



NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

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46 NMB No. 12

March 19, 2019

Elizabeth Tursell
Associate to the General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570-0001

Re: NMB File No. CJ-7182
NLRB Case File No. 16-CA-194297
Allied Aviation Fueling Co. of Texas, Inc.

Dear Ms. Tursell:

This responds to your request for the National Mediation Board's (NMB or Board) opinion regarding whether Allied Aviation Fueling Company of Texas, Inc. (Allied or Employer) is subject to the Railway Labor Act (RLA), 45 U.S.C. §151, *et seq.* On January 2, 2018, the National Labor Relations Board (NLRB) requested an opinion regarding whether Allied's operations are subject to the RLA.

For the reasons discussed below, the NMB's opinion is that Allied's operations and its employees at Dallas Fort Worth International Airport, (DFW) are subject to the RLA.

I. PROCEDURAL BACKGROUND

On March 3, 2017, the Transport Workers Union of America, Air Transport Local 513, AFL-CIO (TWU or Organization) filed an unfair labor practice charge, alleging that Allied violated Section 8(a)(1) and (5) of the National Labor Relations Act by failing and/or refusing to arbitrate or discuss grievances filed by the TWU pursuant to a collective bargaining agreement (CBA) between Allied and TWU and by violating a previous NLRB settlement agreement. On August 30, 2017, the NLRB's Region 16 Office issued a Complaint and Notice of Hearing, and on September 12, 2017, the Employer

filed an Answer to the Complaint denying the commission of any unfair labor practices and asserting that the NLRB was without jurisdiction. The NLRB's Regional Office conducted a preliminary investigation of the jurisdictional issue. Both Allied and the TWU submitted position statements to the NLRB. In addition, the NLRB Investigator took confidential witness affidavits from employee witnesses provided by the TWU, Allied and American Airlines (American). The Employer has additionally provided voluminous documents, including its contract with the consortium of airlines,¹ fueling manuals, memoranda from the airlines, and emails from the airlines.

On January 2, 2018, the NLRB referred the case to the NMB for an advisory opinion on the issue of jurisdiction and provided the record it developed in this matter. The NMB assigned Maria-Kate Dowling to investigate. On June 28, 2018 the case was reassigned to Eileen M. Hennessey. Allied and the TWU each submitted position statements. Allied supplemented the record on September 28, 2018. The TWU filed its response to Allied's supplemental position statement on October 31, 2018. Allied filed an objection to the TWU's citation to of redacted witness statements in this matter on November 15, 2018.² The NMB's opinion is based on the request and the record provided by the NLRB, as well as the position statements and evidence submitted to the NMB by the TWU and Allied.

POSITIONS OF THE PARTIES

Allied contends that it is an entity under the direction and control of common air carriers as defined by the Railway Labor Act. Allied contends that the Consortium of airlines has the ability to direct, control, discipline, and direct the termination of its employees. Additionally, Allied contends that it is required to stay in constant communication with the airlines throughout the

¹ Allied provides its fueling services at DFW pursuant to an agreement with the Dallas-Fort Worth Fuel Company LLC, a consortium (Consortium) of air carriers.

² The TWU cited these affidavits in its position statements filed with the NMB. Because of the confidential and privileged nature of the affidavits, the TWU's citations to the TWU witness affidavits redacted the names of the affiants in the copy of these positions statements served on the Employer by the TWU. Allied requests that the NMB not consider the affidavits cited by the TWU or, alternatively, require that the unredacted affidavits be provided to Allied and Allied be allowed to respond to the affidavits. In the case of jurisdiction referrals from the NLRB, it is the NMB's practice to consider the record provided to it by the NLRB and any supplemental submissions to the NMB by the participants. The affidavits in question are NLRB records, clearly designated as confidential. The NMB does not have the authority to release the unredacted NLRB records. Therefore, Allied's requests regarding the affidavits are denied.

day; that Allied Training Supervisors are trained directly by the airlines; that all fueling and training records are subject to unannounced audits and inspections by the airlines; and that the airlines control Allied's annual budget, the size of its work force, and resources available to provide compensation to its employees. Based on the above factors, Allied argues that there is sufficient carrier control to establish that the NLRB does not have jurisdiction.

