Swissport Cargo Services, LP *and* International Association of Machinists and Aerospace Workers, AFL–CIO and Service Employees International Union, Local 32BJ. Case 22–RC–292717

December 10, 2024

DECISION ON REVIEW AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND WILCOX

The issue in this case is whether the Employer's operations at Newark Liberty International Airport (EWR) are subject to the Railway Labor Act (RLA) or to the National Labor Relations Act (the Act). The Regional Director concluded that the Employer's EWR operations are subject to the Act and directed an election. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board (Board)'s Rules and Regulations, the Employer filed a timely request for review. The Board subsequently referred this case to the National Mediation Board (NMB) for an advisory opinion on whether the Employer's operations in question are subject to the RLA.[1] On November 8, 2024, the NMB issued an advisory opinion stating its view that the Employer's EWR operations are not subject to the RLA. *Swissport Cargo Services, LP*, 52 NMB 25 (2024).

The Board has delegated its authority in this proceeding to a three-member panel.[2]

The Employer's request for review is granted as it raises substantial issues warranting review. On review, we affirm the Regional Director's assertion of jurisdiction in light of the NMB's advisory opinion.

In concluding that the Employer is subject to the Act, the Regional Director applied the NMB's longstanding two-part test for determining whether an employer, which is not itself a rail or air carrier, is subject to the RLA. That test considered (1) whether the work the employer performs is traditionally performed by carrier employees, and (2) whether the employer is directly or indirectly owned or controlled by, or under common control with, a carrier or carriers. The parties here stipulated to the first part of the test; applying the second part of the test, the Regional Director found that carriers do not have sufficient control over the Employer for it to be subject to RLA jurisdiction.

In its advisory opinion, however, the NMB discarded the two-part test applied by the Regional Director, at least with respect to contractors of air carriers. After reviewing the text and legislative history of the RLA, the NMB concluded that the two-part test is atextual and held:

> 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 [of the RLA]. Therefore, the NMB's opinion is that Swissport's operations and its employees at EWR are not subject to the RLA.

52 NMB at 38.

Having reviewed the NMB's advisory opinion, we will give it the substantial deference the Board ordinarily accords such opinions. See *DHL Worldwide Express*, 340 NLRB 1034, 1034 (2003).[3] Considering the record in light of the NMB's opinion, we find that the Employer is not a common carrier by air and, consistent with the NMB's revised position on the reach of the RLA, is therefore not subject to the RLA. Accordingly, we find that the Employer is engaged in commerce within the

[1] The request for review remained pending while the case was on referral to the NMB. Consistent with the version of Sec. 102.67 then in effect, the ballots were originally impounded due to the pendency of the request for review. In *AFL–CIO v. NLRB*, 57 F.4th 1023 (D.C. Cir. 2023), the United States Court of Appeals for the District of Columbia Circuit held that the impoundment provision in former Sec. 102.67 was contrary to Sec. 3(b) of the Act. Based on that holding, the Intervenor moved to open and count the ballots, the Regional Director granted the motion, and the initial tally of ballots showed 38 votes for the Petitioner, 47 for the Intervenor, 11 against representation, and 3 nondeterminative challenged ballots. The Regional Director directed a runoff election; the Employer sought to stay the runoff, but the Board denied that request on July 7, 2023 (as stated in his dissent from the Board's July 7, 2023 order, Member Kaplan would have stayed this proceeding pending the Board's consideration of the NMB's advisory opinion). The tally of ballots for the runoff election showed 63 votes for the Intervenor and 38 votes for the Petitioner, with 7 nondeterminative challenged ballots. The Employer filed an objection to the runoff election, and on September 11, 2023, the Regional Director issued a Decision and Certification of Representative overruling the objection without a hearing and certifying the Intervenor. No request for review of the Decision and Certification of Representative was filed.

[2] Member Prouty is recused and took no part in the consideration of this case.

[3] Chairman McFerran finds that this case is distinguishable from *ABM Onsite Services—West, Inc.*, 367 NLRB No. 35 (2018), where she questioned the deference owed to the NMB decision at issue there that departed from precedent without a reasoned explanation for doing so. Here, in contrast, she finds that the NMB has thoroughly explained its change in precedent and thus would defer to the NMB's definition of a common air carrier and its determination that the Employer is not subject to the RLA's jurisdiction.

meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction.

ORDER

The Regional Director's Decision and Direction of Election is affirmed.

Dated, Washington, D.C. December 10, 2024

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Lauren McFerran, Chairman

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Marvin E. Kaplan, Member

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Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD