ABM Onsite Services-West, Inc. *and* International Association of Machinists & Aerospace Workers, District Lodge W24, AFL−CIO. Cases 19−RC−144377 and 19−CA−153164

November 14, 2018

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

The issue in this Supplemental Decision is whether the Employer's operations at the Portland International Airport (PDX) are subject to the Railway Labor Act (RLA) or to the National Labor Relations Act (the Act).

In 2015, the National Labor Relations Board asserted jurisdiction and certified the Union as the representative of the Employer's bag jammer technicians and dispatchers at PDX. Following the Board's determination that the Employer had unlawfully refused to recognize and bargain with the Union in a test-of-certification case, the United States Court of Appeals for the District of Columbia Circuit remanded the case to the Board, finding that the National Mediation Board (NMB) cases on which the Board relied in asserting jurisdiction represented an unexplained departure from longstanding NMB precedent. Thereafter, the Board referred the case to the NMB and the NMB issued an advisory opinion stating its view that the Employer's PDX operations are subject to the RLA. For the reasons discussed below, we agree. We therefore dismiss the complaint and the petition, and we vacate the Union's certification.

BACKGROUND

Section 2(2) of the Act provides that the term "employer" shall not include "any person subject to the Railway Labor Act." 29 U.S.C. § 152(2). Similarly, Section 2(3) of the Act provides that the term "employee" does not include "any individual employed by an employer subject to the Railway Labor Act." 29 U.S.C. § 152(3). The RLA, as amended, applies to

> 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 or rendition of his service.

45 U.S.C. § 151 First and 181.

When an employer is not itself a carrier, the NMB applies a two-part test to determine whether it nonetheless has jurisdiction over that employer. First, the NMB considers whether the work the employer performs is traditionally performed by carrier employees. 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 met for the NMB to assert jurisdiction. In determining whether the second part of the test is satisfied, the NMB has traditionally considered six factors: (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 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 carrier control over employee training. See, e.g., *Air Serv Corp.*, 33 NMB 272, 285 (2006).

In 2013, the NMB began emphasizing the third of these six factors, carrier control over personnel decisions (particularly discipline and discharge), and it issued a number of advisory opinions declining to assert jurisdiction where such evidence was lacking. See, e.g., *Huntleigh USA Corp.*, 40 NMB 130, 137 (2013). The Board essentially followed suit, in light of its policy to grant "substantial deference" to NMB advisory opinions regarding RLA jurisdiction.[1] Thus, the Board asserted jurisdiction in cases where the NMB declined to do so under its rebalanced test. See, e.g., *Airway Cleaners, LLC*, 362 NLRB No. 87, slip op. at 1 fn. 2 (2015). In addition, consistent with its longstanding practice, the Board asserted jurisdiction, without referral, in cases that were factually similar to cases in which the NMB had declined jurisdiction.[2] See, e.g., *Allied Aviation Service Co. of New Jersey*, 362 NLRB No. 173, slip op. at 1 (2015), enfd. 854 F.3d 55 (D.C. Cir. 2017), cert. denied 138 S. Ct. 458 (2017).

PROCEDURAL HISTORY

On January 13, 2015, the Union filed a petition seeking to represent all full-time and regular part-time bag jammer technicians and dispatchers employed by the Employer at PDX. The Employer argued that the petition should be dismissed, reasoning that it is controlled

[1] See, e.g., *DHL Worldwide Express*, 340 NLRB 1034, 1034 (2003).

[2] See *Spartan Aviation Industries*, 337 NLRB 708, 708 (2002) ("[T]he Board … will not refer a case that presents a jurisdictional claim in a factual situation similar to one in which the NMB has previously declined jurisdiction.").

by the Portland Airlines Consortium (PAC)[3] and that therefore the Board lacks jurisdiction under Section 2(2) of the Act. After a hearing, on March 6, 2015, the Regional Director issued a Decision and Direction of Election, asserting jurisdiction based on his finding that, similar to recent NMB cases, the PAC does not exercise meaningful control over the Employer, particularly its personnel decisions. Thereafter, the Employer filed a timely request for review, and the Union filed an opposition.

The Board denied the Employer's request for review on April 2, 2015, and certified the Union as the exclusive collective-bargaining representative on April 10, 2015. Following the Employer's refusal to bargain, on August 26, 2015, the Board issued a Decision and Order finding that the Employer had violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union. *ABM Onsite Services-West, Inc.*, 362 NLRB No. 179 (2015).

