NATIONAL MEDIATION BOARD
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52 NMB No. 8
November 8, 2024

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National Labor Relations Board
Office of the Solicitor
1015 Half Street, SE
Washington, DC 20570-0001

Re: NMB File No. CJ-7238
NLRB Case No. 22-RC-292717
Swissport Cargo Services, LP

Dear Mr. Jacob:

This responds to your request for the National Mediation Board's (NMB or Board) opinion regarding whether Swissport Cargo Services, LP (Swissport) is subject to the Railway Labor Act (RLA or Act), 45 U.S.C. § 151, *et seq*. On December 1, 2022, the National Labor Relations Board (NLRB) requested an opinion regarding whether Swissport's operations are subject to the RLA. Since the 1980s, the Board has applied a two-part function and control test to determine whether entities that are neither railroads nor airlines are subject to the RLA. Having reviewed the plain language of the statute in light of the contentions in this case, the Board finds it necessary to reconsider the test, and finds that this two-part test strays, both in structure and its application, from the plain language of the statute. As discussed below, the NMB finds no RLA jurisdiction in this case.

I. PROCEDURAL BACKGROUND

On March 23, 2022, the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM) filed a petition with NLRB Region 22 (Region 22 or the Region) seeking to represent all full- and part-time warehouse employees employed by Swissport at Newark Liberty International Airport (EWR). Service Employees International Union, Local 32BJ (SEIU) was permitted to intervene based on a separate showing of interest among the petitioned-for employees. On April 12, 13 and 25, 2022, the Region conducted a pre-election hearing on the sole issue of jurisdiction. The IAM and SEIU (collectively, the Unions) contended Swissport's operations and employees at EWR are subject to National Labor Relations Act (NLRA) jurisdiction; Swissport contended its EWR operations and employees are subject to RLA jurisdiction.

On July 26, 2022, Region 22 issued a Decision and Direction of Election (DDE), finding that Swissport is subject to NLRA jurisdiction; and that Swissport's sole customer at EWR, United Airlines, Inc. (United), does not have sufficient control over Swissport's EWR operations for it to be subject to the RLA. In reaching its decision, the Region followed precedent that applied the NMB's two-part function and control test for determining derivative carrier status.

On August 9, 2022, Swissport filed a Request for Review of the DDE. On August 16, 2022, IAM filed a response in opposition to Swissport's request. SEIU also opposed Swissport's request for review. On December 1, 2022, the NLRB referred the case to the NMB for an advisory opinion on the issue of jurisdiction. On January 23, 2023, Swissport, IAM, and SEIU submitted initial position statements to the NMB. On February 17, 2023, Swissport submitted a reply to the Unions' position statements. SEIU and IAM each submitted a response to Swissport's reply.

On June 9, 2023, in response to the Board's request, United submitted a position statement. The NMB's opinion is based on the request and the investigatory record provided by the NLRB, and the submissions to the NMB from IAM, SEIU, Swissport and United.

II. CONTENTIONS

IAM argues that the NLRB correctly found that United does not directly or indirectly control Swissport's operations at EWR, and its relationship with Swissport is a typical independent contractor relationship. IAM asks the Board to re-examine and reject its current "derivative carrier" function and control test under 45 U.S.C. § 151, First (Section 1, First), and its six-factor test for determining carrier control, arguing that the test has no support in the language of Section 1, First which by its terms applies only to the rail industry. IAM instead

asks the NMB to return to its "original" test that looked only at the plain language of 45 U.S.C. § 181 (Section 201) in determining whether the RLA covers airline contractors and their employees.

SEIU also asserts that United does not control Swissport within the meaning of the statute and therefore the NMB should decline jurisdiction. Like IAM, SEIU asks the NMB to expressly disavow the six-factor control test, arguing that it strays from Congress's intent to exclude independent contractors from the RLA, and has resulted in "a massive, unwarranted expansion" of RLA jurisdiction.

Swissport contends the facts in this case clearly establish that United has complete authority over all aspects of its business operations at EWR, and that jurisdiction of Swissport and its operations and employees at EWR falls under the RLA. According to Swissport, the applicable legal framework is the NMB's traditional two-part function and control test, with carrier control determined by its traditional six-factor test, with no one factor elevated above the others as reaffirmed by the Board in *ABM-Onsite Servs*, 45 NMB 27 (2018). United also submits that under the NMB's two-part function and control test and six-factor test for determining carrier control, Swissport's operations and employees at EWR are subject to sufficient control by United to subject it to RLA jurisdiction.

III. FACTUAL BACKGROUND

Swissport is not an air carrier engaged in interstate or foreign commerce. Swissport is a ground handling services company with corporate offices domestically in Raleigh, North Carolina, and internationally in Zurich, Switzerland. In the United States, Swissport provides services at 16 airports, including EWR, and has between 35-40 different customers, including United.

Effective October 1, 2020, Swissport and United entered into a "Cargo Handling Services Agreement" (Agreement) under which Swissport was engaged to "handle and process, manifest, warehouse, screen, administer and execute" United's cargo operations at EWR. Swissport is the exclusive provider of cargo services for United at EWR, and United is Swissport's only customer there.

