UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

PRIMEFLIGHT AVIATION SERVICES, INC.

Employer

and **Case 12-RC-357112**

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

The petition in this matter was filed by Transport Workers Union of America, AFL-CIO (the Petitioner) on December 20, 2024, under Section 9(c) of the National Labor Relations Act, as amended (the Act), seeking to represent a unit of all full-time and regular part-time aircraft fuelers and lead aircraft fuelers employed by PrimeFlight Aviation Services, Inc. (the Employer) at Orlando International Airport, Orlando, Florida; excluding all other employees, guards, managers, and supervisors as defined in the Act.[1]

A hearing was held on January 6, 2024, before a hearing officer of the National Labor Relations Board (the Board). The only disputed issue is whether the Board has

[1] The parties stipulated that if it is determined that the Board has jurisdiction (i.e. over the Employer's operations) and that the Employer is an employer engaged in commerce within the meaning of the Act, this is an appropriate unit within the meaning of Section 9(b) of the Act.

The parties further stipulated as follows:

> PrimeFlight Aviation Services, Inc., herein called the Employer, is a Delaware corporation in the business of providing airline fueling services for various commercial carriers in the United States of America, at various airports, including Orlando International Airport, Orlando, Florida. The Employer has a principal office and place of business located in Sugar Land, Texas, and an office at 8684 Bear Rd #300, Orlando, Florida 32827. During the past 12 months, in the course and conduct of its business, the Employer purchased and received at locations in the State of Florida goods valued in excess of $50,000 from directly from points outside the State of Florida.
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> The Petitioner is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.
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> There is no collective-bargaining agreement covering any of the employees in the unit sought in the Petition herein and there is no contract bar to an election in this matter.

jurisdiction over the Employer's operations at Orlando International Airport, or, as the Employer contends, those operations are subject to the exclusive jurisdiction of National Mediation Board (NMB) pursuant to the Railway Labor Act (RLA), and for that reason the petition should be dismissed. As explained below, based on the record, the briefs, and relevant NMB and Board law, I have concluded that the Employer's operations involved in this case are not subject to the RLA, and that the Employer is subject to the Board's jurisdiction pursuant to the Act. The parties agree on a manual election. Accordingly, I have directed an election in the petitioned-for unit.

I. Relevant NMB and Board Law

In *Swissport Cargo Services, LP*, Case 22-RC-292717, 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, considering (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 in *Swissport* stipulated to the first part of the test. In applying the second part of the test, i.e. the six-factor carrier control analysis, the Regional Director found that carriers did not have sufficient control over Swissport's operations for Swissport to be subject to RLA jurisdiction, and therefore concluded that Swissport's operations were subject to the jurisdiction of the Act and directed an election. Swissport filed a request for review with the Board, and the Board referred the jurisdictional issue to the NMB for an advisory opinion. Pursuant to the Board's request, on November 8, 2024, the NMB issued an advisory opinion stating its view that the operations of Swissport at Newark Liberty International Airport (EWR) are not subject to the RLA. *Swissport Cargo Services, LP*, 52 NMB 25 (2024). In *Swissport Cargo Services, LP*, 373 NLRB No. 144 (December 10, 2024), the Board explained that the NMB had discarded the two-part test applied by the Regional Director, at least with respect to contractors of air carriers, and that 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. The Board reviewed the NMB's advisory opinion and gave it the substantial deference the Board ordinarily accords to NMB opinions, citing *DHL Worldwide Express*, 340 NLRB 1034, 1034 (2003). The Board considered the record in light of the NMB's opinion and found that Swissport is not a common carrier by air, and consistent with the NMB's opinion, it is not subject to the RLA. Accordingly, the Board found that Swissport is an employer engaged in commerce within the meaning of the National Labor Relations Act and that it will effectuate the purposes of the Act to assert jurisdiction. 373 NLRB No. 144.

