



NATIONAL MEDIATION BOARD
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45 NMB No. 12

February 26, 2018

Susan Leverone, Associate Solicitor
National Labor Relations Board
1015 Half Street, SE Ste. 5120
Washington, DC 20750

Re: NMB File No. CJ-7176
ABM-Onsite Services

Dear Ms. Leverone:

This responds to your request for the National Mediation Board's (NMB or Board) opinion regarding whether ABM-Onsite Services-West (ABM) at the Portland Airport (PDX or Airport) is subject to the Railway Labor Act (RLA), 45 U.S.C. §151, *et seq.* On May 18, 2017, the National Labor Relations Board (NLRB) requested an opinion regarding whether ABM's operations are subject to the RLA, following a remand from the United States Court of Appeals for the District of Columbia Circuit.

For the reasons discussed below, the NMB's opinion is that ABM's operations and employees at PDX are subject to the RLA. In reaching this decision, the NMB reaffirms its traditional two part test for determining whether an entity is a derivative carrier and its reliance on multiple factors to establish the required control by a carrier for RLA jurisdiction.

I. PROCEDURAL BACKGROUND

In January 2015, the International Association of Machinists and Aerospace Workers (IAM) filed a petition seeking to represent bag jammer technicians and dispatchers employed by ABM at PDX. The NLRB rejected ABM's assertion of RLA jurisdiction, held an election, and certified the IAM as the representative of the employees at issue. The IAM filed an unfair labor practices charge after ABM refused to bargain. After the NLRB granted summary judgment against ABM in the unfair labor practice case, ABM appealed to the United States Court of Appeals for the District of Columbia

Circuit. The court concluded that the NLRB's assertion of jurisdiction and the NMB decisions on which it relied departed from past NLRB and NMB precedent without providing a reasoned explanation. *ABM Onsite Services W. v. NLRB*, 849 F.3d 1137 (D.C. Cir. 2017).

On remand, the NLRB requested the NMB's opinion regarding the jurisdictional issue and concerns raised in the court's decision.

Court of Appeals Decision

The court stated that the NMB failed to explain why recent cases departed from its traditional jurisdiction test. In describing what it considered to be this traditional approach, the court cited *Air Serv Corp.*, 33 NMB 272, 285 (2006), for what it called "a list of six factors to guide [the NMB] in determining whether a company is controlled by an air carrier." The court described the six factors as the following:

- (1) the extent of the carrier's control over the manner in which the company conducts its business;
- (2) the carrier's 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.

849 F.3d at 1142. According to the court, the NMB developed this list of factors beginning in the 1980s with the increased use of contractors in the airline industry. *Id.* Citing *Huntleigh USA Corp.*, 40 NMB 130, 137 (2013) and *Bags, Inc.*, 40 NMB 165, 170 (2013), the court noted, however, that more recent NMB cases moved away from the six-factor test to an analysis requiring a substantial degree of control by the carrier over personnel matters before the NMB would find RLA jurisdiction. The court characterized these decisions as a clear departure from precedent without an explanation for the change to the NMB's test for RLA jurisdiction. *Id.* at 1144-45.

II. FINDINGS OF FACT

Background

ABM has operated the baggage handling system (BHS) at PDX since it purchased Linc Facility Services, LLC and assumed all of Linc's contracts, including its contract at PDX (BHS Contract) with the Portland Airline Consortium (PAC). PAC is governed by a committee comprised of representatives of the airlines operating out of the airport. In addition to operating the BHS at the airport, ABM also provides janitorial, parking,

facilities engineering, security, and landscaping services at various locations. It does not operate any baggage handling systems other than the system at PDX.

John Imlay, PAC's General Manager, is responsible for managing, coordinating, and administering the BHS Contract with ABM. The BHS Contract states that "PAC has retained the General Manager to represent it in all matters relating to Contractor's performance of the Services described" and that the General Manager "will have the authority to manage, monitor and coordinate the performance of the Contractor." Much of the testimony in the NLRB hearing in this case centered on his control over ABM through his interactions with Bonnie Wagoner, ABM's Facilities Manager at PDX. Ms. Wagoner takes direction from Mr. Imlay, they have offices next to each other, and communicate throughout the day. He set her schedule to match his. Ms. Wagoner oversees ABM's employees operating the BHS, including bag jammer technicians, dispatchers, and four supervisors.

Ms. Wagoner testified that the BHS is the first point of contact for a passenger with the airline. The airline checks the bag in, prints out a tag, tags the bag and puts the bag into the BHS. Ms. Wagoner analogized the BHS to a "freeway for bags" and noted if there is a "traffic jam, a bag jam," then it creates gridlock in the system and bags "cascade back to the ticket counter which basically stops the functioning" of the airlines check-in process.

ABM's bag jammer technicians work at the ticket counters to help place bags properly in tubs to prevent jams and help spot oversized bags. They also retrieve bags from the oversize belt, using a PAC-provided vehicle, often delivering the bags directly to the aircraft. Bag jammer technicians monitor "stray bags" and check the area of the BHS where explosive detection systems are located.

ABM's dispatchers monitor the BHS from a control center and when they see a jam, they call jammer technicians on the radio and instruct them to clear the jam. Dispatchers also communicate with airline employees about any other issues within the BHS that need resolution. Dispatchers also communicate with the bag jammers and the airline regarding missing or improperly tagged bags. Mr. Imlay personally checks in with dispatchers throughout the day as part of overseeing communication with the airlines.

PAC's Involvement in Structure of ABM at PDX

The BHS initially opened in 2010, with only the south side of the system operating. The north side opened in 2011 and PAC approved the addition of a second supervisor on ABM's staff and Ms. Wagoner was hired in 2011 to fill the second supervisor position. At that time, ABM at PDX consisted of a Facilities

Manager, two supervisors, bag jammer technicians, oversize technicians, and dispatchers.

The following year, PAC had an issue with bags cascading to the ticket counter when jams were not addressed in time by ABM staff. As a result of discussions with the airlines and Mr. Imlay, ABM cross-trained the oversize technicians and bag jammers and reclassified them as bag jammer technicians. Ms. Wagoner described in the hearing how involved Mr. Imlay was in the process to retrain and reschedule employees under this restructuring. Ms. Wagoner testified that

[h]e wanted to see a schedule. How the cross-training would happen. What the cost level would be. What our end result would be. How many employees. . . . The management of ABM gave John Imlay all the schedules, the budgeting, this is how much we are looking at, and John Imlay took it . . . to the committee to make sure that that was going to work, and that's how it was approved.

Ms. Wagoner was promoted to Facility Manager in 2014. This promotion was also facilitated by Mr. Imlay. According to Ms. Wagoner “John Imlay recommended me and made the decision for that position.” He and PAC determined what her salary would be. Mr. Imlay also made the decision that the supervisor position that Ms. Wagoner had previously occupied would be eliminated, based on his review of the budget. Instead, Mr. Imlay decided that four supervisors with salaried positions would provide more coverage and be given raises, thereby avoiding the need to pay overtime. At that time, Mr. Imlay set Ms. Wagoner's schedule so they would have as many corresponding days as possible to facilitate communication.

Contractual Relationship between PAC and ABM

The scope of services in the BHS Contract is essentially a description of the job duties of the dispatchers and jammer technicians. The BHS Contract provides that ABM must maintain a response time of three minutes for clearing bag jams with a goal of the baggage system being operational 99% of the time. The BHS Contract provides that PAC will pay ABM “on an actual cost plus contractor ‘mark-up’ basis,” meaning that PAC reimburses ABM for the cost of labor, supplies, and materials and pays ABM an additional percentage of such costs. ABM characterizes this as a “cost plus” contract. The BHS Contract also provides that the total amount to be paid over the first three years of the agreement, excluding renewals, will not exceed a certain annual amount without prior written agreement of the parties and approval of the committee that governs PAC.