Under the Agreement, Swissport is solely responsible for providing sufficient manpower, supervision and discipline to ensure the requirements and standards of the Agreement are met. It has full and complete authority over its employees and has the sole right to hire and discharge them, although the record does include some evidence that United management has minor involvement with personnel matters. Swissport is solely responsible for all employee pay and benefits related obligations, and is restricted from performing cargo services for other carriers at United's EWR cargo facility during the term of the Agreement and for two years after its expiration, absent the carrier's written consent. If

consent is given, Swissport cannot charge any other airline cargo customers a more favorable rate than the rate it charges United at its EWR cargo facility.

The Agreement requires Swissport to provide sufficient supervision of employees performing the contracted-for services to assure the requirements and standards of the Agreement are met. Swissport maintains its own Employee Handbook applicable to all Swissport non-exempt employees working within the United States. The Handbook describes the employees' basic terms and conditions of employment with Swissport, including benefits, attendance, holidays, paid sick leave, vacation, health and life insurance coverage, leaves of absence, retirement savings, and rules of conduct and discipline.

The Agreement provides that Swissport is responsible for all employee-related tax, levy, benefit, pension, withholding, accrual, payment, reporting and other obligations including: personal income, wage, earnings, occupation, social security, workers' compensation, unemployment, sickness, and disability insurance taxes; payroll levies; employee medical coverage benefit requirements; and pension requirements. Swissport is solely responsible for implementation of these contractual requirements, and neither Swissport nor United claim the carrier has been involved with any of them.

Swissport follows guidance from the Port Authority of New York and New Jersey, which sets minimum hourly wage rates, and has the discretion to pay its employees above the set minimum wage. There is no evidence in the record that United directs or sets, or has any involvement in directing or setting, the pay rates for Swissport employees. In addition, United cannot approve or deny wage increases for hourly Swissport employees working at EWR. Swissport provides all benefits to its EWR employees and United makes no claim that it controls or influences in any way the pay and/or benefits of Swissport's employees. Swissport does not claim that United possesses or exercises such control or influence.

IV. DISCUSSION

Since the 1980s, the NMB has used a two-part function and control test to determine whether a "derivative carrier," a company that is neither an airline or railroad but has a contract to provide services to a carrier, is 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.[1] Second, the NMB determines whether the employer is directly or indirectly owned or controlled by, or under common control with, any carrier or carriers. For the most part, as is

[1] The first part of the two-part test has no basis in statutory language and serves little purpose today when many of the functions at issue have been outsourced for decades. *See, e.g., Mercury Refueling,* 9 NMB 451 (1981) (fueling); *Caribbean Airline Servs.*, 19 NMB 242 (1992) (ground services).

the case with Swissport, the derivative carrier is an independent company that contracts with an airline or airlines to provide certain services.[2]

Our review must necessarily start with the statutory text to understand how far the Board's recent precedent has strayed from the plain language of the Act and why it is necessary to return to the definitions of carrier by rail and air that Congress established. As will be discussed further below, the RLA's definition of carrier by air does not include the control language found in the two-part test. That language is in the definition of rail carrier, where Congress did not intend for it to cover independent contractors.

The derivative carrier test is atextual. The term "derivative carrier" is not found in the statute. Congress enacted the RLA in 1926 and it initially covered only rail carriers. The definitions section of the statute, Section 1, First sets forth key terms. Section 1, First states that the term carrier includes "any railroad subject to the jurisdiction of the Surface Transportation Board" and the following:

> [a]ny company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad . . . .[3]

The second part of the test, the control element, extracts the words "directly or indirectly owned or controlled by or under common control with, any carrier" from the definition and conveniently ignores not only the next two words "by railroad" but also the conjunctive requirement that the controlled entity be providing services in connection with the transportation of goods by railroad. The plain language of the statute makes this control language specific to railroads and services related to transportation by railroad.

This ownership and control language is absent from the statute's definition of air carrier. In 1936, Congress extended the RLA's coverage to air carriers. Notably, Congress did not add carriers by air to the list of entities in Section 1, First. Instead, as the Board described in 1936, the amendments added a title II to the Act "creating the provisions applicable to air carriers and their employees.

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[2] Only two out of the 47 jurisdictional advisory opinions that the NMB has sent to the NLRB since 2003 have dealt with companies contracting with rail carriers.

[3] 45 U.S.C. § 151, First. Section 1, First also includes as a carrier "any express company that would have been subject to subtitle IV of title 49 United States Code, as of December 31, 1995" and "any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier.'" Neither of these definitions encompasses the independent companies that provide services to airlines or railroads through contracts.

The original Act as amended in 1934 applying to railroads was made title I."[4] Within title II,[5] Section 201 provides that

> all of the provisions of title I of this Act, except the provisions of section 3 thereof, [45 U.S.C. § 153,] are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.[6]

This language is clear and unambiguous. Congress limited the application of the provisions of the Act to common carriers by air (or carriers by air transporting mail for or under contract with the United States government) and any individual who performed work *as an employee or subordinate official* for that carrier or carriers. Further, the phrase "subject to its or their continuing authority to supervise and direct the manner of rendition his service" mirrors the language in 45 U.S.C. § 151, Fifth (Section 1, Fifth) that defines an "employee" as "every person in the service of a rail carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official . . . ."[7] Congress did not echo the language of Section 1, First and further define common carrier by air to include companies under corporate ownership or control by air carriers. The plain language of the 1936 amendment simply cannot be read to extend the RLA's jurisdiction to independent contractors that contract to provide services with an air carrier.

Further, 45 U.S.C. § 182 (Section 202) provides that

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[4] 1 NMB ANN. REP. 3 (1936).