In an unpublished decision issued by the Board in *Jetstream Ground Services, Inc.*, Case 10-RC-304155, on December 11, 2024, a day after its *Swissport* decision, the Board deferred to the NMB's December 3, 2024, advisory opinion reported at 52 NMB 63, concerning Jetstream's operations at Charlotte Douglas International Airport (CLT), in which the NMB found that because Jetstream is not a common carrier by air and its only connection to air transportation is through its contract for services to an airline, there is no RLA jurisdiction over Jetstream. Accordingly, the Board found that Jetstream is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction.

In addition, in *PrimeFlight Aviation Services, Inc.*, NMB Case No. R-7647, involving the petitioned-for unit in this case, the NMB issued Findings Upon Investigation – Dismissal, reported at 52 NMB No. 15 (December 11, 2024), concerning the July 23, 2023, application of the Petitioner in the instant case, alleging a representation dispute pursuant to the RLA among the Employer's aircraft fuelers at its Orlando International Airport station.[2] The NMB found that the Employer is not a common carrier by air within the meaning of RLA Section 201, 45 U.S.C. § 181, and its connection to air transportation is only through its contracts for services with various air carriers. Accordingly, the NMB found that the Employer and its aircraft fuelers are not subject to RLA jurisdiction and dismissed the application of the Petitioner in NMB Case No. R-7647.

II. The Employer's appeal of the Hearing Officer's rejection of its offer of proof and prohibition of witness testimony, and the Petitioner's response thereto.

At the hearing, the Hearing Officer gave the Employer the opportunity to make an offer of proof as to the evidence it intended to produce on the jurisdiction issue. The Employer offered to prove, through testimony of Allen Ashcraft, its Executive Vice President, that the fueling operations the Employer's employees perform at Orlando International Airport (MCO) are duties traditionally performed by airline carrier employees, and that the Employer's commercial airline customers at MCO exercise control over the Employer's operations, including, but not limited to, (a) how and when the Employer's employees are scheduled; (b) how many employees are scheduled; (c) setting exact fueling requirements; (d) requiring specific training of employees; (e) conducting training for employees; (f) providing space and equipment for employees; (g) retaining the right to audit the Employer's records and equipment; (h) conducting routine audits of the Employer's records, equipment and performance; and (i) retaining the right to have the Employer remove personnel from servicing the commercial airline customers' planes (such as for misconduct, etc.). The Employer further offered that Mr. Ashcraft would testify about its history of bargaining with respect to the petitioned-for unit at MCO, including the applicable collective-bargaining agreement being governed by the RLA, and that the Employer has bargaining relationships with other unions at other locations in the United States that are governed by the RLA pursuant to prior decisions of both the NMB and the Board. The Employer did not further describe the testimony it intended to present from Mr. Ashcraft and did not offer to present any other witnesses.

The Hearing Officer rejected the Employer's offer of proof and prohibited the Employer from calling Executive Vice President Ashcraft as a witness.

[2] The Employer and the Petitioner each introduced in evidence a copy of the NMB's dismissal of *PrimeFlight Aviation Services, Inc.*, NMB Case No. R-7647.

In addition, the Employer offered to introduce documents as exhibits. The Petitioner reserved the right to object to the exhibits on relevance grounds but did not object to the authenticity of the exhibits, which were admitted in evidence by the Hearing Officer. The Employer's exhibits include portions of it collective-bargaining agreements with unions and certain NMB opinions as described below. The Employer did not seek to introduce any other exhibits.

The Employer's exhibits include excerpts from collective-bargaining agreements between the Employer and unions covering various job classifications of the Employer's employees at certain airports, including its agreements with:

- Service Employees International Union, Local 32BJ (SEIU Local 32BJ) at Philadelphia International Airport. effective by its terms from June 9, 2021, to July 31, 2024.
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- SEIU Local 32BJ at John F. Kennedy International Airport, LaGuardia Airport, and Newark Liberty International Airport that was effective by its terms from April 2, 2021, until February 28, 2024.