On March 7, 2017, the United States Court of Appeals for the District of Columbia Circuit granted the Employer's petition for review, denied the Board's cross-application for enforcement, and remanded the case to the Board for further proceedings. *ABM Onsite Services-West, Inc. v. NLRB*, 849 F.3d 1137 (D.C. Cir. 2017). The court determined that under the NMB's traditional six-factor carrier control test, the Employer "would plainly fall under the control of air carriers" and thus be subject to RLA jurisdiction. Id. at 1143.[4] Although the court acknowledged that the Board's assertion of jurisdiction might be warranted under the NMB's post-2013 decisions, the court criticized those decisions as an unexplained departure from longstanding NMB precedent. Id. at 1144−1146. In remanding the case, the court instructed the Board to either "attempt to offer its own reasoned explanation for effectively whittling down the traditional six-factor test" or "refer this matter to the NMB and ask that agency to explain its decision to change course." Id. at 1147.

On May 18, 2017, the Board requested that the NMB study the record in this case in light of the court's decision and determine the applicability of the RLA to the Employer's operations at PDX. On February 26, 2018, the NMB issued an advisory opinion, where it reaffirmed its traditional six-factor carrier control test in which "[n]o one factor is elevated above all others" and overruled cases requiring carrier control over personnel decisions. *ABM-Onsite Services*, 45 NMB 27, 34−35 fn. 2 (2018). Applying the six-factor carrier control test, the NMB found that the Employer's operations at PDX are subject to the RLA. Id. at 35−36.

DISCUSSION

Having received the NMB's advisory opinion, we will give it the substantial deference the Board ordinarily accords such opinions. See *DHL Worldwide Express*, 340 NLRB at 1034.[5] Considering the record in light of the NMB's opinion, we find that the Employer's bag jammer technicians and dispatchers perform baggage handling work that has traditionally been performed by air carrier employees, and that the PAC exercises substantial control over the Employer's PDX operations under the NMB's traditional six-factor carrier control test.[6]

Under factor one of the carrier control test, the record supports the NMB's finding that the PAC controls the manner in which the Employer conducts its business, supporting RLA jurisdiction. The Employer provides

[3] The PAC was created to operate and maintain the baggage handling system at PDX. It is governed by a committee of airline representatives and a general manager.

[4] Specifically, the court found the facts in this case indistinguishable from those in *Air Serv Corp*., 33 NMB 272 (2006), where the NMB had asserted jurisdiction under the six-factor test.

[5] Contrary to our precedent, our dissenting colleague would not defer to the NMB's advisory opinion, which she contends fails to provide a reasoned explanation for the NMB's reaffirmation of the traditional six-factor carrier control test. We respectfully disagree with the dissent's implication that the NMB's pre- and post-2013 precedent stands on the same footing. To the contrary, in remanding this case the court of appeals stated that "[w]hen the NLRB first adopted and applied the NMB's traditional test, it bound itself to continue doing so; any deviation would require a reasoned explanation." *ABM Onsite Services-West, Inc. v. NLRB*, 849 F.3d at 1146. In our view, the dissent's suggestion that *applying* the traditional six-factor test also requires a reasoned explanation is inconsistent with the court's decision, which is law of the case.

In any event, the NMB grounded its decision to reaffirm the six-factor test in its statutory mission to prevent disruptions of interstate commerce by promptly resolving labor disputes between air and rail carriers and their employees, and it explained 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." *ABM Onsite Services*, 45 NMB at 34. Thus, it was far from irrational for the NMB to reaffirm the six-factor carrier control standard, under which, as the court noted, it had found airline-services contractors to fall under RLA jurisdiction in numerous cases decided over the course of many years. See *ABM Onsite Services-West*, 849 F.3d at 1143.

The NLRB's longstanding deference to the NMB's interpretation of the RLA is well-grounded in the provisions of both statutes as well as established principles of comity. We believe it will best effectuate the policies of both statutes to do so here as well, rather than create a jurisdictional conflict by reasserting jurisdiction over the Employer in the face of a contrary NMB determination.

[6] Because the NMB overruled its cases emphasizing carrier control over personnel decisions, the following Board decisions are no longer precedential to the extent they relied on the overruled NMB cases: *Airway Cleaners, LLC*, 363 NLRB No. 166 (2016); *Allied Aviation Service Co. of New Jersey*, 362 NLRB No. 173 (2015); and *Airway Cleaners, LLC*, 362 NLRB No. 87 (2015).

baggage handling services to air carriers at PDX pursuant to its contract with the PAC. The Employer must meet requirements and performance measures as specified in the contract. The Employer must also follow the PAC's operational procedures and comply with its operations-related requests. Occasionally, individual carriers will also make requests or give instructions to the Employer. For example, Alaska Airlines requested that the Employer's employees place tubs in a different location and use a separate scanner for oversize baggage, and those requests were granted. The PAC's, General Manager, John Imlay created the operations manual for the baggage handling system. Employees' schedules are based on flight schedules. Imlay periodically reviews employee schedules, and he denied a request for additional staffing during the holiday season. The PAC must also approve the Employer's labor costs, including wage increases.

There is also evidentiary support for the NMB's determination that the third carrier control factor weighs in favor of RLA jurisdiction because the PAC exerts significant control over the Employer's personnel decisions. The PAC has a contractual right to request the removal of employees, and it must approve changes in the Employer's key personnel. Imlay approves new hires, and the Employer has acquiesced in his requests to discipline and terminate employees. For example, the Employer discharged an employee at the request of Imlay and United Airlines. Imlay also directed the Employer to reassign an employee to a less busy shift and to investigate further before discharging employees. Further, Imlay promoted the Employer's Facility Manager and decided to eliminate the supervisor position she previously occupied.

The record similarly sustains the NMB's finding that all but one of the remaining carrier control factors demonstrate that the Employer is subject to the PAC's control.[7] The PAC has access to the Employer's operations and records. The Employer's employees wear clothing with the PAC's logo on it. Finally, Imlay conducts part of new employee training and reviews all training materials, and he oversaw the retraining of employees during the expansion of the baggage handling system.

In sum, the record supports the NMB's finding that evidence bearing on five of the six traditional carrier control factors establishes that the Employer is controlled by the PAC. Therefore, we agree with the NMB's determination that the PAC exercises sufficient control over the Employer's operations at PDX to establish RLA jurisdiction.

[7] Only the Employer's supervision of its own employees fails to support PAC control.

CONCLUSION OF LAW

Having considered the facts in light of the opinion issued by the NMB, we find that the Employer is engaged in interstate air common carriage so as to bring it within the jurisdiction of the NMB pursuant to Section 201 of Title II of the RLA. Accordingly, we shall dismiss the complaint in Case 19−CA−153164. We shall also reopen Case 19−RC−144377, vacate the certification, and dismiss the petition.

ORDER

IT IS ORDERED that the complaint in Case 19−CA−153164 is dismissed.

IT IS FURTHER ORDERED that Case 19−RC−144377 is re-opened, the certification issued April 10, 2015, is vacated, and the petition is dismissed.

Dated, Washington, D.C. November 14, 2018

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

The lesson of the District of Columbia Circuit's decision in this case is clear: in deciding jurisdictional issues implicating the Railway Labor Act, the Board may not simply defer to the statutory interpretation of the National Mediation Board, if the NMB itself has failed to engage in the reasoned decision making required by the Administrative Procedure Act.[1] Here, the court found that the NMB had departed from its own precedent on jurisdiction without explanation and that we erred, in turn, by following the NMB's new decisions (instead of the old) without addressing the shift in interpretation.[2] Now that the NMB has reverted to its older "carrier control" precedent (in a divided decision[3]), my colleagues defer to that interpretation of the Railway Labor Act. But I do not believe we can safely do so, because the

[1] *ABM Onsite Services-West, Inc. v. NLRB*, 849 F.3d 1137 (D.C. Cir. 2017).

[2] Id. at 1146−1147.

[3] *ABM-Onsite Services*, 45 NMB No. 12 (Feb. 26, 2018).

NMB's latest decision is similarly deficient under the Administrative Procedure Act. It fails to explain *why* the NMB has chosen one line of precedent rather than the other, and it fails to address (or even acknowledge) the dissenting arguments of NMB Member Puchala.

The Supreme Court has spoken directly to the Administrative Procedure Act's requirement of "reasoned decisionmaking." In the course of rejecting a Board decision interpreting the National Labor Relations Act, the Court has observed that:

> The Administrative Procedure Act, which governs the proceedings of administrative agencies and related judicial review, establishes a scheme of "reasoned decisionmaking."
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> * * *
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> Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.

Allentown Mack Sales & Service, Inc. v. NLRB, 522 U.S. 359, 372 (1998), quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 52 (1983). As relevant here, when an administrative agency is choosing between conflicting lines of precedent, in order to be "logical and rational" the agency must explain its choice. When the agency opts for one line of precedent without explaining its choice (or even acknowledging that it is *making* a choice), it violates the APA's requirement of reasoned decisionmaking. That, of course, is why the District of Columbia Circuit rejected the Board's initial decision in this case, and why the Board, in turn, referred this case to the NMB.

The NMB thus had a choice to make, between its older line of precedent and its newer line. But more to the point, it also had a duty to *explain* its ultimate choice, just as the District of Columbia Circuit has required the Board to do in similar circumstances. In the *DuPont* case, for example, after holding that the Board had "failed to give a reasoned justification for departing from its precedent," the court instructed that "[o]n remand, the Board must either conform to its precedent in [more recent cases] or *explain its return to the rule followed in its earlier decisions.*"[4] In my view, the NMB has failed adequately to "explain its return to the rule followed in its earlier decisions."

