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NLRB ASSERTS JURISDICTION OVER A PRIVATE COMPANY PROVIDING PASSENGER AND BAGGAGE SCREENING SERVICES

The National Labor Relations Board (Board), in a 4-1 decision involving Firstline Transportation Security, found that Firstline, a private company that provides passenger and baggage screening services at Kansas City International Airport in Kansas City, Missouri, pursuant to a contract with the Transportation Security Administration (TSA), is subject to the Board's jurisdiction.

Thus, the Board found that employees of Firstline Transportation are covered by the National Labor Relations Act (NLRA) and can organize for the purpose of bargaining collectively with their employer. The majority opinion is signed by Chairman Robert J. Battista and Members Wilma B. Liebman, Peter C. Schaumber, and Dennis P. Walsh. Member Peter N. Kirsanow dissented. The decision is posted on the Board's website at **www.nlrb.gov**.

The decision found that the Board is not statutorily barred from asserting jurisdiction over Firstline by TSA Under Secretary James Loy's determination that Federally-employed airport security screeners are not entitled to engage in collective bargaining. Further, in accordance with a long line of Board precedent, the Board would not decline to assert jurisdiction. In this regard, the Board concluded that the assertion of jurisdiction is not incompatible with the interests of national security. As the majority stated:

> The Board has been confronted with issues concerning national security and national defense since its early days. Our examination of the relevant precedent reveals that for over 60 years, in times of both war and peace, the Board has asserted jurisdiction over employers and employees that have been involved in national security and defense. We can find no case in which our protection of employees' Section 7 rights had an adverse impact on national security or defense.

In 2003, Admiral Loy issued a memorandum denying collective-bargaining rights and the right to representation to security screeners employed by the TSA. The first issue confronting the Board was whether this memo applied to employees of private contractors. In issuing his memorandum, the Under Secretary relied on the annotation to Section 44935 of the Aviation and Transportation Security Act (ATSA), which vests the Under Secretary with the authority to set the terms and conditions of employment of screeners in the "Federal Service." The Board

queried the TSA, and the TSA responded that the annotation to Section 44935 applies only to security screeners employed by the TSA and not to privately-employed security screeners and, therefore, does not prohibit privately-employed screeners from engaging in collective bargaining.

The majority found that:

> Given this interpretation, the Memorandum issued by the Under Secretary cannot apply to privately employed security screeners because of a lack of statutory underpinning. The Under Secretary only has the statutory authority to 'fix the compensation' and the 'terms and conditions of employment' of Federally-employed screeners and can consequently use that power to prohibit them from being represented for the purposes of collective-bargaining. The annotation does not provide the Under Secretary the statutory authority to prohibit private screeners from being represented for the purposes of collective bargaining, even though those individuals carry out the same security screening function as Federally-employed screeners.

The majority in *Firstline* concluded:

> Since the TSA is the agency charged with administering the ATSA, we defer to the TSA's interpretation of that statute. Indeed, its interpretation is our primary reason for rejecting the Employer's and amici curiae's argument that Admiral Loy's Memorandum applies to privately employed screeners.

Further, after reviewing over 60 years of Board precedent, the majority rejected calls that the Board decline to assert jurisdiction in the interest of national security. The majority further found that "[a]bsent both a clear statement of Congressional intent and a clear statement from the TSA that would support our refusal to exercise jurisdiction, we will not create a non-statutory, policy-based exemption for private screeners," who are otherwise entitled to the protections of the NLRB. The majority concluded that, "we should leave the policy decision to Congress, since the issue is essentially not one of federal *labor* policy, but of national-security policy." [emphasis in original]

In reaching its decision, the Board upheld a representation petition filed by the Security, Police, and Fire Professionals of America International (SPFPA) seeking to represent approximately 400 screeners and lead screeners at the Kansas City International Airport. It affirmed a Regional Director's Decision and Direction of Election. The election was conducted on June 23, 2005, and the ballots were impounded pending the disposition of the Employer's request for review. The ballots will now be opened and counted.

In dissent, Member Kirsanow agreed with the majority that the Board is not statutorily barred from asserting jurisdiction over private employers of airport security screeners. However, as a matter of public policy, he would decline to assert jurisdiction over such employees in the interest of national security.

Member Kirsanow stated he would:

> [D]efer to the finding of the federal official entrusted with responsibility over airport security, which is that unionization and collective bargaining are incompatible with the critical national security responsibilities of individuals carrying out the security-screening function.

Member Kirsanow stressed that his position was "based on two circumstances never before presented to the Board and unlikely ever to be presented again." First, Federal and private employees perform indistinguishable functions deemed critical to national security and second, the responsible agency head has found that these functions are incompatible with collective bargaining.

Member Kirsanow concluded:

> This is not a situation in which national security and Section 7 rights may be harmonized and reconciled. A contrary determination has been made. Thus, although I am deeply mindful of employee rights, in this highly unusual and perhaps even unique case I cannot accord them primacy.

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