The TWU contends that Allied is within the jurisdiction of the NLRB and there is a long history of NLRB jurisdiction. The TWU cites an informal NLRB settlement involving the Employer and the TWU and to the fact that Allied continues to follow the terms of the collective bargaining agreement and its processing of certain grievances as evidence that the Employer is within the jurisdiction of the NLRB. The Union further contends that Allied's operations at DFW Airport are materially indistinguishable from the facts and circumstances of Allied's operations at Newark International Airport, at issue in *Allied Aviation Serv. Co. of New Jersey v. Nat'l Labor Relations Bd.*, 854 F.3d 55 (D.C. Cir. 2017), *cert. denied sub nom. Allied Aviation Serv. Co. of New Jersey v. N.L.R.B.*, 138 S. Ct. 458, 199 L. Ed. 2d 330 (2017). In that case, Allied challenged the jurisdictional issue after the NLRB decision which had addressed the merits of the case. The D.C. Circuit noted the lack of an evidentiary record to support Allied's claim of RLA jurisdiction and found that it had failed to establish that it was not within the jurisdiction of the NLRB.

II. FINDINGS OF FACT

The Consortium

Allied provides fueling, maintenance, fuel tank farm operations, ground handlers and associated services to multiple common air carriers operating out of DFW. These services are provided to the following common carriers operating out of DFW: American; Lufthansa German Airlines; Asiana Airlines; British Airways; Cathay Pacific Airlines; China Airlines; Emirates Airlines; Envoy Airlines; Eva Airways Corporation; JAL Airlines; Korean Air Airlines; Qantas Airways Ltd.; and Qatar Airways Airlines. Collectively these carriers formed and are members of the Consortium with which Allied has a contract to provide services.

The Consortium is a Delaware limited liability company (LLC). Both the Operating Agreement and the Access Agreement refer to the LLC Agreement which is the operating agreement for the Consortium. The LLC Agreement sets forth the terms of membership for the Consortium and establishes a Fuel

Committee to manage the Consortium. The Fuel Committee appoints a Chairperson in accordance with the LLC Agreement. Currently, Christine Wang, Manager of Fuel Services at American, serves as the Chairperson for the Consortium. Kevin Lager, Fuel and Energy Management Senior Manager for American previously served as the Chairperson for the Consortium.

The Employer services approximately 40 different types of aircraft that utilize the separate gates at DFW and it fuels and refuels the aircraft of the respective common air carriers. Allied employs approximately 250 people at DFW. It's largest client at DFW is American; 80-85 percent of Allied's DFW workforce spends a majority of its work day providing fueling services to American and American plays a prominent role in the Consortium. The Employer's second largest clients at DFW are American Eagle and Envoy which are regional partners of American, operating short and medium haul feeder flights.

Allied's relationship with the Consortium is governed by the Fuel System Maintenance, Operation and Management Services Agreement (Operating Agreement) and the Fuel System Access Agreement (Access Agreement). The Operating Agreement is a cost-plus contract under which Allied is "appointed" by the Consortium to perform services relating to the operation, maintenance and management of the fuel system at DFW. The Access Agreement grants Allied the right to withdraw fuel from the Fuel Service System at DFW as authorized by the carriers.