Certainly, the NMB made a choice. It rejected the approach of its more recent cases (in a footnote) and returned to the approach of its earlier "carrier control" decisions. The NMB's majority opinion stated that "[t]o the extent that prior Board [NMB] cases can be read as treating the ability to dictate personnel decisions as required or necessary to establish carrier control, they are overruled." 45 NMB No. 12, slip op. at 35 fn. 2. The NMB majority also *described* the test to which it was returning and *applied* that test to the facts of this case. Id. at 34–36. But what the NMB majority did not do was explain *why* it was overruling its most recent line of "carrier control" cases and returning to what it called its "traditional jurisdiction test." Id. at 28. The NMB majority did not assert that this test was compelled by the Railway Labor Act and thus that it could not choose to follow the recent cases, insofar as they deviated from the traditional test. Nor did the NMB majority point to any other legal or policy shortcomings in the newer approach. The majority made no attempt to explain why (in its view) the traditional test was superior to (or, at least, not inferior to) the newer approach, measured against the language and policies of the RLA or other legitimate, administrative considerations.

The NMB majority's failure to explain its choice is all the more striking given its failure to respond to the arguments made by dissenting Member Puchala, who *did* explain her reasons for adhering to the newer precedent and not returning to the old.[5] She argued that the NMB's traditional "carrier control" test "like many multifactor tests, was prone to inconsistencies." 45 NMB No. 12, slip op. at 37 (dissenting opinion). Indeed, she argued that 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." Id. at 38. She then proceeded to examine the RLA's language and legislative history with care. Id. Member Puchala also pointed to changes in the airline industry since the NMB first adopted its traditional test, culminating in a "highly

[4] See, e.g., *E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65, 70 (D.C. Cir. 2012) (emphasis added). As this case illustrates, and contrary to the majority's representations, the requirement that agencies explain themselves is not a one-way street. Reasoned decisionmaking requires explanation when departing from precedent *and* when returning to a prior precedent after some deviation.

[5] The District of Columbia Circuit has made clear, in cases involving the NLRB, that to comply with the requirement of "reasoned decisionmaking," a multimember agency must, among other things, engage with the arguments raised before it, including those made by a dissenting member. See, e.g., *Hawaiian Dredging Constr. Co., Inc. v. NLRB*, 857 F.3d 877, 881–882 (D.C. Cir. 2017), denying enf. 362 NLRB No. 10 (2015); see also *Contractors' Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1061 fn. 6 (D.C. Cir. 2003), denying enf. in part to 335 NLRB 260 (2001). The Circuit thus has criticized the NLRB for a "dismissive" response to a dissenting Board member's position, which the court found left "critical gaps" in the majority's reasoning. *David Saxe Productions, LLC v. NLRB*, 888 F.3d 1305, 1312 (D.C. Cir. 2018), remanding in relevant part 364 NLRB No. 100 (2016).

regulated and secure airline/airport environment," id. at 39, where ostensible "carrier control" over subcontractors actually reflects pervasive government regulation over the industry. In adhering to the traditional test, Member Puchala argued, the NMB had failed to respond to changed circumstances, as an administrative agency must. Id. at 40.

There may be good answers to Member Puchala's dissenting arguments, but the NMB majority has not provided them—or even tried. Reasoned decision-making requires more. From the perspective of the APA, the NMB's decision here is clearly deficient, and we should therefore refer this case to the NMB again, so that agency may provide a sufficient explanation of its decision to reverse its more recent precedent and to return to its old jurisdictional test.[6] Accordingly, I dissent from today's decision, which I fear is headed toward the same fate as our earlier decision in this case, when it reaches the District of Columbia Circuit.

Dated, Washington, D.C. November 14, 2018

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

[6] The majority misunderstands the District of Columbia Circuit's instructions here, in suggesting that the "law of the case" permits us to defer to the NMB's most recent decision, regardless of whether or not it was sufficiently explained. The court gave us two choices: either to explain why we were adopting the NMB's "whittl[ed] down" jurisdictional test or to refer the case to the NMB for an explanation of its decision to adopt that test. 849 F.3d at 1147. We referred the case to the NMB. But instead of providing the anticipated explanation, the NMB changed course again—over the carefully reasoned dissent of one NMB member, which the NMB majority ignored.

So we are again presented with an NMB decision that adopts a jurisdictional test, but fails to explain it adequately. The law of the case neither requires us, nor permits us to defer to that decision. *Some* agency—whether the NMB or the Board—must engage in reasoned decision making here.

The majority's perfunctory effort to defend the NMB's decision, essentially by pointing out that it was a return to prior precedent, is not enough, because it is now that return which must be explained. Either the Board is adopting the NMB's traditional test itself (in which case *we* must address the NMB dissenter's arguments, in order to engage in reasoned decision making), or the Board is simply deferring to the NMB's decision (in which case we are making the same mistake we did before, given the NMB's own failure to engage in reasoned decision making).