450 (2012); *Signature Flight*

Support/Aircraft Serv. Int'l, Inc., 32 NMB 30 (2004); *John Menzies PLC, d/b/a Ogden Ground Servs., Inc.*, 30 NMB 405 (2003); *Signature Flight Support of Nevada*, 30 NMB 392 (2003); *Aeroground, Inc.*, 28 NMB 510 (2001).

The record in the instant case demonstrates that American does not exercise a sufficient amount of control over Airway to establish RLA jurisdiction. The contract between American and Airway and the evidence provided in this case describes a typical relationship between a carrier and a contractor. The extent to which the carrier controls the manner in which Airway conducts its business is no greater than that found in a typical subcontractor relationship. As discussed in prior cases where the Board has not found jurisdiction, a carrier must exercise "meaningful control over personnel decisions," and not just the type of control found in any contract for services, to establish RLA jurisdiction. *See, e.g., Bags, Inc.* 40 NMB 165, 170 (2013). All contracts specify certain standards that a company must follow in performing services for a carrier. The contract provisions at issue here are similar to those in *Bags*. In that case, carriers provided training to a Bags' employee, who in turn trained other employees. *Id.* at 169. The carriers provided equipment to Bags, had the right to bar employees from the airport if they did not comply with safety or other standards, and reported employee misconduct to Bags. *Id.* at 169-70. These examples of control were not sufficient to establish RLA jurisdiction; rather, they were merely examples of the kind of control exercised by a carrier over a subcontractor. The relationship between American and Airway is similar.

The evidence includes one example of Airway acquiescing to American and retraining an employee despite not agreeing that the employee was guilty of the allegations against him. This incident, however, is not sufficient to establish that American exercises jurisdictionally significant control over Airway's labor relations. American does not hire, fire, or routinely discipline Airway employees. Dupont testified that a General Manager was hired after a recommendation from an American representative and based on previous employment with American. This is not surprising considering DuPont himself was previously Vice President of Airport Services at American. Prior employment with and knowledge of American would be useful in a position overseeing a contract with American. This is hardly evidence of America exercising control over Airway's hiring. Airway has its own HR department and conducts its own hiring. The record includes evidence of Airway not hiring individuals suggested by American. American has no involvement in the hiring of front line staff, even if it has recommended an individual for a management position. There is no more control here

than that found in other cases where the NMB has also found no RLA jurisdiction. For example, in *Air Serv Corp.*, 39 NMB 450, 457 (2012), the Board found no jurisdiction where Air Serv hired a manager based on approval from the carrier but where the carrier had no involvement in the hiring of shuttle service employees.

In previous cases applying the standard two-part test to determine whether there is RLA jurisdiction, the Board has required evidence that a carrier or carriers effectively recommend discipline, discharge, and promotion of a company's employees. *See Air Serv Corp.*, 38 NMB 113 (2011); *PrimeFlight Aviation Servs.*, *Inc.*, 34 NMB 175 (2007). In *Signature Flight Support/Aircraft Serv. Int'l, Inc.*, 32 NMB 30, 33-34 (2004), the Board found sufficient control on which to base RLA jurisdiction where the company provided evidence that it complied with carrier requests to terminate, discipline, and reassign employees, including terminating a ground service employee after the carrier requested he be removed from the ramp.

American does not have sufficient control over the hiring, firing, and discipline of Airway employees to establish RLA jurisdiction. Evidence of one instance of complying with a carrier request to retrain an employee does not establish such control. As described above, the control exercised by American over Airway is not the meaningful control over personnel decision required to establish RLA jurisdiction. As the Board has stated in the past, this is the type of control "found in almost any contract between a service provider and a customer." *Bags*, 40 NMB at 170.

CONCLUSION

Based on the record in this case and for the reasons discussed above, the NMB's opinion is that Airway and its employees under its contracts with American at JFK are not subject to the RLA.

By direction of the NATIONAL MEDIATION BOARD.

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Chairman Hoglander, concurring.

Applying the Board's existing two-part test, I agree with Member Puchala and would find that there is insufficient jurisdictionally significant control exercised by the American over Airway's operations at JFK. This result is consistent with my view of the two-part test and with the NMB's most recent jurisdictional decisions in *Bags, Inc.*, 40 NMB 165 (2013); *AeroPort Services, Inc.*, 40 NMB 139 (2013); *Huntleigh USA Corp.*, 40 NMB 130 (2013); and *Air Serv Corp.*, 39 NMB 450 (2012), *mtn for reconsideration denied*, 39 NMB 477 (2012).

I write separately because I disagree with my colleagues' application of this test. I believe that the statutory definition of air carrier demands a different test than the two-part test used by the Board. It is the Board's responsibility to recognize and address developments in the rapidly changing transportation industry and to reevaluate even long-standing policies if they are no longer furthering the purposes of the RLA. An agency is free to revise a long-standing policy as long as it acknowledges it is doing so and provides a good reason for its actions. *Fed. Commc'n Comm'n v. Fox Television Stations*, 556 US 502, 515 (2009). This applies with equal force to an agency's jurisdictional determinations. *City of Arlington v. Fed. Commc'n Comm'n,* 133 S.Ct. 1863 (2013). Thus, the Board is free to re-examine its jurisdictional test.

As discussed below, in determining whether entities that contract with common carriers by air to provide services that were once provided by the carriers themselves are covered by the RLA, I would apply a test that conforms to the statutory definition of common carrier by air and the Board's traditional interpretation of that definition. Specifically, I would apply a test that parallels the common law agency test to determine whether the employees of these companies are subject to the RLA based on the language in Section 181.

My colleagues here apply the following two-part test: 1) Whether the services performed are the type traditionally performed by carrier employees; and 2) whether the carrier directly or indirectly owns or controls the entity in question. The crux of the analysis by the majority here and in most cases is whether the company at issue is "directly or indirectly owned or controlled by . . . any carrier." This language, however, parallels statutory language defining a carrier *by rail* and not the statutory definition of carriers by air. In Section 1, First, a carrier is defined as any railroad or "any company which is directly or indirectly

owned or controlled by or under common control with any *carrier by railroad . . .*" (emphasis added). Thus, Congress clearly intended the RLA to extend to companies owned or controlled by railroads.

The 1936 amendments extended the RLA's jurisdiction to air carriers. Section 182 provides that

> the duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of subchapter I of this chapter except section 153 of this title shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of 'carrier' and 'employee' respectively in section 151 of this title.

The amendments also included a definition of air carrier that did not include the "owned or controlled" language that the Board has historically incorporated into the derivative carrier two-part test. When these amendments extended the jurisdiction of the RLA to air carriers, Section 181 defined air carriers as

> every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the US 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 his service.

The Board has in the past recognized a distinction between the definition of carrier by rail in Section 1, First and carrier by air in Section 181. In *Northwest Airlines, Inc.*, 2 NMB 19 (1948), the Board discussed the 1936 amendments and stated that Section 182 "does not say that those duties, requirements, etc. shall apply 'provided' that the air carrier and its employees are included within the definition of Section 1, First." Rather, the Board held that Section 182 merely provides that the effects of coverage under the RLA are the same for air carriers as they are for carriers by railroad. In my view, by establishing and continuing to apply the two-part test described above to determine whether companies that provide services to airlines are carriers, the Board has required these companies to fit into a definition of rail carrier that was drafted by Congress before airlines were even covered by the RLA.

Based on the definition of air carrier in Section 181, the appropriate analysis is not whether a company is owned or controlled by an air carrier but, rather, *whether the company's employees are subject*

to the RLA because they "perform[] work as an employee or subordinate" or are subject to the "continuing authority" of a carrier by air. The Board has in the past recognized that this definition calls for a common law of agency analysis. In *Eastern Airlines*, 9 NMB 285, 296 (1982) the Board held that the language in Section 181 "is intended to set forth the common law of agency as the test for employee/independent contractor status. Therefore, if the carrier has a right to control the manner and means by which the result is to be accomplished, the subject personnel will be deemed employees. "

In the first instance of the Board taking jurisdiction over a company providing services to air carriers, *Thaddeus Johnson Porter Service*, 3 NMB 83 (1958), there was internal debate over whether the definition of carrier in Section 1, First should be part of the analysis. The Executive Secretary urged the Board to hold that Section 1, First was limited to railroads. In its published decision, the Board did not articulate the exact test it was using, but a review of the facts shows a company whose operations and employees were under much greater control by an airline than the operations and employees of Airway. For example, airlines restricted the porter company from engaging in other commercial activities so much so that its entire existence was based on its contract with air carriers at one airport. The Board placed great emphasis on the fact that airlines had control over the company's employees. The airlines controlled the number of employees, their compensation, their qualifications, and according to the Board,