- SEIU, United Service Workers West at San Francisco International Airport that is effective by its terms from April 1, 2021, through April 1, 2025.

- SEIU Local 32BJ at Boston Logan International Airport that was effective by its terms from October 1, 2020, to September 30, 2023.

- United Service Workers Union Local No. 74 (USWU Local 74), dated December 19, 2022, confirming that the labor agreement concerning the bargaining unit of fuelers at MCO between USWU Local 74 and Skyfuel Aviation Services of Orlando, LLC (Skyfuel), which had been purchased by the Employer, remained valid through no later than December 31, 2023, was subject to the RLA, and that the parties agreed to revisit the Skyfuel collective-bargaining agreement to determine whether any changes to wages and benefits should be made at a future date to be mutually determined by the parties. The Employer's exhibits also including excerpted pages from the Skyfuel agreement, which appears to have been effective by its terms for three years starting on January 25, 2019.

The above-referenced exhibits except the excerpt from the collective-bargaining agreement covering employees at Philadelphia International Airport include statements that the agreements are subject to requirements of the RLA or are governed by the RLA.

The Employer and the Petitioner stipulated that in April 2023, USWU Local 74 disclaimed interest in representing the employees in the petitioned-for unit. The record includes a letter dated April 21, 2023, from USWU Local 74 President Sal Alladeen to Employer General

Counsel Allen Ashcraft, informing the Employer that USWU Local 74 disclaimed interest in representing the Employer's employees at MCO effective on that date.

The Employer also offered exhibits that were received in evidence consisting of two NMB opinions issued on August 22, 2018, finding RLA jurisdiction over the Employer's operations based on the two-part test subsequently overruled by the NMB in *Swissport Cargo Services, LP*, 52 NMB 25 (November 8, 2024). In those 2018 opinions the NMB found that the Employer's operations were traditional airline functions, and further found, in *PrimeFlight Aviation Services, Inc*., 45 NMB No. 32, that the Employer's operations at Westchester County Airport were sufficiently controlled by JetBlue, a common carrier by air, to establish RLA jurisdiction, and in *Prime Flight Aviation Services, Inc.*, 45 NMB No. 33, that the Employer's operations at LaGuardia Airport were sufficiently controlled by six common carriers by air to establish RLA jurisdiction. The Board deferred to these NMB determinations finding RLA jurisdiction, vacated certifications of representative, and dismissed representation petitions filed pursuant to the Act in *PrimeFlight Aviation Services, Inc.*, 367 NLRB No. 81 (January 29, 2019) (involving the Employer's operations at Westchester County Airport), and in *PrimeFlight Aviation Services, Inc.*, 367 NLRB No. 83 (January 31, 2019) (involving the Employer's operations at LaGuardia Airport).

At the hearing the Employer requested special permission to appeal the Hearing Officer's rejection of its offer of proof and decision to prohibit testimony from Executive Vice President Ashcraft and appealed, arguing that notwithstanding the NMB's *Swissport* opinion overruling the two-part "function and control" test, the testimony should be admitted because it will provide evidence critical to a proper understanding of complex factual and legal issues. The Employer argues that the NMB's *Swissport* decision is not likely to withstand judicial scrutiny, and cites *ABM Onsite Services v. NLRB*, 849 F.3d 1137 (D.C. Cir. 2017) in support of that proposition. In the alternative to a determination granting its request for special permission to appeal and granting the appeal, the Employer requests the right to file a brief on the issue.

The Petitioner opposes the Employer's request for special permission to appeal, arguing that the legal issues concerning jurisdiction are straightforward, that the documents submitted by the Employer are based on the jurisdictional standard that was abandoned by the NMB in *Swissport*, and that the Board properly deferred to the NMB's *Swissport* decision.