[5] Title II includes 45 U.S.C. §§ 181-188. 45 U.S.C. § 182 in particular will be discussed and cited as Section 202.

[6] 45 U.S.C. § 181.

[7] The Act does not define "subordinate official." It is a term derived from the Transportation Act of 1920. The Transportation Act included provisions pertaining to the handling of labor disputes between railroads and their employees and subordinate officials. The Interstate Commerce Commission (ICC) was involved in distinguishing the work of railroad employees and subordinate officials from that of management officials. A February 5, 1924 ICC order held that the term 'subordinate official' as used in Title III of the Transportation Act of 1920, a term also used in the RLA, included "foremen or supervisors . . . with rank and title below that of general foremen." *Seaboard Air Line Ry.*, 1 NMB 168 (1940). The RLA, as enacted in 1926, repealed Title III of the Transportation Act, but the function of the ICC—namely, determining whether individuals are employees or subordinate officials eligible to vote in representation elections and bargain collectively under the RLA or management officials beyond the Act's coverage—was preserved in Section 1, Fifth. *See, e.g., Northwest Airlines*, 2 NMB 19 (1940); *Northwest Airlines*, 2 NMB 27 (1940). *See generally* NMB Representation Manual Section 9.211.

> the duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of title I of this Act, except section 3 thereof, [45 U.S.C. § 153,] 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 1 thereof.[8]

Swissport and our dissenting colleague argue that this statutory language means that the control language from the definition of rail carrier must be considered part of the definition of air carrier. They rely on *Thibodeaux v. Executive Jet International, Inc.*, 328 F.3d 752 (5th Cir. 2003) and *Verrett v. SABRE Group*, 70 F.Supp.2d 1277 (N.D. Okla. 1999), two cases arising in the context of the Fair Labor Standards Act and relying on the Board's own cases applying the two-part jurisdictional test.[9]

Not long after the 1936 amendments, however, the Board itself rejected that interpretation, recognizing that the definition of carrier by rail in Section 1, First and definition carrier by air in Section 201 were distinct and separate. In *Northwest Airlines*, 2 NMB 19 (1948), the Board discussed the 1936 amendments and stated the following:

> Section 202 says that the duties, requirements, etc., set forth in Title I, etc., 'shall apply' to carriers by air and their employees 'as though' the carriers and their employees 'were' included in the definitions contained in Section I of Title I. Section 202 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, Title I. The words 'as though' used in Section 202 obviously are synonymous with the words 'as if' and the word 'were' is used in the subjunctive mood. To put it a little differently, Section 202 simply gives the Mediation Board the power to impose upon air carriers and their employees, the duties, requirements, etc. set forth in Title I, just as if those duties, requirements etc., had been restated at length in Title II.

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[8] 45 U.S.C. § 182.

[9] In *Verrett*, the court applied the NMB's traditional two-part test to find that the company—which was under common ownership with American Airlines and operated computer reservation systems for American and other airlines—was a carrier under the RLA and that the overtime exemption to the FLSA applied. *Verrett*, 70 F.Supp.2d at 1281. In *Thibodeaux*, the court cited *Verrett* in finding that the Section 1, First definition "results in RLA coverage for carrier affiliates that do not fly aircraft for the transportation of freight or passengers if their functions are nonetheless related to air transportation," and found that the overtime exemption applied. *Thibodeaux*, 328 F.3d at 752.

> Thus, Section 202 on its face relates not to the coverage of Title II, but *only* to the consequences and effect or effects of coverage upon 'said' carriers by air and their employees – in other words the carriers and employees referred to in Section 201. Section 202 is not even reached until that initial question of coverage under Section 202 is first determined.

Id. at 25-26. Thus, the Board recognized in 1948 that although Congress intended to extend RLA coverage to the airline industry it did not intend to define carriers in the two industries the same way.

Congress likely did not extend the definition of air carrier to include companies under control of carriers because of the fledgling nature of the airline industry compared with the railroad industry which had been an essential transportation system for almost 100 years. In 1936, there were only 10,000 employees in the airline industry, and the only unionized work group was pilots.[10]

As evidenced by the debate at the 1936 hearings, Congress did recognize that, even in its infancy, the airline industry shared several characteristics with rail transportation that made RLA coverage appropriate. O.S. Beyer, Director of Labor Relations for the Coordinator of Transportation, noted that although the airline industry "was still very young as industries go," it was an organized transportation system and the Wagner Act legislation did not provide the dispute resolution mechanisms of mediation and arbitration that were equally important for air transport. *See To Amend the Railway Labor Act: Hearing on S. 2496 Before the S. Comm. On Interstate Commerce*, 74th Cong. 28 (1935) (statement of O.S. Beyer).[11] Both airline and railroad operations are spread geographically over a widely dispersed routing system. Therefore, bargaining units and the bargaining process should be systemwide rather than restricted to a single facility or a limited geographic area. Further, employees in the air industry fall into generally distinguishable occupational groups similar to the occupational craft or class units in the railroad industry. That the purpose of the 1936 amendments was to extend the same coverage of the RLA to the airline industry as to the rail industry is evident from Report of the Senate Committee on Interstate Commerce on S. 2496 recommending the bill's passage and quoting Beyer's statement that "anything which makes for stability in labor relations and good morale of the railroad industry applies also to the flying industry." S. REP. NO. 74-895, at 1 (1935). The Report of the House Committee on Interstate and Foreign Commerce on S. 2496, states that "[i]n short, this measure provides the same machinery

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[10] Mark Kahn, *Labor-Management Relations in the Airline Industry*, *in* THE RAILWAY LABOR ACT AT FIFTY 97 (Charles M. Rehmus ed., 1977).

[11] All citations to the 1934 and 1936 legislative history are reprinted in THE RAILWAY LABOR ACT OF 1926*:* A LEGISLATIVE HISTORY (Michael H. Campbell & Edward C. Brewer III eds., 1988).

for mediating disputes in the air transportation industry which is so successful on the railroads." H.R. REP. NO. 74-2243, at 3 (1935). It would be decades before the Board would look to the definition of rail carrier established in 1934 to define derivative carriers in the airline industry.

The language in the control element of the NMB's two-part test was added to the definition of carrier in Section 1, First as part of the 1934 amendments to the 1926 Act. In the years following the passage of the 1926 Act, some railroads created wholly owned subsidiaries to perform some of their transportation-related functions in an effort to evade certain tax provisions and other obligations specific to railroads.[12] Likely in part as a reaction to such actions by the railroads, Joseph Eastman, the Federal Coordinator of Transportation and drafter of the 1934 amendments, sought to amend the definition of "carrier" under Section 1, First to include companies owned or controlled by carriers. Eastman's initial draft amendments sought to extend the RLA to all employees doing rail transportation work, regardless of whether they worked for a carrier. *See To Amend the Railway Labor Act: Hearings on S. 3266 Before the S. Comm. on Interstate Commerce*, 73rd Cong. 10 (1934) (statement of Joseph Eastman). Eastman's initial draft would have added the following to the definition of "carrier": "any company operating any equipment or facilities or furnishing any service included within the definition of the terms 'railroad' and 'transportation' as defined in the Interstate Commerce Act." *Id.* at 10. According to Eastman, the most important of these companies were refrigerator car companies, along with companies performing maintenance work on railroad equipment and structures. *Id.*

Railroads objected to this expanded language and offered language which eliminated companies "which operate facilities or furnish service, forming a part of railroad transportation." *Id.* at 145. As a compromise, Section 1, First was amended to provide, in relevant part that the term "carrier" includes

> any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking services) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad.

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[12] *See, e.g., Utah Copper Co. v. R.R. Ret. Bd.*, 129 F.2d 358, 362 (10th Cir. 1942) ("Until 1920, all of the ore of the Copper Company was transported by the Railway Company in its own equipment, manned by its own employees . . . for the purpose of avoiding the effects of the recapture clause of the Revenue Act . . . this equipment was transferred to the Copper Company."); *ITEL Corp. v. R.R. Ret. Bd.*, 710 F.2d 1243 (7th Cir. 1985) (Congress foresaw and provided statutory tools to halt rail carriers who sought to undermine the [Railroad Unemployment Insurance Act and Railroad Retirement Act] by creating subsidiaries who in fact exist only to serve their rail carrier parents and whose primary purpose is to remove workers from the Acts' coverage.").

Eastman stated that this compromise language served the purpose of "limit(ing) the definition *to railroads or similar companies and the subsidiaries they control* which are engaged in transportation service . . . ." (emphasis added) *Hearings on H.R. 7650 Before the H. Comm. on Interstate and Foreign Commerce*, 73rd Cong.18 (1934) (Statement of Joseph Eastman).

Eastman made clear that trucking controlled by railroads would be included, but when asked whether trucking by independent contractors would be under the RLA, Eastman replied that it would not. *Id.* at 17. It is clear from the legislative history that by "[s]imply . . . making a contract with a private company a railroad would not" bring that private company under the provisions of the RLA. *Id.* at 21. Eastman also agreed when prompted that "private contractors were not subject to the provision[s] of this bill." *Id.* at 20. Discussion during the Senate hearing also indicates that the drafters of the amendment considered control in corporate terms and even described indirect control as a matter of percentage of stock owned by a holding company. *Id.* at 19-20.[13]

The Board recognized the meaning of this amended language when in a nearly contemporaneous determination it asserted jurisdiction over a company that furnished the Great Northern Railway with refrigerator equipment and repair services, and icing and refrigerator services. *Western Fruit Express Co.*, 1 NMB 496 (1936). The Board noted that the Great Northern Railroad had performed its own refrigerator service with its own employees prior to creating Western Fruit Express as its wholly owned subsidiary. *Id.* at 497. The Board found that Western Fruit Express was "a carrier because it is owned and controlled by the Great Northern Railroad and operates equipment or facilities and performs services in connection with the transportation, refrigeration or icing, storage and handling of property transported by railroad as defined in Section 1 First, of the Railway Labor Act as amended June 21, 1934." *Id.* at 500*; see also Erie R.R.*, 1 NMB 20 (1937) (dismissing a representation application for the craft or class of Marine Freight Handlers of Erie Railroad and Seaboard Terminal & Refrigeration Co., a contractor doing work that would otherwise be performed by the railroad, finding that it was an independent contractor not subject to the RLA). The Board's findings are consistent with the text of the RLA.