> [t]he air carriers are not paying merely for the service they receive, but paying for service based on a specified expense based on a fixed number of employees in three categories, and a basic allowance per employee. The Company is not permitted to conduct its own operations on what it may believe is necessary to accomplish its work, but is obligated to assume the fixed expense outlined therein, and thereby its earnings are closely regulated by contract. If the company believed it could increase its profit by reducing the number of its employees, it could not unilaterally exercise this managerial prerogative.

Id. at 85. The Board concluded that airlines supervised and directed the porter company's employees saying "if any group of employees are subject to the continuing authority of a carrier or a group of carriers, to supervise and direct the manner of rendition of service, this is a prime example." *Id.*

Here, the majority applied the traditional two-part test, a test which has been applied inconsistently and has the potential to result in a finding of RLA jurisdiction based on a level of indirect control never

intended by Congress. The problem with this test is that it can be used as a basis for jurisdiction when there is an undefined level of "indirect control" that is evident in any contract for services. Clearly, this was not the intent of Congress. If Congress had intended for the NMB to exercise jurisdiction over any company that contracts with an airline, it would have said as much. In *Thaddeus Johnson* implicitly and in *Eastern Airlines* explicitly, the Board recognized that the language of Section 181 articulates the factors of a common law agency test. This suggests that RLA jurisdiction over a company contracting with an air carrier requires significant and direct control greater than that found in a standard contract for services. Based on the facts in this case, I would find that American does not exercise sufficient authority over Airway's employees to establish RLA jurisdiction.

Member Geale, concurring in part and dissenting in part.

I agree with and join the Board's majority decision that the NMB's traditional and well-settled two-part test is the appropriate analysis for determining whether an employer that is not a rail or air carrier engaged in the transportation of freight or passengers is covered by the RLA.[3] I respectfully disagree, however, with the decision to find that the employer at issue in this case is not subject to the NMB's jurisdiction based on the record evidence. I also believe public policy and our statute would favor a broad-based jurisdiction generally for the NMB, including for Airway Cleaners and its employees in this case.

Much like other industries, the airline industry has changed substantially over the last several decades. Shared services among multiple carriers and/or outsourcing of aircraft cleaning, terminal cleaning, baggage handling, and other jobs formerly performed by airline employees has become common. In recent years, airlines have subcontracted even more functions that are necessary for the effective operation of the carriers and the airports where they are based while retaining a substantial degree of control over those functions.

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[3] The Chairman's separate opinion suggesting the NMB discard this test and substantially limit jurisdiction might have been persuasive in 1938 and for some time later while the NMB was developing its interpretation of the statute. Given the gloss of decades of history and that the current test has been applied by every Board for decades without objection from Congress, however, I cannot support his proposed revision to our longstanding test. Moreover, I believe such a change is wholly impractical given the current economic, safety and security realities in the airline industry and would lead to the kind of disruptions to the industry that the NMB is charged with limiting or preventing.

In this case, American only recently began contracting out its aircraft cleaning operations and even requested that Airway hire a former American Vice President of Airport Services to oversee the work. As detailed more fully below, I find that the contract between American and Airway, as well as the actual interactions as documented in briefs and a hearing before the NLRB, evidence a sufficient degree of direct or indirect control by American to establish RLA jurisdiction. In fact, the contract with Airway allows American substantial power to audit, dictate other terms and conditions, and limits the ability of Airway to offer its services to other carriers. Companies like Airway can either accept the terms of these contracts or risk losing the business of the carriers. The contract itself and the facts presented show that American can and does retain tremendous power over Airway and its employees, and Airway should be subject to NMB jurisdiction as a result.

The contract language involved here was clearly written by American Airlines and favors American in virtually every aspect—including, among other items, a one-sided indemnification provision, forum selection and choice of law, damages limitations, notice and permission from American for any change of control of Airway, and required enforcement of various American policies and its code of ethical conduct. The contract has a number of punitive provisions including liquidated damages for each act of noncompliance by Airway and/or each American flight delayed by Airway's failure to comply with American requirements. The contract is also terminable for American's convenience with only a 30-day notice and terminable by American in only 10 days for cause. Furthermore, Airway cannot necessarily offer its services to other carriers without potential adverse consequences; Airway must notify American of any similar contracts it enters at the airport and allow American to renegotiate rates as a result of any such additional work it performs for other carriers.

In addition to those factors, American exercises direct or indirect control over Airway's day to day operations in virtually all the important facets historically considered by the Board in determining RLA jurisdiction. These include American's role in effectively hiring and/or disciplining employees and supervisors, the degree to which American generally affects the working conditions of Airway employees, American's control over training of Airway employees, and the fact that American provides space, equipment, and supplies to Airway.

Airway's contract with American specifically allows American to audit Airway's business records and have access to its facilities, requires Airway to notify American of staffing changes, and gives American the right to approve the hiring of Airway management and/or front-line

employees. The following contract provisions document some of the involvement American has in the operations of its supplier Airway:

> b. Supplier shall provide notice to American at least thirty days prior to any staffing changes and shall not materially change the composition of its staff without the written consent of the American general manager.
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> c. All Supplier personnel shall record the start and end times of shifts actually worked by such employees in accordance with any procedures specified by American at each Station.
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> e. American shall have the right and option at any time and from time to time to interview and approve Station management and other employees of Supplier.
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> * * *

These provisions are not theoretical either as a number have apparently been enforced in the short period this contract was in existence based on the record provided. For example, American effectively recommended the hiring of at least one manager. Airway also needed to seek American's permission to increase the size of its cabin cleaning staff after American increased its daily flight schedule at JFK and when it introduced an extended range aircraft.

The evidence provided also establishes that American personnel effectively supervise and/or oversee Airway employees regularly. American personnel train Airway employees through a "train the trainer" program. American provides all materials and aircraft specific training takes place onboard an American aircraft, at no cost to Airway. American keeps records of Airway employees, and Airway can be fined if its employees are not up to date on American training requirements. Airway paid at least one fine to American when it was responsible for a delayed flight due to slow cleaning of the plane. In fact, American has hired a quality control specialist to observe Airway's operations at JFK. American and other carriers also conduct separate audits of Airway's cabin cleaning work.

In recent cases where the Board has declined to find jurisdiction over similar companies, it generally relied on the absence of substantial control over "the firing and discipline of a company's employees . . ." *See, e.g., Huntleigh USA Corp.*, 30 NMB 130, 137 (2013) ("[T]he carriers report problems or conduct but the decision to discipline or discharge an employee is made by Huntleigh."). Those cases were decided before my

tenure and appear to overly emphasize that aspect compared to pre-2011 NMB precedent. However, in the instant case, I believe that requisite control over hiring, firing and discipline functions is also met.

For example, American recommended the individual who was hired by Airway to oversee the contract with American. In an incident discussed in detail in the Board's decision, Airway was forced to retrain an employee after an aircraft door was damaged even though its investigation determined that the employee was not at fault. The company's representative said that "ultimately we had to comply with what (American's) directive was as far as keeping the employee off and then retraining him." This seems to me to be exactly the type of control over employee hiring and discipline that the Board has in recent years stated is necessary to finding jurisdiction. Along with all of the other factors discussed above, including the one-sided contract, the totality of the circumstances points to a finding of RLA jurisdiction over Airway because it is directly or indirectly controlled by American through the contract.

The fact that American actually has substantial direct and/or indirect control over Airway's labor relations and operations should come as no surprise to one of the parties, Local 32BJ. After having fully briefed the jurisdictional dispute arguing that American did not have direct or indirect control over Airway, Local 32BJ was part of discussions with all the major airlines, including American, regarding increasing the wages and enhancing the benefits of this airport's contractor employees in January 2014. The Port Authority of New York and New Jersey (Port Authority) also specifically relied on the airlines' control of contractors to secure these changes as stated in a letter to Local 32BJ, American, and three other carriers:

> Following my meetings with each of you or your representatives yesterday, I wanted to outline the immediate steps we deem necessary for each of your airlines to take to provide improvements in the wages and benefits for the thousands of hardworking men and women working for your contractors and vendors to support flight and terminal operations at our airports. [4]

[4] January 27, 2014 letter from the Executive Director of the Port Authority to Delta, American, JetBlue, United and Local 32BJ, available at http://www.governor.ny.gov/assets/documents/lettertoairlinesand32bj.pdf. While neither party briefed the subsequent involvement of the Port Authority over wages and conditions of contractor employees at JFK, the Board can take administrative notice of such matters and does so in this case.

The Port Authority request was reportedly implemented by American at JFK.[5] As such, Local 32BJ's position that American lacks direct or indirect control over Airway is obviously contradicted by Local 32BJ's later success in convincing American to require changes to its contractor's wages and benefits at JFK.

There is a substantial sound public policy interest in maintaining RLA coverage of these contracted services also. Otherwise, along with this trend of air carriers subcontracting functions necessary to air travel comes a substantial risk of localized labor disputes disrupting interstate travel. Avoiding such potential issues is in fact one of the major reasons Congress enacted the RLA. First and foremost in Section 151(a) is the avoidance of "any interruption to commerce or to the operation of any carrier engaged therein." Indeed, the Supreme Court has noted that "Congress endeavored to bring about stable relationships between labor and management in this most important national industry." *Bhd. Of R.R. Trainmen v. Chicago River & Ind. RR Co.*, 353 U.S. 30, 40 (1957). The RLA "creates a special scheme to govern the labor relations of railroads and airlines because of their unique role in serving the traveling and shipping public in interstate commerce." *Verrett v. Sabre*, 70 F.Supp.2d 1277, 1281 (N.D. Ok. 1999). It is intended to apply to air and rail carriers and those activities closely related to air and rail transportation carried on by a subsidiary or controlled enterprises in order to effectuate the underlying goals.

In 1934, Congress specifically broadened the definition of carrier in Section 1, First to include carrier affiliates that perform services related to transportation but were not originally covered by the RLA.[6] This expanded definition, including the "owned or controlled" language that forms the basis of the two-part test discussed above, was clearly intended to prevent certain employees of carrier subsidiaries or related companies from interrupting commerce with a strike. Further, by adding this language, Congress sought "to prevent a carrier covered by the RLA from evading the purposes of the Act by spinning off components of its operation into subsidiaries or related companies." *Thibodeaux v.*

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[5] *See, e.g.*, "Low-wage contract workers at regional airports getting long-awaited raises next month," Kenneth Lovett, NEW YORK DAILY NEWS, Friday, June 13, 2014, available at http://www.nydailynews.com/new-york/exclusive-low-wage-airport-workers-raises-month-article-1.1828191 ("Delta and American Airlines agreed to raise salaries for contract workers at Kennedy and LaGuardia, but not Newark.").

[6] The 1936 amendments further expanded the RLA's coverage to air carriers and extended "all the duties, requirements, penalties, benefits, and privileges" to "carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included with the definition of 'carrier' and 'employee,'" respectively in Section 1, First.

Executive Jet Int'l, Inc., 328 F.3d 742, 752 (5th Cir. 2003); *See also Verrett*, 70 F.Supp.2d at 1281.

In this case and in many other jurisdictional determinations that come before the Board, the company in question performs transportation-related services that until recently were performed by the air carriers themselves. That fact has been stipulated to by all parties in this dispute and is not in dispute in either of my colleagues' separate opinions. The services being performed are likewise a necessity for the functionality of our transportation system and American's operations at JFK Airport. The cleaning of terminals and airplanes, including checking for contraband like weapons, is a requirement of flying as a common carrier. A labor dispute at one service provider could in fact disrupt operations at the entire airport. If the services provided by Airway and others were to be disrupted as part of a strike (even assuming no other RLA covered employees honored the picket lines), American would be unable to operate through JFK—a major hub for its domestic and international flights – until the strike was resolved or a replacement contractor with trained employees became available (a process that would take considerable time considering background checks and training). That, in and of itself, argues for RLA coverage. Indeed, the core goals of preventing localized labor disputes from disrupting interstate travel and ensuring carriers do not evade their responsibilities under the RLA can only be achieved if the Board asserts jurisdiction, as Congress intended, over these companies that are so clearly linked with and necessary to interstate travel.

The history and current working relationship between Airway and its employees through their recognized representatives also strongly supports the appropriateness of RLA jurisdiction in this case. Indeed, while having been marginally observing NLRA-style labor relations at this airport, the parties' interactions exhibit all the characteristics of a Railway Labor Act relationship. First, all employees employed by Airway that are not in management are part of the same craft or class and represented by the same organization with the same CBA covering their relationship. When asked on March 13, 2013, by the NLRB hearing officer if each employee was under the same CBA, Alfred DePhillips, Airway Chief Operating Officer, responded "That's about the tenth time. Yes." The rates of pay are also set forth in the agreement for each specific job as negotiated with the labor organization. The record also shows that employees and supervisors of Airway while generally hired under specific contracts (probably to ensure full compliance with the specific requirements of each carrier) also are cross-trained to some degree and periodically work for different carriers and terminals throughout the airport. That sort of single unit and single representative

across an entire property is characteristic of a RLA collective bargaining relationship – not an NLRA relationship generally. [7]

The decision of the Board to not assert RLA jurisdiction in this case also may have negative consequences to the employees involved and their union by fragmenting a current bargaining unit. The NLRB's decision to allow an election for these new employees under the American contract when there is an existing representative for them under a master CBA appears to violate a longstanding and general policy of both the NLRB and the NMB against fissuring or fragmenting bargaining units. In fact, this policy against fragmentation is part of the reason that the NLRB generally accretes employees into an existing bargaining unit without an election when new groups of employees have come into existence after a union's certification. *See, e.g., United Parcel Service*, 303 NLRB 326 (1991).[8] I was, therefore, surprised by the procedural posture this case was in when the NLRB referred it to the NMB.

Certainly, the community of interest, given the cross-training and general similarity of work as discussed above, argues against creating a new unit with a new representative for each contract. These employees are likely best served by having a larger unit with its additional bargaining power based on the community of interest. As detailed in the Board's majority decision, American can and has changed contractors performing this work periodically. Without a craft or class composed of all employees at JFK, the employees on this contract could lose their jobs and have no ability to move to another contract at the airport if the unit as designed by the NLRB is allowed. Those who earn seniority under this contract will likely have no bumping rights for other positions at other terminals or under other contracts. In addition to depriving these employees of potentially improved job security for their seniority, the decision will also needlessly limit the effectiveness and efficiency of Airway in managing its contracts and employees by creating silos of

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[7] It also does not matter that they have historically observed NLRA processes as the NMB's discretion to assert jurisdiction is not governed by party practice or history. *See, e.g., Northwest Airlines, Inc.*, 27 NMB 307, 312-13 (2000) (*quoting US Airways, Inc.*, 27 NMB 138 (1999)).

[8] The NLRB has also considered craft or class fragmentation in other contexts and allowed it in certain instances. *See, e.g., Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011) (allowing what some characterize as micro-units in a health care setting); *but see The Neiman Marcus Group, Inc., d/b/a Bergdorf Goodman*, 361 NLRB No. 11 (2014) (reversing initial finding that full-time and regular part-time women's shoes associates in the 2nd Floor Designer Shoes Department and in the 5th Floor Contemporary Shoes Department were an appropriate unit). Such non-system wide units are not contemplated under the RLA though. *See, e.g., Delta Air Lines Global Servs.*, 28 NMB 456, 460 (2001); *American Eagle Airlines*, 28 NMB 383 (2001).

personnel under each contract with a carrier and each separate CBA with its corresponding work rules. In addition to the bureaucratic costs of administering additional contracts, this also harms American and Airway by improperly limiting the availability and adaptability of workers in an industry that frequently requires flexibility given the impacts of unexpected weather. [9]

With all that said, there are certainly reasonable arguments that the evidence in this particular matter does not meet the specific criteria of our most recent jurisdictional decisions, and I do not fault the majority for weighing the evidence differently. I, however, believe that the evidence provided favors asserting NMB jurisdiction based on the direct or indirect control of Airway by American. I also believe that the decision to decline jurisdiction is incongruous with a number of our statutory charges and public policy interests as discussed above and ignores a relationship that has all the characteristics of a RLA collective bargaining agreement. As a result, I am concerned that the failure to assert jurisdiction will be harmful to the employees involved, their current representative in collective bargaining (and any future one as well), Airway Cleaners, American Airlines, and the public potentially.

Accordingly, I must respectfully dissent.

[9] Don Matera, Vice President of Operations for Airway, testified at a March 2013 NLRB hearing that Airway negotiates airport-wide CBAs and recognition clauses for productive synergies, to keep costs predictable, and because "any one of our contracts can be cancelled within 30 days' notice."