Under the BHS Contract, PAC has the right to direct ABM “to remove any personnel from the performance of Services from any position upon material

reason therefore given in writing. Any cost of removal will be borne by Contractor.” ABM cannot replace “Key Personnel” without written consent of PAC. PAC also reserves the right to request the removal of any ABM employee “should the employee’s behavior, appearance, and professional, ethical, credential or licensing etc., not meet those requirements of PAC.”

The BHS Contract requires that “[a]ll books and accounts in connection with the Services will be open to inspection by the General Manager or other authorized representative of PAC . . . upon reasonable notice given by PAC” to ABM. These documents include reports on ABM operations; documents relating to compliance with non-discrimination laws; documents showing employee qualifications and training; documents relating to operations and maintenance safety plan; and reports of accidents resulting in injury or property damage.

ABM provides a uniform for each employee working under the BHS Contract. The BHS Contract specifies that the “uniform will have the PAC logo and employee name clearly visible on the uniform.” PAC also reimburses ABM for providing employees with black work pants and work boots. PAC has also approved ABM employees wearing PAC logoed uniform sweatshirts or jackets that employees can purchase. PAC also approved a request to allow employees to wear t-shirts with ABM’s logo on “casual Fridays.” Mr. Imlay, however, denied a request to have “casual Mondays” for employees who do not work Fridays.

ABM’s Day-to-Day Operations

The BHS Contract indicates that PAC, in coordination with ABM, will establish all standard operating procedures and provide all operating manuals. PAC’s General Manager Imlay created a BHS operations manual outlining procedures for 30 separate aspects of the system such as system start-up, checked luggage, firearms, locked baggage, baggage tubs, oversize items, and gasoline powered devices.¹

Individual airlines also occasionally request or give instructions about the operational procedures ABM should follow. In November 2014, for example, PAC purchased carts for jammer technicians to transport baggage tubs used to hold luggage on the BHS from the lower level to the upper level of the Airport. Alaska Airlines (Alaska) requested that the jammer technicians put the tubs in a new location when replenishing the tubs at Alaska’s ticket counter. The jammer technicians initially refused the request and informed an ABM supervisor who in turn informed ABM’s Facility Manager. Alaska’s

¹ Only the table of contents of the manual was introduced into evidence. ABM asserted that the manual procedures include sensitive security information that cannot be disclosed under Transportation Safety Administration regulations without written permission of the United States Secretary of Transportation.

employees raised the issue with their General Manager who requested a meeting with Mr. Imlay and Ms. Wagoner. During the meeting, Ms. Wagoner acceded to Alaska's request. On another occasion, Alaska purchased scanners for the oversized baggage area to address concerns about missing and late oversized bags. Alaska requested that the jammer technicians scan the bags as they passed through that area. ABM complied with Alaska's request until Mr. Imlay agreed that the practice could be discontinued due to improvements in ABM's operations.

Alaska and United Airlines also requested that ABM's employees highlight the tags of bags from the run-out belt and also the oversized belt so that the airline employees could easily identify the bags when they were put in the bag wells. Again, ABM complied with that request.

Scheduling

The airline members of PAC influence the scheduling of ABM's operations. Under the contract, the normal operation of the BHS is 20 hours a day, seven days a week. ABM provides services from approximately 3:30 am through 11:30 pm when the last flight departs. ABM's dispatchers and jammer technicians work two 10-hour shifts spanning that time. The schedule may vary, for example, when ABM employees work later because of a flight delay. ABM also started some employees' shifts earlier because United Airlines decided to open its ticket counter at 3:00 am. Ms. Wagoner testified that ABM periodically provides a proposed employee schedule to Mr. Imlay for his review and approval.

Wage Rates and Benefits

PAC and ABM annually negotiate overall labor costs during the budgeting process. Anticipated labor costs, including health and welfare costs, and 401(k) contributions are worked into the budget. The budget includes an overall labor cost for each month that is not broken down by employee, job classification, or type of labor expense. ABM's Branch Manager Robert Allen testified that PAC's budget from the airlines "dictates what our budget is going to be." Mr. Allen stated that he attempts to include some reserve in the budget but Mr. Imlay will not agree to include amounts PAC deems unnecessary. Throughout the year, when the budget needs to be adjusted, for example, because of an anticipated decrease in the amount of baggage, Mr. Imlay discusses that need with Mr. Allen. Mr. Allen also testified that when he requests a wage increase for ABM employees, Mr. Imlay determines whether to grant the increase based on whether PAC's budget can accommodate it. According to Mr. Allen, all wage increases or decreases must be approved by PAC's General Manager.

Each month, ABM submits an invoice to Mr. Imlay, who reviews it and raises any concerns with either Ms. Wagoner or Mr. Allen. The invoice shows the number of hours worked and the pay for each ABM employee each day as well as each employee's total health and welfare expenses for the month. The invoice also shows other costs including equipment, supplies, and materials. PAC's General Manager must approve the invoice before ABM is paid. When Mr. Imlay questions unexpected or high costs, he will meet and negotiate the amount that will be paid with Mr. Allen or Ms. Wagoner.

Hiring, Firing, Discipline, and other Personnel Matters

As previously noted, PAC generally controls the number of employees ABM may hire through the annual budget process. For example, during a previous budget negotiation, ABM requested additional labor for the holiday season but it was denied by PAC.

Ms. Wagoner also testified that when a vacancy is being filled, Mr. Imlay asks for updates on who has been interviewed and what she thinks about the applicants. She indicated that there is a conversation between the two of them and that while he trusts her judgment, "if there is any issues or concerns, he says that he doesn't want somebody hired or he doesn't feel good about that person, then it was not done." She reports that she has to ask permission to hire a specific person for a position as well as increase her staff.

As noted above, under the BHS Contract, PAC has the right to direct ABM to remove personnel. PAC, through Mr. Imlay, has exercised this right. For example, following an altercation involving an ABM employee, Mr. Imlay and a United Airlines manager asked ABM to take action and the employee was terminated. Ms. Wagoner also testified about another instance where Mr. Imlay was concerned about the performance of a dispatcher and asked the prior Facility Manager to move the employee to the less-busy night shift until his performance improved. In another situation, ABM investigated an incident involving multiple employees that escalated to a violation that was grounds for multiple terminations. Upon hearing about the incident, Mr. Imlay asked ABM to investigate further before terminating. The employees were eventually terminated following a full investigation. Ms. Wagoner reported that only after further investigations did Mr. Imlay say "go ahead" with the terminations.

Training

Upon hire, each ABM employee receives three weeks of training. The first week involves training with each station in the BHS and other basics. The second week is bag jammer training with a veteran ABM employee. The third week involves shadowing an employee and a test at the end of the week. There is a meeting with a supervisor at the end of the third week to determine if more training is needed. As noted above, the BHS Operations Manual was initially

created by Mr. Imlay. Mr. Imlay conducts one part of the training, the “bag hygiene portion.” Any training materials given to employees must first be reviewed by Mr. Imlay.

IV. 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.

ABM 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 the baggage handling work performed by bag jammer technicians and dispatchers is traditionally performed by airline employees. *Huntleigh Corp.*, 29 NMB 121 (2001); *International Total Services*, 20 NMB 537 (1993). Therefore, to determine whether ABM is subject to the RLA, the NMB must consider the degree of direct or indirect control exercised over its operations by the airlines through PAC.

The RLA does not apply to every independent contractor performing work for a carrier. The NMB’s exercise of its jurisdiction must be based upon the nature of the work performed and that work’s relationship to interstate transportation. *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 557 (1937). Congress enacted the RLA to create a comprehensive statutory scheme to prevent disruptions of interstate commerce through the prompt resolution of labor disputes between air and rail carriers and their employees. The Board has recognized that changing corporate relationships and the increasing use of contractors to perform work integral to rail and air transportation cannot be used to evade the procedures of the RLA that protect the public interest by minimizing interruptions to interstate commerce. *Norwegian Air Shuttle ASA*, 43 NMB 97 (2016); *Delpro, Inc.*, 8 NMB 58 (1980).

Mindful of its statutory mission, the Board finds 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.² These factors, as recognized by the court, 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).

Carrier Control over ABM and Its Employees

In this case, the record demonstrates that PAC exercises significant influence over ABM's operations at PDX. ABM is required to meet various PAC requirements, including providing services specifically described in the contract; meeting performance measures specified in the contract; following operational procedures developed by PAC; and complying with operations-related requests from the individual airlines. The airlines influence the scheduling of ABM employees. ABM employees stay past the scheduled end of their shift because of flight delays. ABM also started shifts earlier at the request of United Airlines.

PAC and ABM negotiate overall labor costs during the budgeting process. ABM requests wage increases but PAC must approve such an increase. Each month ABM submits an invoice to Mr. Imlay showing the number of hours worked and the pay for each employee. Mr. Imlay must approve the invoice before ABM is paid. If Mr. Imlay questions unexpected costs, he will meet with ABM to negotiate the amount that will be paid. PAC also retains the contractual right to review all records related to the services provided by ABM.

Mr. Imlay created the BHS operations manual outlining the procedures for operating the BHS. During the expansion of the BHS, PAC's General Manager oversaw the retraining and rescheduling of all the ABM employees on the BHS when PAC had a problem with cascading bags. He conducts part of ABM's new employee training and reviews all training materials.

PAC, through Mr. Imlay, exerts significant control over staffing levels, hiring, firing, promotion, and discipline of ABM's employees. Periodically ABM provides a proposed employee schedule to Mr. Imlay for his review and approval. His approval is required for all hires and ABM has acquiesced to his demands regarding discipline of employees. He has denied requests for additional staffing and selected the Facilities Manager, Ms. Wagoner, as well as determined her schedule and office location. After Ms. Wagner was promoted from Supervisor to Facility Manager for ABM, Mr. Imlay made the decision to

² To the extent that prior Board cases can be read as treating the ability to dictate personnel decisions as required or necessary to establish carrier control, they are overruled.

eliminate the Supervisor position based on his review of the budget. PAC, though Mr. Imlay, has exercised its contractual right to remove employees. After a request by Mr. Imlay and a United Airlines manager, an ABM employee was terminated. Mr. Imlay has requested reassignment of a dispatcher because of performance issues and requested additional investigation of an incident before approving terminations of the ABM employees involved.

Finally, the contract requires and the record establishes that ABM's dispatchers and jammer technicians wear a variety of clothing articles with PAC's logo.

In sum, the record shows that PAC has sufficient control over ABM's operations at PDX to establish RLA jurisdiction.

CONCLUSION

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

BY DIRECTION OF THE NATIONAL MEDIATION BOARD



Mary L. Johnson
General Counsel

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Member Puchala, dissenting.

I.

I write separately because I disagree with my colleagues' decision to return to the six factor analysis for determining carrier control in jurisdiction

cases as set forth in the court's decision in *ABM Onsite Services W. v NLRB*, 849 F.3d 1137 (D.C. Circuit 2017). In my view, many of those factors used to determine control under the NMB's two part jurisdictional test have lost their significance as subcontracting has increased and the airline industry's business model has changed. As discussed below, I would find that demonstrable evidence of carrier control over personnel decisions including the hiring, firing, and discipline of subcontractor employees and a high degree of supervision over how subcontractor employees perform their duties are required factors to establish RLA jurisdiction. Without such evidence of carrier control over the manner of rendition of their services, the other factors cannot establish RLA jurisdiction.

I agree that for many years the NMB applied a multi-factor analysis to determine carrier control as part of its two part test for RLA jurisdiction. This test, however, like many multifactor tests, was prone to inconsistencies. For a period of time, the NMB asserted jurisdiction over practically every case that came before it, basing these determinations on varying amounts of evidence and providing different weights to the various factors. At times, factors other than those included in the *ABM* court's six-factor control analysis were considered and weighed heavily by the Board. For example, prior to the 2006 *Air Serv* case cited by the court, the Board considered whether a carrier provided office space to an independent contractor an important factor on several occasions. See, e.g. *Signature Flight Support*, 32 NMB 214, 224 (2005) (Finding that the fact that Signature owned and maintained its own equipment indicated a lack of carrier control over Signature's operation.); *Complete Skycap*, 31 NMB 1 (2003); *John Menzies PLC*, 30 NMB 463 (2003). In those years, the Board also 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 *Air Services International Group*, 31 NMB 361, 371 (2004), the Board considered it relevant that Northwest was the company's only customer at the specific airport in question. Like the factors outlined in the six-factor control test cited, these factors were not determinative. In fact, no factors were determinative.

In most cases, the Board recognized the importance of carrier supervision or observation of employees in order to establish RLA jurisdiction. One exception was *Kanonn Service Enterprises Corp.*, 31 NMB 409, 413 (2004), where the Board asserted jurisdiction despite finding that "[t]here is no language in the contract giving Delta the right to recommend discipline or removal of Kanonn employees who are performing poorly, or for other reasons" and Delta was not involved in hiring, firing, evaluating, or otherwise disciplining employees. The NMB, however, asserted jurisdiction over Kanonn because Delta determined how many employees worked each shift, could report personnel problems to Kanonn management, and provided office space. In some cases the Board recognized the importance of carrier control over

personnel issues even when there was no evidence of such authority actually being used. For example, in *Globe Aviation Services*, 28 NMB 41, 46 (2000), a contract provision allowing the carrier to remove an employee from the contract was cited, yet it is unclear if the carrier exercised that authority. See also *Command Security Corp.*, 27 NMB 581 (2000) (citing only the contract as evidence of carrier control). In my view, the multifactor control analysis has resulted in a situation where almost any company with a contract with an air carrier could be found to be a derivative carrier subject to the RLA, a result inconsistent with both the language and legislative history of the RLA.

The RLA covers two industries, railroads and airlines. There is no evidence that Congress intended RLA jurisdiction to extend to every entity contracting with an air carrier. The legislative history of the 1934 amendment that expanded the RLA's jurisdiction to include "any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad . . ." 45 U.S.C. 151 indicates that Congress knew that simply providing services to a carrier under a contract was not sufficient to bring a company under the RLA. Commissioner Joseph Eastman, who drafted the amendment, originally proposed extending RLA jurisdiction over all employees in rail transportation, to "any company operating any equipment or facilities or furnishing any service" within railroad transportation. 3 *The Railway Labor Act of 1926: A Legislative History* section 2, at 10-11 (1988). This proposal was rejected by Congress over the objections of railroads, worried that it would "affect their contracts for all kinds of work." *Id.* at 145. A few years later, the Supreme Court noted that independent contractors of railroads were not under RLA jurisdiction. *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 557 (1937). See also *Reynolds v. N. Pac. Ry. Co.*, 168 F.2d 934, 941 (8th Cir. 1948) ("Congress was cognizant of the long-established practice obtaining in the railroad world of contracting for the furnishing by outside contractors of services such as those here involved, and it chose not to include such contract workers generally or as a class in the scope of this railroad legislation. Thus, when it was proposed in 1934 to bring all the contracting companies performing services which were an integral part in railroad transportation within the definition of a 'carrier' in the Railway Labor Act . . . Congress would not accept the proposal" and only agreed to include companies that were "owned or controlled" by a carrier.").