In short, the Board's decisions that were close in time to the enactment of the statutory language hewed to the intent of Congress, as expressed in text and

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[13] In *Virginian Ry. v. System Federation*, 300 U.S. 515 (1937), the Supreme Court recognized that independent contractors were not included in this definition when it found a legally enforceable obligation for a railroad to bargain with the representative of its own "back shop" employees and noted that "it is no answer that [the railroad] could close those back shops and turn the repair work to independent contractors. Whether the railroad should do its own work in its own shops or in those of another is a question for of railroad management. It is the [Railroad's] determination to make its own repairs which had brought its relations with its own shop employees within the purview of the RLA." *Id.* at 557.

legislative history.[14] Since the 1980s, however, the Board has used this same language untethered from its statutory context to assert jurisdiction over virtually any company with a contract for services with an air carrier—a broad jurisdictional span beyond the boundaries set by Congress.

From 1936 through the 1970s, there was little competition among air carriers and little incentive to outsource work. Most airlines conducted all their own transportation-related services. For example, in 1976, workers employed by United Airlines and represented by IAM included the Ramp & Stores, Food Service, Guards crafts or classes, positions that are routinely outsourced today.[15]

The perils of departing from statutory language became clearer as subcontracting increased as the airline industry grew and matured, particularly after the Airline Deregulation Act of 1978. The Board began using its two-part test in the 1980s as outsourcing became the norm and the Board lost jurisdiction over employees performing work that had "traditionally" been performed by air carrier employees. When the Board began looking to the language of the 1934 amendments to create the two-part test it considered factors that could be present in almost any contract for services with an air carrier.[16] The lack of a

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[14] The Board remained somewhat faithful to the text for some years afterward. In *Chesapeake & Ohio Ry.*, 4 NMB 215 (1962), the Board rejected a claim that the Chesapeake Realty Development Corp. (Realty) was a carrier within the meaning of Section 1, First because it was a wholly owned subsidiary of the Chesapeake and Ohio Railway (Railway) and managed a building housing the offices of the Railway using funds provided by the Railway. The Board stated that while it had been shown that Realty was a wholly owned subsidiary, it did not perform any services in connection with the transportation and handling of property transported by railroad. The Board stated "to be a 'carrier' the subsidiary must, among other requirements perform service "'in connection with the transportation receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage and handling of property transported by railroad.'" *Id.* at 217*; see also Canadian Nat'l Marine Corp.*, 6 NMB 480 (1978) (Company operating passenger, automobile and small truck ferry service between Bar Harbor, Maine and Yarmouth, Nova Scotia was not a carrier under Section 1, First even though it was a wholly owned subsidiary of Canadian National Railway because the ferry did not connect with rail passenger or freight operations).

But the Board also began to expand its jurisdiction to some independent contractors who provided services to railroads. In 1967, noting that Section 1, First included "indirect control" by a rail carrier, the Board asserted jurisdiction over a wholly owned subsidiary of a mining company that "might come under the literal definition of an independent contractor" because it performed services transferring ore from vessels to train cars only for the Pennsylvania Railroad "in a continuous operation" and those services had a strong connection with the transportation of freight. *Ohio & W. Pa. Dock Co.*, 4 NMB 285, 288 (1967).

[15] Kahn 108.

[16] In an early jurisdictional determination, *Pinkerton's Inc.*, 5 NMB 255 (1975), the Board acknowledged that where there is a contract for service between an air carrier and a company, a certain amount of interaction between the company and carrier equipment and personnel was to be expected. It stated that there was "necessary cooperation between the Company and the involved air carriers, and between the employees of the Company and the employees of the air carriers." *Id.* at 256-57. Even though the Board considered "control" as found in the definition of

textual basis for jurisdiction over derivative carriers has resulted in consideration by the Board of a series of inconsistent, various and varying factors to determine carrier control. These factors have included whether a carrier provided office space to an independent contractor, *see Aeroground, Inc.*, 28 NMB 510 (2001), *ServiceMaster Aviation Servs.*, 24 NMB 181 (1997); whether a company owned and maintained its own equipment, *see, e.g. Signature Flight Support*, 32 NMB 214 (2005), *Complete Skycap*, 31 NMB 1 (2003), *John Menzies PLC*, 30 NMB 463 (2003); whether carrier supervisors participated in the company's managerial meetings, *see Aircraft Servs. Int'l Group, Inc.*, 33 NMB 200, 211-212 (2006); whether the carrier conducted background investigations and required industry standard safety uniforms, *see Automobile Distribution of Buffalo, Inc.*, 37 NMB 372 (2010); whether the carrier provided contractor employee parking in its parking lot, *see Air Serv Corp.*, 35 NMB 201 (2008); and whether the carrier established appearance standards, *see Kannon Serv. Enterprises, Corp.*, 31 NMB 409 (2004). The Board even considered the fact that a carrier provided travel passes to a company's employees in several cases where it asserted jurisdiction. *See, e.g., John Menzies, above*; *Signature Flight Support*, 30 NMB 392 (2003).

In 2018, the Board adopted the following six factors cited by the court in *ABM Onsite Servs.-W., Inc. v. NLRB*, 849 F.3d 1137 (D.C. Cir. 2017), for determining carrier control:

> (1) the extent of the carrier's control over the manner in which the company conducts its business; (2) the carrier' access to the company's operations and records; (3) the carrier's role in the company's personnel decisions; (4) the degree of carrier supervision of the company's employees; (5) whether company employees are held out to the public as carrier employees; and (6) the extent of the carrier's control over employee training.

Id. at 1142. As the discussion above demonstrates, the Board had never applied these six factors exclusively and the court's ruling was the first time this test was standardized. Yet some of these factors are simply not relevant. For example, in recent years employees of subcontractors are rarely held out as carrier employees or wear uniforms with carrier insignia.

Not only does the two-part function and control test import language from the definition of a carrier by rail into the definition of carrier by air, it also broadens that language in a manner expressly rejected by Congress in the rail context. Thus, the application of the current two-part test has expanded RLA jurisdiction to independent international corporations that provide a variety of

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rail carrier, it recognized that the contractor in *Pinkerton's* was an "independent corporation" and refused to exercise jurisdiction over it.

services in multiple industries and locations.[17] These companies are not under corporate control by or with any of the carriers with which they contract. No carrier controls their entrepreneurial freedom, their commercial activities, or the manner in which these independent companies do business. These service contracts—like the one at issue here between Swissport and United—often expressly state that the contracting company rather than the carrier has exclusive control over and is fully responsible for their employees. In fact, many contracts between airlines and service providers—also like the one at issue here—include language stating that personnel performing the contracted-for services shall at all times be employees of the contractor, not the air carrier, yet the Board has nevertheless asserted that these employees are controlled by air carriers who are held harmless for the performance of their service by the provisions of the contract.

The status of these companies under the RLA is a decision for Congress to make and Congress excluded them from the RLA's jurisdiction. There are policy reasons why this makes sense. As previously discussed, airlines were added to the coverage of the RLA because they, like railroads, are transportation systems within a network across large geographic areas. Employees are organized in system-wide bargaining units including every person who performs the same work no matter their work location. Collective bargaining occurs on a system-wide basis. None of these factors apply to these companies contracting with airlines. Companies like Swissport perform work under competitively bid contracts which are generally specific to individual locations for a limited duration. In some cases, employees perform service under separate contracts with numerous airlines and often a company such as Swissport provides a variety of different services under contracts with different airlines at different locations. There is no permanent relationship between the airline and the contractor.[18] The workforce is not permanent but ebbs and flows with shifting contracts. There is no community of interest necessary to establish a stable system-wide craft or class. The dispute resolution mechanism of the RLA centered on representation and mediation on a system-wide basis is a poor fit to address disputes of disparate, dispersed, decentralized workforces.

Having reviewed the plain language of the RLA and the Board decisions issued contemporaneously with enactment of that statutory language as well as the legislative history, the Board finds that its two-part jurisdictional test is

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[17] Application of the two-part test has also at times led to inconsistent results with the Board asserting jurisdiction over a company's employees at one location while not asserting jurisdiction over employees, sometimes with the same job title, at another location. For example, the Board asserted jurisdiction over Air Serv shuttle drivers in Memphis, Tennessee, *Air Serv. Corp.*, 35 NMB 201 (2008), and several years later found no jurisdiction over shuttle drivers at LaGuardia Airport in New York, New York. *Air Serv. Corp,* 39 NMB 450 (2012).

[18] Further, an airline's solution to a threatened interruption to service provided by a derivative carrier—such as a strike—is to void the contract for non-performance and seek a substitute contract with a competitor.

atextual. The Board must look to the definitions of carrier by rail and carrier by air established by Congress to determine the coverage of the RLA. The Board must give effect to the language that Congress adopted and that people rely on. The definition of air carrier is clear; the Act covers every common carrier by air engaged in interstate or foreign commerce. Applying that definition to the facts in the instant case, the Board finds that Swissport, a company that is not a common carrier by air and that is connected to air transportation only through its contract for services with United, is not a carrier within the meaning of Section 201. Therefore, the NMB's opinion is that Swissport's operations and its employees at EWR are not subject to the RLA.

V. CONCLUSION

Based on the record in this case and the reasons discussed above, the NMB's opinion is that Swissport's operations and its employees at EWR are not subject to the RLA.

BY DIRECTION OF THE NATIONAL MEDIATION BOARD.

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Chairman Sweatt, dissenting.

I respectfully dissent from my colleagues in this decision. First, subjecting any worker or company to the vagaries of the National Labor Relations Board (NLRB) does nothing to protect interstate commerce or bring about labor peace. The current state of the NLRB also does nothing to protect workers' rights to a secret ballot election; to respect the results of an election rejecting representation; or to protect workers from workplace violence, offensive language, or harassment.

The majority opinion unfortunately adopts the whipsaw changes of law from the NLRB, suddenly deciding after more than 40 years that the National

Mediation Board (NMB or Board) has been wrongly interpreting the statute all along. No court, nor any Board majority from either party, has ever come to the conclusion that the majority has in this instance. After decades of debate over which factors to include in the two-part test and how much carrier control is necessary to establish jurisdiction, the majority now believes that "control" was never relevant at all. The NLRB has long been recognized for these types of outcome-based swings due to political preferences of the controlling administration. The NMB, however, has not faced as many of these accusations. I am concerned this decision will subject this Board to similar criticisms.

The majority spends considerable time discussing the legislative history of the Act (a factor not usually considered in a textualist analysis of a statute). The purpose of the Act, however, is at least as relevant as legislative history in understanding a statute. The first purpose outlined in the RLA itself is "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a. This applies with equal force to air carriers and rail carriers and asserting jurisdiction over derivative carriers has helped the NMB fulfil its mission and serve this purpose.[19] For example, Gate Gourmet, an airline catering company contracting with multiple airlines at approximately 30 airports, was released from mediation in June 2024. During the statutorily mandated cooling off period, a deal was reached with the help of the NMB. This avoided a strike or lockout that in my opinion would have severely disrupted air transportation across the country, due both to the cessation of delivery of crew and passenger meals and the interruption of the company's role in containment and safe disposal of international waste. The prospect of a Presidential Emergency Board established under the RLA likely played a role in the successful resolution of the parties' dispute. The outcome would have been vastly different had Gate Gourmet been subject to NLRA jurisdiction, with separate units of represented employees at each airport location at which Gate Gourmet operated.