Pursuant to the Operating Agreement, Allied must, among other obligations:

- Maintain a separate bank account in the name of the [Consortium] to pay expenses of the [Consortium], the funds in which account shall not be commingled with other [Allied] funds, shall be solely used for the business of the [Consortium] and shall be subject to withdrawal only upon the signature of such persons as the [Consortium] may designate from time to time, which persons may include specified personnel of [Allied] if approved by the [Consortium]; manage cash and related controls which entail monthly reconciliations of bank accounts; and maintain adequate balances, authorized signature cards and a cumulative record of cash sources and uses. Operating Agreement, Section 3.01(x);

- Invest from time to time surplus funds in an interest-bearing account in the name of the [Consortium], in such investments as directed by the [Consortium], provided however, that such funds shall not be commingled with any [Allied] funds. Operating Agreement, Section 3.0l(y);
- Annually submit to the [Consortium] for its approval (which approval shall not be unreasonably withheld) [Allied's] proposed budget and staffing plan of the Fuel System for such year . . . and including an identification of job positions, scope of duties, salary and wage levels plus such additional information as [Allied] may require from time to time. At the reasonable request of the [Consortium], [Allied] shall periodically (but no more than quarterly) submit to the [Consortium] a revised budget for the Fuel System. [Allied] shall provide updates of other information relating to the Fuel System as the [Consortium] may reasonably require from time to time. [Allied] shall provide personnel for the Fuel System in accordance with such approved staffing plan. Operating Agreement, Section 3.0l(hh);
- Obtain [Consortium] approval prior to the appointment or removal of Allied's general manager for the Fuel System. Operating Agreement, Section 6.04;
- Subject to the approval of the [Consortium] [Allied] shall prepare and maintain an operations manual . . . which shall include quality control and a preventative maintenance program utilizing ATA Specification 103 and the Fuel System maintenance manuals as the basis for minimum standards, which . . . shall become [Consortium] property. Operating Agreement, Section 3.0l(e).

Under the Operating Agreement, the Consortium must pay for Allied's Reimbursable Direct Costs relating to the services provided by Allied to the Consortium, which include:

- Direct salaries and wages (including overtime pay), together with payments or costs for reasonable associated payroll expenses, retirement funds or unemployment compensation funds, employee savings programs, life, health, accident and unemployment insurance premiums, Workers' Compensation, vacation and holiday pay, sick leave pay and other fringe benefits for [Allied's] employees assigned to operate the Fuel System, but excluding any multi-employer pension fund

payments or costs, hourly or salaried employee severance pay or management bonus, unless specifically approved in writing by the [Consortium]. Operating Agreement, Section 4.01 (b)(1);

- Commercially reasonable costs of auto repair, maintenance, parts and insurance coverage for motor vehicles used solely in connection with the Fuel System at DFW or Fuel System Capital Assets. Operating Agreement 4.01 (b)(1); and
- Costs of gasoline or other fuel for the Fuel System ground equipment usage; and cost of equipment, material and supplies for the inspection, testing and analysis of fuel in the Fuel System. Operating Agreement, Sections 4.01 (7) and (10).

The Access Agreement grants Allied the right to withdraw fuel from the Fuel Service System at DFW as authorized by the air carriers. Allied must maintain all records of fuel transactions, including records of withdrawals of fuel from the Fuel System and all distributions of fuel into aircraft. The Consortium has the right to perform inspections of all equipment that interface with the Fuel System to verify compatibility and safety, and with respect to any metering device, the accuracy of such device. Access Agreement Sections 2.3, 7.6 and 7.5.

Staffing and Scheduling

Allied has authority to hire employees but must receive approval from the Consortium of airlines prior to significantly increasing staffing levels. The Employer must obtain the consent and approval from the airlines before it can make or, in the case of Allied's unionized employees, offer changes to the wages and terms and conditions of employment of its employees. Allied annually submits a proposed budget to a Consortium committee, comprised of representatives from the airlines. In meetings concerning the most recent budget, the cost of overtime was discussed. Ultimately, the Consortium agreed to the budget number that was initially submitted by Allied, however, American informed Allied that it would like to see the overtime rates decrease and stated that Allied was authorized to hire more employees in order to reduce the overtime. During the year, Allied will discuss unexpected expenses as they arise with the Carriers. Additionally, when the billed expenses exceed the budgeted forecast, American has requested an explanation of the cost overrun from Allied.

The number of employees scheduled by Allied is determined by the airlines' schedules. Once a month the airlines send Allied the flight schedules and based upon these schedules, Allied determines the staffing levels. Employees schedules are determined through a shift bid committee which is made up of representatives from the TWU and Allied. The airlines are not involved in this committee.

Carriers do request that Allied increase staffing under certain circumstances. For example, American has "Flex Banks" approximately seven to eight times a year, usually around the holidays. During these times, American adds additional flights. American has informed Allied and requested that the Employer ensure that there is sufficient staff to handle the fueling for the additional flights. In addition, if bad weather causes flights to back up, the airlines have requested that the Employer hold extra personnel to ensure that the backed up planes are fueled in a timely manner. In another example, prior to the Super Bowl weekend, American requested that Allied ensure that it would be fully staffed for the weekend and inquired about additional coverage in case of sick calls.

Carrier Involvement in Day-to-Day Operations

Much of Allied's performance for the carriers at DFW is governed by the fueling manuals of each respective carrier. The fueling manuals contain procedures and protocols that Allied's employees must follow relating to the fueling of each carrier's aircraft. Allied employees have access to each airline's fueling manuals. In addition, Allied issues its own handbooks to its employees.

Allied supervises its employees on a day-to-day basis. American conducts quarterly observations of Allied employees and when it notes deficiencies in performance, it requests that Allied correct the issues. The other airlines conduct yearly reviews of Allied employee performance. When, during the regular course of their work, American personnel witness Allied employees violating safety or other protocol, they inform Allied supervisors and request corrective action or discipline and have required Allied submit documentary evidence of the action taken by Allied.

For example, in approximately May 2017, Mesa Airlines had issues with Allied employees regarding fuel spills. In response to these fuel spills, Mesa Airlines began monitoring Allied employees more closely. Based on these observations, Mesa Airlines personnel informed the Allied Training Supervisor that several Allied fuelers were not following the proper automatic fueling

procedure. Mesa Airlines personnel instructed the Allied employees how to correctly perform this procedure and informed Allied that it had done so. Mesa's Regional Manager - Airport Operations followed up with Allied senior managers documenting the infraction and requesting Allied follow up with a copy of their fuel training record and corrective action to ensure these two employees properly understand the correct fuel procedures.

American periodically issues memos that apply to Allied employees. For instance, American sent a memorandum requesting that Allied employees not smoke, even in designated smoking areas and not use Samsung Galaxy phones because they were a safety hazard. Similarly, American sends memos to Allied employees regarding fueling procedures.

Allied hires and interviews its employees and it is not required to seek approval from the airlines before making a hiring decision. Allied employees must be able to read, write, and speak English, possess a valid Texas Driver's License, pass a background check and pass a math test. The requirement to read, write, and speak English is mandated by American. The Driver's License and background check are mandated by the DFW Airport.

On a daily basis, certain Allied personnel have three regularly scheduled calls with American to go over delays, the previous day's performance, and issues with equipment and service. Allied also has regularly scheduled calls with American Eagle twice daily. On a weekly basis, American personnel make about fifty phone calls directly to Allied employees with updates to rapidly changing information such as gate changes and delays.

American personnel attend Allied safety meetings. At the Allied safety meeting, if American brings up an issue, it can require that Allied employees make necessary changes to comply with their safety requirements. Allied personnel, in turn, attend American's' safety meetings. Allied sends a safety manager, several other managers, and a union member of the safety committee to these meetings. Employees of Allied also attend safety meetings of the other airlines, but not as frequently as American's safety meetings.

Carrier Access to Allied's Operations and Records

Allied maintains records that are audited by the airlines. Allied keeps fuel inventory records which are provided to the airlines on a daily basis. These records show each airline how much fuel they have. Airlines also

perform audits in response to an incident. Approximately twice a year carriers audit maintenance records.

Fuel tickets show the amount of fuel placed in each carrier's planes. The airlines receive copies of fuel tickets on a daily basis. The fuel tickets must include the date, name of the airline, flight number, type and quantity of fuel, fuel truck number, and the name of the employee who fueled the plane. The fuel ticket is a form created by Allied which it uses with all airlines. American audits fuel tickets on a weekly or monthly basis.

Carriers have reported fuel ticket irregularities to Allied. When Allied receives these reports, its training supervisor generally retrain employees involved on the proper way to complete the fuel tickets. Although, the airlines do not generally direct Allied to discipline employees for improperly completing fuel tickets, Allied has disciplined employees for not doing so. It is unclear how many employees have received such discipline.

Allied also maintains maintenance records of the fueling equipment it uses, including the fuel lines, and fueling tanks. All of the airlines annually audit Allied's maintenance records. One record that is maintained for American is a certified trainer form (802 Form). The 802 Form shows that only certified fuelers have been fueling American's planes. On a monthly basis, American requires that Allied provide it with these 802 Forms.

Carrier's Role in Personnel Decisions and Benefits

The wages and benefits of employees are set by the collective bargaining agreement between the TWU and Allied. American has no authority to directly discipline Allied employees. However, American has the authority to request a particular Allied employee not fuel its planes and has exercised this authority. The Employer provided multiple examples of carrier involvement in Allied personnel and discipline matters.

For example, in the late 1990s or early 2000s, Delta requested that Allied remove an employee from fueling its aircraft because this employee allegedly made racist remarks. Ultimately, Allied fired that employee. In around 2008 or 2009, Airborne Express requested that an Allied employee be removed from fueling its planes because the employee was allegedly unprofessional in dealing with Airborne Express personnel. Allied reassigned, but apparently did not discipline, this employee to fuel another carrier's planes.

In another example, in 2014, an Allied employee committed several safety violations including pulling a fuel cart away from a plane while the hose was still hooked up to the plane. After this event, American informed Allied that the employee was no longer allowed to fuel American planes. No one from American directed Allied to terminate or otherwise discipline the employee. However, because the employee had violated serious safety provisions of both the Allied handbook and the American fueling manual, Allied terminated the employee.

On April 28, 2016, 15 Allied employees punched in and shortly thereafter all went home sick, resulting in multiple delays for American planes. Allied immediately suspended all of these employees and deactivated their employee ID badges in order to prevent them from returning to the airport and influencing other employees to leave work.

Soon thereafter, Allied managers attended a meeting with American Airlines managers where they provided the reason for the delays and Allied's contingency plan. Allied also informed American that it suspended the employees who had left and had their badges deactivated. In an affidavit to the NLRB Investigator, Allied Operations Manager Douglas Miller later testified that at the time he intended to terminate all of these employees for their actions. Allied did not inform American at the meeting that it intended to terminate these employees. During the meeting, American stated that it did not want these employees fueling their planes. Allied informed American that it planned on having these employees fuel American Eagle planes and American responded that it did not want these employees fueling those planes either. American asked how this would affect Allied's staffing and Allied informed them that they were already down 20 employees, if they lost the 15 employees they would be down 35 employees, and it would take a while to replace them. American informed Allied that these employees could continue fueling their airplanes but requested that Allied counsel the employees and ensure this "sick out" not occur again. Although American did not dictate to Allied what level of discipline to issue these employees, these employees were all subsequently disciplined by Allied.

Most recently, in approximately May 2017, an American inspector caught an Allied employee violating protocol by fueling an airplane without completing an inspection sheet. Because the employee was ultimately honest about the violation, the American inspector told Allied personnel that there was no need

to discipline the employee. No disciplinary action was taken against this employee.