The Board was aware of this history when it first asserted jurisdiction over a company providing services to air carriers. In *Thaddeus Johnson Porter Service*, 3 NMB 82 (1958), it required a much greater degree of control over personnel issues than would later be required under the six-part test. The Board found jurisdiction in that case, stating that the airlines supervised and directed the company's employees to the extent that "if any group of employees are subject to the continuing authority of a carrier or a group of carriers, to supervise and direct the manner of rendition of service, this is a prime

example.” *Id* at 85. Later in *Pinkerton’s Inc.*, 5 NMB 255, 257 (1975) the Board considered whether carriers “do in fact have the authority to ‘supervise and direct’ the manner of rendition of the contracted employees’ services.”

The *ABM* court noted that in 1980, the Board stated in *Delpro, Inc.*, 8 NMB 58, 60 (1980), that it had done “an extensive evaluation of its jurisdictional standards.” The examples cited in *Delpro* were ones where the Board considered carrier control over employees and personnel issues. For example, in *Ground Services, Inc.*, 7 NMB 509, (1980), despite the fact that the contract reserved the company’s right to fire or discipline employees, the Board relied on evidence that the company “would be compelled to discipline or discharge any employee upon request by [the carrier], and that it has done so in the past” and found jurisdiction. In *Boeing Airport Equipment, Inc.*, 7 NMB 396 (1980), the Board relied on factors such as the carrier’s right to require termination of any employee and that carrier personnel acted as supervisors to employees when finding RLA jurisdiction. *See also Missouri-Illinois Central Industries Ltd*, 7 NMB 491 (1980) (finding jurisdiction where, despite the company retaining the right to discipline employees in contract, there was evidence that “it would be compelled to discharge any employee where one of the railroads requested this action.”).

Contract provisions that can be found in virtually every contract the Board reviews are not ones that indicate the unusual amount of control necessary to demonstrate RLA jurisdiction. For example, in the past several years, in virtually all jurisdiction cases the contract allows carriers to review a company’s records. This is a standard provision in cost plus percentage contracts where both parties have agreed to an annual budget cap with audits to verify contractor expenditures. In addition, anytime a company contracts with an air carrier, factors such as the number of employees and those employees’ schedules and duties will be impacted by the air carrier’s flight schedule and other considerations such as government regulations. All contracts include standards that employees will follow in performing services for a carrier. All contracts will require job specific training, background checks, and airport badging. These are not indicators of carrier control over the company, they are part of doing business with an air carrier in a highly regulated and secure airline/airport environment.

Much has changed since the Board’s 1980 “evaluation of jurisdictional standards.” As carriers began to develop and protect their brand, they have limited the number and type of subcontractor employees who wear their insignia. Airlines have become increasingly reluctant to allow subcontractor employees to wear uniforms with their corporate logo lest the public mistakes them for company representatives. I do not believe the *Delpro* Board could imagine an airline industry where carriers subcontract for mechanics, flight attendants, and pilots. Or, as in this case, restrictive conditions created by

airport authorities that changed standard airline lease agreements to prohibit individual airlines from directly staffing or subcontracting for outbound checked baggage screening services by forcing all passenger airlines to share services in an airport created cost center “consortium.”³ A combination of factors including competition from Low Cost Carriers (LCCs) since airline deregulation, airline mergers and bankruptcies, changing Transportation Security Administration security measures, volatile oil prices, less public money for airport operation, and competition between primary and secondary airports have all placed increased pressure on airlines and airports to lower costs while expanding revenues. Added to this is a growing number of local, state, federal, and international laws and regulations that govern their operations, potentially increase their liability and strain resources. The result of such economic pressures is an expanding population of subcontractor employees performing what once were airline jobs.

For much of its history, the NMB was consistent in requiring control over personnel issues and strayed far from its earliest derivative carrier cases when it later found RLA jurisdiction where there was little or no carrier control over the hiring, firing, and discipline of employees such as in *Kanonn*. A multifactor test that has the potential to find jurisdiction over almost every such company is not appropriate because the RLA and its legislative history do not support such a result. The decisions discussed above purporting to rely on the six-factor test demonstrate what one judge referred to when he stated that multifactor tests require a decision maker to “throw a heap of factors on a table and then slice and dice to taste”⁴ rather than on the basis of a comprehensive rule of law. Multifactor tests where all factors theoretically carry equal weight lead to inconsistencies and here provide little guidance for employees who need to know whether they are operating under the RLA or the NLRA.

The Board is required to respond to changed circumstances and for this reason I would require that a company asserting RLA jurisdiction must demonstrate that a carrier exercise a meaningful degree of control over personnel decisions as described in *Airway Cleaners, 41 NMB 262 (2014)*. The factors related to personnel issues are particularly important because these are the factors which affect employees’ working conditions and which can be measured with testimonial evidence. They are the factors which employees are aware of on a day-to-day basis. Employees are often privy to information regarding who supervises them, who is responsible for discipline, and who makes decisions regarding hiring and firing. Other factors may be probative to the overall level of control, but without a carrier having significant control over

³ I take administrative notice of the Port of Portland’s 2010 Emergency Ordinance No. 433-R establishing PAC.

⁴ *Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1283 (7th Cir. 1990) (Easterbook, J. concurring).

these factors, the RLA will not apply. For several years, the Board has moved toward this standard. It is a return to the previous approach of *Thaddeus Johnson* and *Pinkerton's*, discussed above, and aligns with the language and legislative history of the RLA. It is also not an impossible standard as suggested by some. Since the *Airway Cleaners* decision, the Board asserted jurisdiction in *Gateway Frontline Services*, 42 NMB 146 (2015).

II.

I agree that ABM's bag jammer technicians and dispatchers perform work traditionally performed by carrier employees. I disagree however that the record establishes the required degree of carrier control over ABM.

ABM employees are not held out to the public as carrier employees or their representatives through the display of recognizable airline corporate insignia. Quite the opposite, their uniforms carry a PAC logo which distinguishes them from carrier employees.

ABM employees are trained to operate the airport owned outbound checked baggage conveyor system which is controlled by TSA and the airport, not the carriers. The record reflected that the bulk of their training consisted of on the job training conducted by experienced ABM employees.

It is clear from the record that the role of the PAC General Manager is to enforce the agreed upon budget limits of the cost plus percentage fee contract with ABM. If ABM intends to go beyond the budgetary limits it must seek PAC approval or assume the liability for those costs. These cost based collaborative discussions between the parties reflected in the record are an indication that both parties recognize their responsibilities to respect the terms of the contract and not an indication of carrier control over the manner in which ABM conducts its business. PAC and ABM entered into a contract with agreed upon cost limits and agreed upon service levels. Ultimately it is ABM's responsibility to make daily decisions that fulfill the contract.

The BHS contract does not give PAC the right to hire, fire, or discipline ABM's employees. There is no direct evidence that PAC takes a significant or meaningful role in ABM's interviewing process or has overruled any of its hiring decisions. The record indicates only one instance where an airline requested the removal of an employee but that removal only occurred after an independent investigation by ABM. Although the record indicates that ABM acquiesced in PAC's request to delay and reinvestigate before discharging another employee, the employee was ultimately discharged. There is no direct evidence that PAC approves or decides promotions. Rather the record indicates that ABM consults with PAC regarding them.

According to its website, www.abm.com, ABM is a multi-national independent multi-billion dollar company which provides a wide range of services to thousands of clients including airports, airlines, stadiums, arenas, hospitals, and the U.S. Government. ABM employees are subject to the ABM Employee Manual administered by its own Human Resources (HR) Department. The record reflects that ABM employs an HR manager that negotiates and administers its contract with PAC. All hiring, firing and supervising is performed by ABM employees, not airline, airport or PAC employees. ABM employs an on-site manager and supervisors that supervise ABM employees, investigate all airline and ABM employee complaints and resolve airline service issues related to this contract. ABM Supervisors control daily work schedules based on conditions such as employee absences and fluctuations in service demands, approve overtime and, along with other members of the ABM HR department, are the ABM employees' primary point of contact. ABM is not a company that is directly or indirectly controlled by a "carrier" under the RLA.