The statutory language regarding jurisdiction may be ambiguous but the purpose of the RLA is not. This is evidenced by the fact that courts and the NMB itself have read the statute in a consistent manner divergent from that interpreted by the majority and the Board at large for over 40 years. The two-part test that the majority rejects here came into being presumably because the

[19] A review of the legislative history includes support for passage of the Act to prevent disruption of commerce and carrier operations by the Honorable Frances Perkins, then-Secretary of Labor. A letter from Secretary Perkins to President Roosevelt, read into the record during 1934 Senate debates, reinforces the Act's purpose urging, "the leaders in both the Senate and the House be requested to take the necessary action to make sure that these two particular bills . . . be not permitted to go by default and that all possible be done to bring about their enactment . . . . If this is done it will not only forestall almost certain railroad labor difficulties in the near future but will progressively improve railroad labor relations, thus furnishing a worthy object lesson to other industry." *Debate in the Senate on S. 3266*, 73rd Cong. 953-54 (1934) (statement of Sen. Clarence Dill).

Board believed—and consistently believed over decades, as evidenced by its continued application—that it was consistent with the language, intent, and jurisdictional scope of the Act and advanced its purposes. In 1980, the Board undertook a comprehensive review of its jurisdictional standards. It reported that it "considered a series of cases involving companies performing services in connection with rail and air transportation for carriers. In general, the Board found RLA jurisdiction where the carrier exercised significant control over the contractors' employees and the manner of performing the work to be done."[20] Are we to believe that the Board's comprehensive analysis resulting in that conclusion did not include a review of the statutory language at issue in this case?

Courts have upheld this interpretation of the Act, holding that the control language in Section 1, First is applicable to air carriers. In *Thibodeaux v. Executive Jet Int'l, Inc.*, 328 F.3d 742 (5th Cir. 2003), the court did not ignore the "carrier by rail" language that the majority finds so determinative and stated the following:

> In 1934, Congress amended the RLA and expanded the definition of 'carrier' to include carrier affiliates that perform services related to transportation: 'The term 'carrier' includes any railroad . . . and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service ... in connection with the transportation . . . of property . . . by railroad.' This focus on the whole entity engaged in transportation indicates that Congress sought '(1) to avoid the possibility that certain employees could interrupt commerce with a strike, and (2) 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.' Title II of the RLA establishes that any consequences flowing from § 151's expansive definition of the term 'carrier' apply with equal force to common carriers by air and their employees. Thus, in the air carrier context, the affiliate prong of the § 151 definition results in RLA coverage for carrier affiliates that do not fly aircraft for the transportation of freight or passengers if their functions are nevertheless related to air transportation.

Id. at 752. The court clearly understood that in order to effectuate the purposes of the Act, the definition of carrier in Section 1, First should be extended to carriers by air. *See also Verrett v. SABRE Group,* 70 F. Supp. 2d 1277, 1281 (N.D. Okla. 1999) ("When the activities of carrier affiliates are necessary to the operations of an air carrier, and a labor dispute at the affiliate could cripple airline operations, those affiliates must be subject to the RLA because such

[20] 46 NMB ANN. REP. 14 (1980).

disruption is the very type of interruption to air commerce the RLA was designed to prevent.")

In *ABM Onsite Services*, discussed by the majority, the court accepted that the NMB's two-part test was the proper interpretation of the statutory language. *See ABM Onsite Servs.-W., Inc. v. NLRB*, 849 F.3d 1137, 1140 (D.C. Cir. 2017) ("Congress expanded the Act in 1934 to cover certain companies that perform transportation-related services for those carriers."); *see also Cunningham v. Elec. Data Sys. Corp.*, No. 06 Civ. 3530, 2010 WL 1223084 (S.D.N.Y. Mar. 30, 2010). As former Member Geale notes in *Envoy Air*, 43 NMB 18 (2015), "In the absence of some change of circumstances, it is generally incumbent on government agencies to follow the standing precedent and guidance on agency policy . . . . This ensures fairness and an equal playing field for the community generally." *Id.* at 26-27.

Given that the Board has used its two-part test for decades without objection from Congress, I cannot support this abrupt change in policy. While the Board may have raised questions about the statutory language in 1948, it certainly did not consistently hold such a view. The "owned and controlled" language that is the basis of the two-part test was added because 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*, 328 F.3d at 752. This consideration is equally as important in the airline industry as the railroad industry. Really, a plain reading of the legislative text—as passed—demonstrates the only provision of the RLA that does not apply to air carriers is 45 U.S.C. § 153.

In the face of alleged ambiguous statutory language, Congress can certainly act to ensure the NMB furthers the purpose of the RLA. Ceding jurisdiction over essential transportation work, like that provided by Swissport, will no doubt result in a greater risk of work stoppages and transportation disruptions. There is no ambiguity regarding the impact of Swissport's operations on interstate commerce or carrier operations, the employer has provided affirmative evidence that during a strike or lockout, disruptions would occur. Swissport's reply brief asserts the following:

> In this case in particular, as an example, a strike by the Swissport unit at Newark would impact all of United's cargo operations nationwide. Swissport employs hundreds of workers at Newark whose sole responsibility is to manage cargo operations for United. If those workers went on strike, it would absolutely cause interruption to commerce and United's operations outside of Newark. The primary purpose of extending RLA jurisdiction to contractors such as Swissport is to avoid such interruptions. Accordingly, the jurisdictional tests proposed by IAM and SEIU

> would eliminate jurisdiction over contractors that have the direct ability to interrupt commerce and air travel.

If the services provided by one of these companies were disrupted as part of a strike, a major air carrier could potentially be unable to operate in a region of the country until the strike was resolved or a replacement contractor with trained employees became available. This process takes considerable time considering the safety training and background checks required in the industry. Services provided by derivative carriers are necessary for the functioning of our transportation system. That, in and of itself, argues for RLA coverage. Indeed, the core goals of preventing localized labor disputes from disrupting interstate travel and ensuring that carriers do not evade their responsibilities under the RLA can only be achieved if the Board asserts jurisdiction, as Congress intended, and provides the statutory mediation and dispute resolution procedures under the Act. The NMB should be able to adjust to changing circumstances and should not be forced to cede jurisdiction over an important part of the transportation industry if doing so impedes the purpose of the Act.

The Majority rightly notes that the airline industry in 1936 was new, small, and not reflective of today's airline operations. As we are mining the legislative history, it is notable that the Air Line Pilots Association testified before a Senate Subcommittee of the Committee on Interstate Commerce endorsing RLA coverage. In fact, the testimony rejects the Wagner Act (NLRA), even before its passage:

> It may occur to some of you to inquire whether the Wagner bill will not answer our need. We believe that, as common carriers and as contractors to the United States Government for the carriage of the mail, we are in need of a more certain remedy than even the Wagner bill affords.[21]

Thus, the NLRB construct was dismissed by those in the industry in 1935, before the passage of the Wagner Act amendments, preferring the RLA.

Today's carriers make economic decisions regarding operations and how to structure the corporate entity for the most effective, profitable system. To be blunt, derivative carriers support the profit margin of the operation. By removing these entities from the RLA, allowing the possibility of disruption that would reduce freight revenue, carriers may have challenges funding the improved pilot and flight attendant contracts that NMB mediators have assisted in finalizing over the years. Again, the consequences of this decision undermine the

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[21] *To Amend the Railway Labor Act to Cover Every Common Carrier by Air Engaged in Interstate and Foreign Commerce: Hearing on S. 2496 Before S. Subcomm. of the Comm. On Interstate Commerce*, 74th Cong. 5 (1935) (statement of Edward G. Hamilton, Representing the Air Line Pilots Association).

constitutional charge to the Board to protect interstate commerce or the statutory charge of ensuring the operation of any carrier. Even if we jettison the control test, the fact remains Swissport is solely an adjunct of United's operations in this instance. Interruption of cargo services would impact the carrier's operations and economic stability.

There are other practical reasons why the NMB is the better agency to oversee labor relations at these companies. The structure of the NMB has resulted in an agency more focused on beneficial terms and conditions for workers demonstrated by ratifiable contracts and less influenced by politics. The process for appointing a chairperson and the limited enforcement power of the NMB has meant that significant changes in policy, such as the one suggested by the majority here, are less frequent and expected than under the NLRB.[22]

The majority decision does not settle this issue in any way. It simply sets the workers, the carrier, the NMB, and the NLRB up for a new round of lengthy litigation and confusion. Some derivative carriers are currently in statutory mediation. There are others that have been certified by the NMB and are engaged in negotiations under 45 U.S.C. § 156. Organizations representing employees at derivative carriers are likely to seek jurisdiction under the NLRB in order to gain the right to immediately strike, rather than the more reasoned approach of mediation engaged by the Board. This leads to potential work disruptions that Congress intended to avoid through the RLA construct. The majority appears to dismiss these upheavals and other unintended consequences of its unexpected course reversal.

Position statements filed in this case raise the issue of an individual NLRB Member questioning the NMB's interpretation and requesting a justification. The NMB does not litigate before the NLRB. Deference is consistently given to the NMB for its RLA expertise. In fact, the case cited, *ABM-Onsite Services*, confirms NLRB deferral to the NMB's interpretation of the statute and expertise regarding jurisdictional questions. *See also Pan Am. World Airways*, 115 NLRB 493, 495 (1956). This is not a two-way street and highlights the consequences of sending parties back to the NLRB that have been within the NMB's process for years as the majority sets up in its opinion.

Before concluding, it is notable that two sitting NLRB Members have professional ties to the SEIU. Historically, these members do not recuse themselves from cases heard before that Board. Parties have decried this ethical dilemma but have been unsuccessful in securing recusals. Conflicts will arise from ceding this case to the NLRB and those conflicts are predetermined in favor of the union—not the workers—as the parties are likely to not receive neutral adjudication as they would at the NMB because of these conflicts.

[22] For a discussion of relevant differences between the agencies, see Molly Gabel & Samuel I. Rubinstein, *Return to Decades of Precedent, at Least for Now: Derivative Carriers Under the RLA and NLRB Deference to the NMB*, 36 A.B.A. J. LABOR & EMP. LAW 1, 89, 96-98 (2022).