Carrier Control over Training

Allied's training program is referred to as a "train to trainer." Under that program, an employee from each of the airlines directly trains an Allied training supervisor who, in turn, trains all Allied employees. Allied training supervisors are certified to train employees on the procedures of all the customers. Currently, Allied has two training supervisors. When employees are hired by Allied, they are directly trained by an Allied training supervisor. Full-time employees are trained on how to fuel planes for all of the airlines while part-time employees are only trained on how to fuel American Eagle planes.

To be certified, Allied training supervisors complete about eight to 16 hours of training by American and anywhere from one to two hours of training by the other airlines. The training of Allied supervisors is not recurrent and additional training occurs when an airline adds new aircraft with new fueling procedures. During this training, airline personnel review fueling manuals with Allied training supervisors emphasizing all of the airline's specific requirements for fueling each aircraft. The fueling procedures vary from airline to airline. For instance, Emirates Airlines requires fuelers to be guided into the aircraft by another employee while hooking up fueling equipment to the airplane, whereas other airlines do not have this requirement. Another example, is that only British Airways requires fuelers to wait 20 minutes after the plane arrives at the gate before hooking up the fueling equipment to its planes.

Every year, an Allied training supervisor administers a proficiency test which includes questions about airlines' specific fueling procedures and Federal Aviation Administration requirements. This proficiency test was created by Allied. The airlines do not review or approve this test and do not require that Allied administer this proficiency test. The proficiency test was adapted from the airlines' fueling manual. If an employee fails the proficiency test, Allied will retrain and retest the employee.

In addition, seven airlines have their own tests which are administered to Allied employees either annually, biannually or every three years, depending on the airline. If an employee fails the test, the employee is not allowed to fuel those airlines' planes until they pass the test. Allied has terminated a few employees who failed these tests multiple times. Employees who fail to

respond to the carriers' training requests within the specified time period face deactivation of their fueling credentials by the carrier.

Carrier Provided Equipment and Holding Out to the Public

Allied employees have their own uniforms and safety vests with the Allied logo on them. Allied employees wear security badges that identify them as employees of Allied.

The Consortium pays for all of the equipment that Allied employees use on a day-to-day basis to fuel planes. This equipment includes stationary hydrant fueling cars, tanker trucks, hydrant trucks, and support vehicles. The equipment is branded with Allied logos.

The fuel used to fuel the airplanes is owned by the Consortium. DFW Airport owns underground and above ground storage tanks where the airplane fuel is stored. Allied pays the Airport for the use of the tanks and bills this cost to the Consortium.

The Consortium leases an office building called the "Fuel Center" which is used by Allied to dispatch fuel orders. Only Allied employees work out of the Fuel Center. American provides Allied with computers in the Fuel Center and a program called Sabre which provides Allied data on American's flights including arrival time and the arrival gate. American also provides a printer that generates fuel slips which direct Allied employees the amount of fuel to put into a particular plane. This information is generated through the Sabre system. The other airlines do not provide computers to Allied. These airlines will email or call Allied to let them know their specific fueling needs.

The Consortium also leases a maintenance area consisting of five separate bays which Allied uses to repair and clean fueling equipment. Only Allied employees work in the maintenance area.

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.

Allied does not fly aircraft and is not directly or indirectly owned by an air carrier. The first part of the two-part test is met because fueling maintenance, fuel tank operations and ground handling is work traditionally performed by airline employees. See e.g., *Aircraft Services International*, 45 NMB 50 (2018).

Therefore, to determine whether Allied 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 Allied's and Its Employees

Similar to the PAC consortium in *ABM Onsite Servs.*, 45 NMB 27 (2018), the Consortium in this case is made up entirely of airline carriers and exercises significant oversight over Allied's operations at DFW. Allied's operations at DFW are essentially governed by its Operating Agreement with the Consortium, its Access Agreement with the Consortium, and each carrier's fueling manual.

While Allied has the authority to hire employees, it must receive approval from the Consortium prior to significantly increasing staffing levels. In the

most recent budget discussions, the Consortium authorized Allied to hire more employees in order to reduce the overtime costs billed to the Consortium. The number of employees scheduled on a shift are determined by airlines' schedules and the carriers do request that Allied make staffing adjustments based upon weather, special events and seasonal fluctuations. Wages and benefits for Allied employees are set by the collective bargaining agreement between Allied and the TWU. However, Allied submits an annual budget to the Consortium for its approval. During the budget process carriers, through their consortium representatives, raise issues and make recommendations concerning staffing, retention hiring and overtime.

The Employer supervises its own employees. However, carriers can and have effectively recommended discipline for Allied employees. Allied employees interact with carrier personnel daily and when carriers observe Allied employees violating a safety or other protocol they inform Allied and request corrective action or discipline. In addition, the carriers conduct either quarterly or yearly reviews of Allied employees' performance. Also, American, Allied's largest client at DFW, periodically issues memos directly to Allied employees regarding safety issues and fueling procedures.

On a daily basis, Allied has three regularly scheduled calls with American to go over the previous day's performance, delays and issues with equipment and service. Allied personnel attend Allied safety meetings and Allied sends a safety manager and several other managers and a union member to American safety meetings. The Consortium performs inspections of all equipment used by Allied and verifies the safety and accuracy of the equipment.

Carriers have a broad right under the Operating and Access Agreements to audit Allied's operations and they regularly exercise these rights. Fuel inventory records are provided to the airlines on a daily basis; fuel tickets are audited by American on a weekly or monthly basis. Carriers perform audits in response to an incident and carriers audit Allied's maintenance records twice a year.

Allied Training Supervisors are trained by the carriers and these Training Supervisors, in turn, train Allied employees. Allied requires its employees to take yearly proficiency tests which are adapted from the carriers' fueling manuals. In addition, many of the airlines administer their own tests to Allied

employees. Failure to take carriers' test, or failure of the test itself, will result in deactivation of the Allied employee's fueling credentials by the carrier.

Allied employees wear uniforms and security badges with the Allied logo on them. However, the fuel used by Allied is owned by the Consortium; the storage tanks where the fuel is stored are leased by Allied from the Airport and Allied bills this cost to the Consortium. The Consortium leases an office building which is used by Allied to dispatch fuel orders. The Consortium also leases a maintenance area used to repair and clean fueling equipment. The Consortium pays for all of the fueling equipment used by Allied. This equipment, however, is branded with Allied logos. American provides Allied with computers and the Sabre program that furnishes Allied with the data on American flights as well as a printer that generates the fuel slips.

The record provided in the instant case stands in contrast to the record provided to the NLRB in *Allied Aviation Serv. Co. of New Jersey v. Nat'l Labor Relations Bd.*, 854 F.3d 55 (D.C. Cir. 2017). In that case, the D.C. Circuit noted:

Allied presented no evidence that it was under contract with any common carrier, nor did it identify any case in which an employer without a carrier contract was subject to RLA jurisdiction. Instead, the only contract the record refers to—fleeting—is Allied's "performance driven" contract with the Port Authority. . . . [T]he record is devoid of evidence of the composition of the fueling committee, whether it contains any, let alone a controlling bloc of, common air carrier representatives, or the extent of any authority the fueling committee may have to control Allied's staffing decisions.

Id., at 64. As cited and discussed above, Allied provided both its Operating Agreement and Access Agreement with the Consortium (and its carrier members) to the NMB and NLRB. These agreements govern Allied's operations at DFW including, finance and budget, staffing levels, services to be provided, fees and charges.

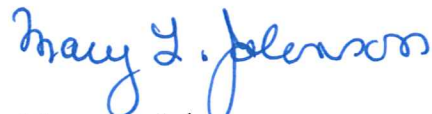
In sum, the record establishes that carriers, through the airline Consortium, exercise sufficient control over Allied's operations at DFW to establish RLA jurisdiction.

We recognize that this determination differs from the NLRB's decision regarding Allied's operations at Newark International Airport (EWR) discussed above. The uneven results for Allied's operations at EWR and DFW are the consequence of an unequal application of the NLRB's referral policy and a departure from a standard of control known to the rail and air industries for many decades. The Board is aware that changes in the airline industry have led to an expanding population of subcontractors performing jobs that are critical to the operation of air carriers, and were once airline jobs. However, this expansion does not justify the diminishing of a jurisdictional standard that has been in place for decades. Nor, does the RLA mandate carrier control to a level where a carrier's interaction with its subcontractors is indistinguishable from its interaction with its own employees. The Board has a responsibility to monitor and meet the changes in the air and rail industries with careful consideration, being ever mindful of the purpose of the RLA. These changes do not demand a capricious response that swings back and forth in quadrennial cycles, creating unequal outcomes and the possibility of disruption. Instead, these jurisdiction determinations require a consistent rationale based upon the RLA, the facts, and NMB precedent.

CONCLUSION

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

BY DIRECTION OF THE NATIONAL MEDIATION BOARD



Mary L. Johnson
General Counsel

Copies to:
Gregory S. Lisi, Esq.
Frank W. Brennan, Esq.
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Member Puchala, dissenting.

Contrary to my colleagues, I would not find that Allied's operations and employees at DFW 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 including the hiring, firing and discipline of subcontractor employees and a high degree of supervision over how the subcontractor employees perform their duties. As I have previously stated, without such evidence of carrier control over the manner of rendition of their services, the other factors relied on by my colleagues cannot establish RLA jurisdiction.

As I stated in my dissent in *ABM, above*, the air transportation business model has changed since the Board's 1980 evaluation of its jurisdictional standards. The increased pressure on airlines to lower costs and increase revenues has led to an expanding population of subcontractor employees performing what once were airline jobs. Despite these changed circumstances, the majority's test continues to substitute the terms of a cost plus contract for actual control of Allied's employees by an airline to establish RLA jurisdiction. In fact, however, Allied's relationship with the Consortium is that of two equal parties. In no other business environment would the terms of a cost plus contract be construed as placing one party of the contract under the control of the other party to the contract.

The cost plus contract between the DFW Consortium and Allied does not give the Consortium or any carrier the right to hire, fire or discipline Allied employees or have access to their personnel files. The record indicates that Allied management has reserved those functions for itself. Allied controls the manner in which it conducts its business. Allied is responsible for its own personnel decisions. Allied, not airline officials, supervise Allied employees. Allied determines its own staffing levels based upon the airlines' schedules. While airlines can request staffing changes, corrective action or discipline, Allied ultimately makes independent decisions regarding its employees. The role of carrier employees in discipline is merely reportorial. The wages and benefits for Allied employees are set by the Collective Bargaining Agreement between Allied and the TWU not by the Consortium or airlines. The record indicates that work schedules are determined by an Allied/TWU Committee and that the work schedules are bid every four months by Allied personnel.

Allied controls the manner in which it conducts its business. Allied and employees follow the Allied Employee Manual. Allied management develops and administers the necessary training for aircraft fueling and equipment operation for Allied employees. Allied fueling procedures are specific to aircraft type and comply with the manufacturer and Federal Aviation Authority (FAA) regulations, directives and requirements.

The record indicates that the Consortium only has access to Allied records which concern the fueling operations outlined in the contract such as fuel receipts, fuel inventory, employee training and equipment records. Allied's contract with the Consortium does not grant access to Allied corporate records.

Allied employees are not held out to the public as carrier employees or their representatives through the display of recognizable Consortium or airline corporate insignia. Quite the opposite, their uniforms and security badges identify them as Allied employees. The equipment used is branded with Allied logos.