United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1342 **September Term, 2019**

FILED ON: JANUARY 27, 2020

AMERICAN SALES & MANAGEMENT ORGANIZATION, LLC, D/B/A EULEN AMERICA,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ,
INTERVENOR

Consolidated with 19-1018

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: WILKINS and RAO, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

J U D G M E N T

This petition for review and cross-application for enforcement of a National Labor Relations Border order were presented to the court and briefed and argued by counsel. The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons set out below, it is

ORDERED and **ADJUDGED** that the petition for review be denied and the cross-application for enforcement be granted.

American Sales & Management Organization, LLC ("Eulen") petitions for review of a decision by the National Labor Relations Board, which concluded that Eulen violated the National Labor Relations Act by terminating an employee in retaliation for striking. Eulen contends that the NLRB lacks jurisdiction because Eulen's employees and operations at the Fort Lauderdale-Hollywood International Airport are subject to the Railway Labor Act, not, as the NLRB found, the National Labor Relations Act. We hold that Eulen waived a challenge to the NLRB's non-referral

of the question to the National Mediation Board and that the NLRB's resulting decision was supported by substantial evidence and not otherwise arbitrary, and thus enforce the NLRB's order.

The allocation of jurisdiction over labor disputes between the Railway Labor Act and the National Labor Relations Act warrants a brief explanation. Under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, the NLRB has authority to decide labor disputes in the private sector. One exception is the transportation sector. Under the Railway Labor Act, a special regulatory scheme governs labor relations for rail and air carriers, as well as some companies working with those carriers. *See* 45 U.S.C. §§ 151, 181. The National Mediation Board, rather than the NLRB, administers the Railway Labor Act.

When a labor dispute arises involving a company operating in the transportation sector, a threshold question is whether that company is subject to the jurisdiction of the Railway Labor Act or the National Labor Relations Act. No statute or regulation dictates which agency is to make this jurisdictional determination. *See ABM Onsite Servs.-West, Inc. v. NLRB*, 849 F.3d 1137, 1140 (D.C. Cir. 2017). In the absence of either, the NLRB has developed a practice of referring many jurisdictional questions to the National Mediation Board and deferring to its view. *Id.* But when the NLRB believes a case is clearly controlled by National Mediation Board precedent, it will make a jurisdictional determination on its own. *Id.* Here, the NLRB declined to refer the jurisdictional question to the National Mediation Board and instead conducted its own analysis, concluding that Eulen was not subject to Railway Labor Act jurisdiction.

Eulen challenges the NLRB's jurisdictional finding as erroneous and inconsistent with its prior decisions. Eulen does not press the argument that the NLRB's decision to resolve the jurisdictional question without seeking an advisory opinion from the National Mediation Board was itself an arbitrary departure from the NLRB's established practices.[1] We thus consider solely whether the NLRB's jurisdictional determination was arbitrary or erroneous.

The National Mediation Board has created a two-part test to determine whether it has jurisdiction under the Railway Labor Act. First, the employer must perform work traditionally performed by carrier employees. The NLRB found that Eulen does so. Second, the company must be "directly or indirectly owned or controlled by or under common control with any carrier[.]" 45 U.S.C. §§ 151, 181. The NLRB found that Eulen was not under carrier control, and Eulen contests that conclusion.

The National Mediation Board considers six factors to determine whether carriers control an employer: (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

[1] Though a single sentence in petitioner's briefing suggests that the NLRB should have referred the decision to the National Mediation Board, this does not suffice to raise the issue. *See, e.g., SEC v. Banner Fund Intern.*, 211 F.3d 602, 613–614 (D.C. Cir. 2000).

employees; (5) the extent of the carrier's control over employee training; and (6) whether company employees are held out to the public as carrier employees. *See ABM Onsite Servs.-West*, 367 NLRB No. 35, at *1 (2018) (citing *Air Serv Corp.*, 33 NMB 272, 285 (2006)). "No one factor is elevated above all others in determining whether this significant degree of influence is established." *ABM-Onsite Servs.*, 45 NMB No. 12, at *34–35 (2018). Considering these factors, the NLRB found that the second factor favored Railway Labor Act jurisdiction, but the other five factors did not, and thus that Eulen was not subject to Railway Labor Act jurisdiction. Eulen challenges the NLRB's findings regarding each of those five other factors.