The parties made closing arguments at the hearing. The Employer essentially repeated the above-stated arguments in its offer of proof and its appeal. The Petitioner argued that the Board should assert jurisdiction in the instant case based on the NMB decisions finding no jurisdiction under the RLA in *Swissport* and *Jetstream*, the Board's decisions deferring to those NMB findings, and the NMB's decision finding no jurisdiction under the RLA with respect to the Employer's MCO operations at issue herein.

IV. Analysis

Based on the NMB's abandonment of the two-part jurisdictional test concerning contractors providing services to common carriers by air in *Swissport Cargo Services, LP*, 52 NMB 25 (2024), the Board's deferral to that determination in *Swissport Cargo Services, LP*, 373

NLRB No. 144 (December 10, 2024), and the NMB's reliance on its *Swissport* decision in dismissing *PrimeFlight Aviation Services, Inc.*, NMB Case No. R-7647, involving the petitioned-for unit in this case, reported at 52 NMB No. 15 (December 11, 2024), I find that the Hearing Officer appropriately rejected the Employer's offer of proof and refused to permit the testimony of Executive Vice President Ashcraft. There is nothing in the offer of proof that would change the determination of this case. The relevant facts necessary to apply the recent NMB and Board decisions on jurisdiction over the operations of non-carrier contractors that serve air carriers are not in dispute. Therefore, the Employer's request for special permission to appeal is denied. Even if I granted that request I would deny the appeal as lacking in merit. In view of the recent determinations of the NMB and the Board in the above-cited cases I decline to exercise my discretion under Section 102.66(h) of the Board's Rules and Regulations to permit the parties to file briefs in this matter.

For the reasons stated by the Board in *Swissport Cargo Services, LP*, 373 NLRB No. 144 I defer to the NMB's conclusion in *PrimeFlight Aviation Services, Inc.*, NMB Case No. R-7647, reported at 52 NMB No. 15, that the Employer's operations at Orlando International Airport are not subject to the RLA because the Employer is not an air carrier. I further find that the Employer is an employer within the meaning of Section 2(2) of the National Labor Relations Act, its employees are employees within the meaning of Section 2(3) of the Act, and the Employer is engaged in commerce within the meaning of Section 2(6), and (7) of the Act. Accordingly, I am directing an election in this case.

V. CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings of the Hearing Officer at the hearing are free from prejudicial error and are hereby affirmed.

2. I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. The parties stipulated, and I find that there is no collective-bargaining agreement covering any of the employees in the unit sought in the Petition herein and there is no contract bar to this proceeding.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

6. I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time aircraft fuelers and lead aircraft fuelers employed by the Employer at Orlando International Airport, Orlando, Florida; excluding all other employees, guards, managers, and supervisors as defined in the Act.

III. DIRECTION OF ELECTION

A. Election Details

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for the purposes of collective bargaining by Transport Workers Union of America, AFL-CIO.

A manual election will be conducted at the Hyatt Regency Orlando International Airport hotel, Shannon meeting room, located on the Hotel Lobby, Level 4, 9300 Jeff Fuqua Blvd., Orlando, Florida on Saturday, February 1, 2025, from 10:00 a.m. to 11:00 a.m. and 3:00 p.m. to 4:00 p.m., and on Monday, February 3, 2025, from 10:00 a.m. to 11:00 a.m. and 3:00 p.m. to 4:00 p.m. The ballots will be commingled and counted immediately after the Board Agent closes the final polling period on February 3, 2025.

The ballots and Notice of Election shall be printed in English, Spanish, and Haitian Creole.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending January 17, 2025, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. In a mail ballot election, employees are eligible to vote if they are in the unit on both the payroll period ending date and on the date they mail in their ballots to the Board's designated office.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period, and, in a mail ballot election, before they mail in their ballots to the Board's designated office; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **January 23, 2025**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**[3]

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election, which will be provided separately at a later date, in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of

[3] The Petitioner agreed to waive 5 days of the 10-day period that it is entitled to have the voter list.

Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: January 21, 2025.

David Cohen

David Cohen, Regional Director
National Labor Relations Board, Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, Florida 33602-5824