We review the NLRB's findings to ensure that they are supported "by substantial evidence in the record considered as a whole" and that the Board has not "acted arbitrarily or otherwise erred in applying established law to facts." *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1282 (D.C. Cir. 1999) (internal quotation marks and citations omitted). We conclude that the Board's overall jurisdictional finding is supported by substantial evidence.

Eulen makes several arguments contending that carriers do exert extensive control over the manner in which Eulen conducts its business, but none point to a defect in the NLRB's analysis. True, carrier service specifications, audits and performance standards all allow the airlines to exert some control over the nature and quality of their bargained-for services. But, they primarily serve to clarify the scope of services that Eulen is obligated to perform rather than controlling the way that Eulen fulfills those obligations. This is distinguishable from cases where the carriers exerted more direct control over staffing decisions and labor costs. *See ABM Onsite*, 367 NLRB No. 35, at *3 (noting a carrier employee reviewed schedules and approved wage increases); *see also Swissport USA, Inc.*, 35 NMB No. 55, at *5 (2008). The NLRB's conclusion that Eulen primarily controlled the conduct of its own business, based on its control over its employees' terms and conditions of employment and its providing most of its own equipment, is thus supported by substantial evidence.

As to the third factor, Eulen claims that the carriers exert substantial control over the company's personnel decisions. Again, the evidence supports the NLRB's conclusions. While airlines may on occasion have raised concerns about particular Eulen employees, the company retains full responsibility for conducting its own investigations into any issues and making any consequent personnel decisions. The National Mediation Board has previously found this weighs against Railway Labor Act jurisdiction. *See Signature Flight Support*, 32 NMB No. 42, at *225 (2005) (where final decision–making power regarding personnel rests with the company, carriers do not exercise substantial control over its personnel decisions).

Eulen further claims that the carriers played a significant supervisory role with respect to Eulen's employees and thus that the NLRB's conclusions to the contrary are error. Again, the NLRB's position is supported by the record. Though Eulen puts forth evidence of limited carrier input into staffing levels, most of the carriers it works with expressly disclaim any responsibility over the assignment, supervision and direction of Eulen's employees, as well as how those employees perform their work. The record also suggests that the carriers exert supervisory authority by auditing Eulen's performance only infrequently and informally. *Cf. ABM Onsite*, 849 F.3d at 1143–44

(emphasizing a carrier wielded "a great deal of influence *in practice* through its comprehensive monitoring of the contract's performance").

The fifth factor addresses the extent of carrier control over employee training. Eulen stresses the train-the-trainer programs and training programs provided directly by the airlines, which point toward this factor favoring Railway Labor Act jurisdiction. But other evidence, such as Eulen's sole control over training of certain employees and the fact that airline-provided training is only permitted to displace Eulen's training when it covers substantially similar material, cuts against Railway Labor Act jurisdiction. This factor has weighed against Railway Labor Act jurisdiction in other cases where the employer is generally responsible for employee training even when airlines provide substantial additional training or preempt some of the employer's training. *See Ogden Aviation Servs.*, 23 NMB 98, 106–107 (1996). We cannot say that the NLRB's conclusions on this factor lack substantial evidence.

Eulen last challenges the NLRB's conclusion that Eulen's employees are not held out to the public as carrier employees. As the NLRB notes, the vast majority of Eulen employees wear Eulen uniforms rather than airline uniforms, which provides substantial support for the proposition that these employees are held out as Eulen's employees and not as airline employees. This is distinguishable from a case like *Primeflight Aviation Servs., Inc.*, 367 NLRB No. 83, at *4 (2019), where the majority of the contractor's employees wore airline uniforms.

Because Eulen does not challenge the merits of the NLRB's unfair labor practice findings, our approval of the jurisdictional decision ends the case. We therefore deny the petition for review and grant the Board's cross-application for enforcement.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. 41(b); D.C. CIR R. 41(a)(1).

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk