BEFORE THE NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF:	)	
	)	
FIRSTLINE TRANSPORTATION SECURITY, INC.,	)	
	)	
Employer,	)	
	)	Case No. 17-RC-12354
and	)	
	)	
INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA),	)	
	)	
Petitioner.	)	

EMPLOYER'S REPLY BRIEF ON REVIEW

Comes now the Employer, FirstLine Transportation Security, Inc. ("Employer" or "FirstLine"), through counsel, pursuant to the National Labor Relations Board's ("NLRB") July 7, 2005 Notice and Invitation to File Briefs ("Notice"), and submits this Reply Brief on Review.

I. INTRODUCTION

The Employer herein responds to certain issues broached by briefs filed with the NLRB. Specifically, the Employer will demonstrate that the limited Statement of the Transportation Security Administration ("TSA") does not disturb the interpretation that the Under Secretary of Transportation for Security's ("Under Secretary") determination that federal screener employees cannot engage in collective bargaining also applies to employees of private screening companies. Additionally, even if the NLRB somehow holds that it may assert jurisdiction, the public policy in favor of national security and safety still mandates the uniform treatment of the collective bargaining issue. The policy arguments contained in the Employer's Brief in Support of its Request for Rejection of Decision and Denial of Petition ("Employer's Brief on Review") are now even more strongly supported by the submission of briefs by the Honorable Dick Armey

and the Honorable John Mica, which clearly speak to the Congressional intent and public policies underlying the Aviation Transportation and Security Act ("ATSA"). Also, in its brief filed with the Federal Labor Relations Authority ("FLRA"), the TSA decidedly set forth its beliefs on why collective bargaining would hinder screeners in the performance of their duties. In the face of these clear, significant policy considerations, for the reasons discussed below, the opposing parties' briefs are unpersuasive. For these reasons, it is again respectfully requested that the NLRB reject the May 27, 2005 Decision ("Decision") of the Regional Director, Region 17, and deny the petition.

II. ARGUMENT

A. The TSA's Statement is compatible with the interpretation that the Under Secretary's Memorandum applies to private screener employees and, therefore, bars NLRB jurisdiction.

In its condensed brief, the TSA states that Section 111(d) of ATSA "does not prohibit privately-employed screeners from engaging in collective bargaining." TSA Statement at 1. Simply, the Employer agrees with this proposition. Section 111(d) of ATSA is one of a number of provisions giving the Under Secretary certain powers with respect to screener personnel. See 49 U.S.C. §44935 Note. Neither it nor any other provision of ATSA provides for the collective bargaining rights of any employee, private or federal, and it certainly does not specifically prohibit collective bargaining. As such, the Employer readily concedes that ATSA itself does not prohibit collective bargaining.

Rather, it was the Under Secretary's January 8, 2003 Memorandum ("Memorandum") that prohibited screener employees from engaging in collective bargaining. While Section 111(d) of ATSA would give the Under Secretary the authority to issue such a determination, it is by no means the only provision of ATSA that would do so, and it is not the provision upon which the Employer and other amici curiae have relied in interpreting the Memorandum to apply

to both federal and private screeners. See Employer's Brief on Review at 2 (citing 49 U.S.C. §§114(b)(1), (e)).[1] Instead, the Employer and other parties have looked to 49 U.S.C. §114 as providing authority, in addition to Section 111(d), by which the Under Secretary could make such a determination.[2] Section 114 provides a number of relevant responsibilities and functions of the Under Secretary:

- Responsible for security in all modes of transportation;
- Responsible for day-to-day federal security screening operations for passenger air transportation and intrastate air transportation under Sections 44901 and 44935;
- Develop standards for the hiring and retention of security screening personnel;
- Train and test security screening personnel;
- Be responsible for hiring and training personnel to provide security screening at all airports in the United States where screening is required under Section 44901, in consultation with the Secretary of Transportation and the heads of other appropriate federal agencies and departments;
- Develop policies, strategies, and plans for dealing with threats to transportation security;
- Enforce security-related regulations and requirements;
- Oversee the implementation, and ensure the adequacy, of security measures at airports and other transportation facilities;
- Carry out such other duties, and exercise such other powers, relating to the transportation security as the Under Secretary considers appropriate; and

[1] In interpreting the intent of Congress with respect to the Memorandum, Leader Armey and Representative Mica also support the interpretation that it must apply to all screeners. "On its face, the use of the term 'individual' in this determination clearly refers to all screeners whether they are employed directly by the federal government, or are working under a contract to the federal government. Congress did not differentiate between the two in ATSA." Brief of Amicus Curiae, the Honorable John L. Mica, United States House of Representatives ("Mica Brief") at 10-11; see also Brief of Amicus Curiae, the Honorable Dick Armey ("Armey Brief") at 8-9.

[2] In fact, as observed by the AFGE, the relevant language in Section 111(d) is only an interpretive Note to the ATSA. See Brief of Amicus Curiae American Federation of Government Employees, AFL-CIO in Support of Petitioner ("AFGE Brief") at 3 n.1. Section 114, the codified section of ATSA which specifically sets forth the Under Secretary's powers and duties, is a more direct source of his ability to issue the Memorandum.

- Make such modifications to the personnel management system . . . as the Under Secretary considers appropriate.

49 U.S.C. §114(d), (e), (f), (n).[3]

All of these statutory provisions supply the Under Secretary with the authority to issue the Memorandum, and, for the reasons discussed at length in the Employer's Brief on Review, the Memorandum applies to both private and federal screeners.[4] The TSA's Statement regarding Section 111(d) does not speak to the coverage of the Under Secretary's Memorandum, which is the instant crucial jurisdictional issue, and it can be read consistently with the jurisdiction arguments of the Employer and supporting amici curiae. The TSA's Statement can also be read consistently with public policy interests and Congressional intent (see infra at 7-8) and with TSA Acting Deputy Administrator Thomas Blank's July 28, 2005 comments before Congress (see Employer's Brief on Review at 6-7). Surely, Deputy Administrator Blank's statement that the TSA's policy is "that screeners may not, whether they are federal or private, engage in collective

[3] Some of these provisions refer specifically to federal employees, while others do not make a distinction and apply to all screeners. Even those provisions that do speak to "federal" employees, however, should be read to apply to all screener employees. Representative Mica spoke to Congressional intent with respect to such language:

> By using the term "federal screeners," the Conferees differentiated between the pre-9/11 aviation security model under which air carriers were responsible for screening passengers and the post-9/11 screening model under which this function became the responsibility of the federal government, to be carried out either by federal employees or private employees under a contract to the federal government.

Mica Brief at 8-9; see also id. at 5-6 (referring to private screening programs as "Federal screening programs"); Armey Brief at 7. This intent of Congress makes Section 114 relevant to all screeners. Along with Representative Mica's reference to Congress' intent that private employees be "agents" of the TSA (see Mica Brief at 9), it also defeats the SEIU's argument that the NLRB should assert jurisdiction based solely on Section 2(2) of the National Labor Relations Act. See Amicus Curiae Brief of Service Employees International Union in Support of the Decision of the Regional Director, Region 17, Exercising Jurisdiction and Directing an Election ("SEIU Brief") at 1-2.

[4] These statutory provisions and related Memorandum also rebut the AFGE's argument that the Homeland Security Act ("HSA") somehow grants jurisdiction to the NLRB in this case. In its brief, the AFGE correctly points out that the HSA mandates that a personnel system shall ensure that "employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them." See AFGE Brief at 12. While the AFGE did correctly quote the first part of that statutory language, it neglected to include the rest of the sentence, which provides that the statute section is "subject to any exclusion from coverage or limitation on negotiability established by law." 5 U.S.C. §9701(b)(4). In addition to other differences between ATSA and HSA, this clear exception applies to the above-referenced sections of ATSA and the Under Secretary's Memorandum pursuant thereto.

bargaining" more explicitly and more comprehensively expresses the Agency's stance on the issue, especially in light of the TSA's further comment, in its Statement, that it "does not take any position regarding . . . whether the NLRB has jurisdiction . . . ." TSA Statement at 2.

The Employer will not opine as to the rationale behind the TSA's puzzlingly limited statement. As noted by others (including the Regional Director and Member Liebman), the TSA has made efforts in the past to appear to remain "neutral" on the question of collective bargaining rights of private employees. Perhaps it has chosen to do so again in its brief Statement, for whatever political or proprietary reasons. Regardless, the TSA's Statement is not determinative with respect to the effect of the Under Secretary's Memorandum, and, for the reasons discussed above and in the Employer's Brief on Review, the application of the Memorandum to all screener employees bars NLRB jurisdiction in the current matter.

B. Even if the NLRB determines that it has jurisdiction, it should decline to assert it in the interests of national security and safety.

If the NLRB somehow interprets the TSA's Statement as suggesting that the Under Secretary's Memorandum should not bar jurisdiction or if the NLRB otherwise finds it may assert jurisdiction, it should not do so. For the reasons discussed at length in the Employer's Brief on Review, public policy mandates equal treatment of the collective bargaining issue. As will be discussed below, a review of the TSA's detailed examination of the risks of collective bargaining and the Congressional intent behind ATSA further support this conclusion, while none of the opposing amicus curiae briefs set forth a relevant rebuttal.

1. TSA's argument supporting the prohibition of collective bargaining must apply to all screener employees.

As discussed at length in the Employer's Brief on Review, the TSA, in a 2003 brief to the FLRA, zealously argued in favor of the prohibition of collective bargaining for screener employees because of their critical national security and safety functions. See Employer's Brief

on Review at 9-13. The TSA referenced Congress' recognition of the new, post-9/11 environment and the effect it would have on the screening industry. Id. at 10. It noted that "virtually all the decisions regarding the [screening] checkpoints from the specifics of scheduling screeners to how they perform their job functions, implicate security directly or indirectly." Id. When the TSA considered the possibility of collective bargaining in that context, it determined that bargaining requirements would greatly inhibit an employer's "ability to respond quickly, discretely, and efficiently to emerging security circumstances." Id. at 13.[5] The TSA was adamant and patently clear in its argument that screener employees should not be allowed to engage in collective bargaining due to the unique nature of their position and as evidenced by Congressional intent.

What neither the TSA, in its Statement or elsewhere, nor any other party has done is to argue credibly why these same concerns would not apply to private screener employees. Simply, no such viable argument exists. The current record is replete with examples of how there is no functionality difference between federal and private screeners. They perform the same jobs, are subject to the same standards, are directed by Federal Security Directors, and operate under the same tight control of the TSA. See, e.g., Decision at 5; Employer's Brief on Review at 2-4; Mica Brief at 6-8. If the TSA's well-researched, well-reasoned argument applies to federal employees, it must equally apply to the private employees who are performing the same tasks under the same standards. The failure to apply the TSA's rationale equally would necessarily create different conditions and different security and safety risks at varying airports. As

[5] Explaining the rationale behind his Memorandum, the Under Secretary noted the same risks associated with collective bargaining: "Fighting terrorism demands a flexible workforce that can rapidly respond to threats . . . . That can mean changes in work assignments and other conditions of employment that are not compatible with the duty to bargain with labor unions." See Mica Brief at 11-12; Armey Brief at 9.

happened on 9/11, some of the terrorists originated at smaller airports. Once beyond security, they could access any other airport in the country without having to clear security again.

Certain amici curiae have argued that such differences are not necessarily bad and that they have traditionally been accepted by Congress or the NLRB. See, e.g., SEIU Brief at 12-13. Succinctly, such differences cannot be tolerated where they represent varying degrees of security and safety based on whether collective bargaining occurs at any given airport. Such differences cannot be allowed where they may mean, for example, at any given PP5 airport, a supervisor who is prohibited from performing bargaining unit work cannot jump in to help two screeners who are hurriedly finishing their work at a checkpoint that must be completed within a certain amount of time. It is not difficult to imagine scores of similar, every-day examples of how security and safety concerns would not be fully provided for in a union setting. Simply, the rigidity of the unionized workplace cannot trump security and safety interests. As stated by Deputy Administrator Blank, security and safety should be "non-negotiable." Employer's Brief on Review at 17.

The TSA, which was tasked with implementing appropriate screening standards and which has an intimate, unique knowledge of the post-9/11 aviation environment, has clearly set forth the rationale behind prohibiting collective bargaining for screeners. Even if the NLRB were not to take into account Deputy Administrator Blank's unequivocal comments regarding the bargaining rights of private employees or somehow interpret the TSA's Statement as continuing its neutral stance on the matter, the TSA's comprehensive examination of collective bargaining is still quite persuasive and must be considered in relation to those private screeners who perform the same job as TSA employees.

2. Congressional intent demonstrates the desire to treat federal and private screeners equally and prohibit collective bargaining for all screeners.

In its Brief on Review, the Employer touched on the legislative history of ATSA. See Employer's Brief on Review at 9-11. Leader Armey and Representative Mica filed amicus curiae briefs which provide even further insight into the history and intent of ATSA. While the documents speak for themselves, a brief analysis is relevant here.

Representative Mica noted that "Congress viewed the airport security screening role as an essential national security function . . . ." Mica Brief at 6. "Congressional intent was to ensure that all screeners, whether federal employees or employees of federal contractors participating in a federal security program, were to be treated in a similar manner." Id. Leader Armey clearly stated that it "was the intent of Congress that [federal and private screeners] be considered one and the same . . . for all conditions of employment." Armey Brief at 6 (emphasis added); see also Mica Brief at 9 (stating that "private screeners were to be agents of the TSA and subject to the same conditions of employment as federal security screeners") ("In creating the TSA, the PP5 and the SPP (the two private screening programs), Congress never intended there to be different expectations and standards for privately employed security screeners.").

Having established the clear intent of Congress to treat all screeners alike, the Congressmen went on to describe how allowing private screeners to engage in collective bargaining would eviscerate this intent. In no uncertain terms, the Congressmen stated that the NLRB's assertion of jurisdiction would be counter to the purposes of ATSA as envisioned by Congress. See, e.g., Armey Brief at 9; Mica Brief at 11. Leader Armey suggested that the assertion of jurisdiction by the NLRB "could jeopardize national security." Armey Brief at 9. Representative Mica also noted the potential "security risks" and further suggested that a private screener employer that participates in collective bargaining in violation of the Under Secretary's

Memorandum could be subject to the termination of its contract with the TSA – "clearly not the result Congress was seeking when it created the federal screening program in ATSA." Mica Brief at 10-11.

A number of parties suggest in their briefs that Congressional intent should be a controlling factor. See, e.g., Brief, Amici (sic) Curiae, of the American Federation of Labor and Congress of Industrial Organizations in Support of the Decision of the Regional Director ("AFL-CIO Brief") at 5, 7-9; Amicus Brief of ILWU Supporting Board Jurisdiction ("ILWU Brief") at 3, 8; SEIU Brief at 3-5; AFGE Brief at 2-6. The insight of Leader Armey and Representative Mica, both of whom were intimately involved in the drafting and passing of ATSA, is invaluable in ascertaining that intent. Moreover, the Congressmen could not have been any clearer in stating Congress' intent with respect to collective bargaining:

> [T]he incompatibility of collective bargaining with the flexibility required to wage the war on terrorism is no different for federal employees and non-federal employees fulfilling the same critical and national security function. To determine otherwise would be adverse to the will of Congress.

Mica Brief at 12; see also Armey Brief at 9.

3. Citations to earlier Board precedent regarding the coexistence of collective bargaining and national security and safety interests are unpersuasive.

A number of opposing parties, as did the dissenting opinion to the NLRB's Grant of Review, spend considerable time discussing Board and court precedent in support of their contentions that national security and safety interests and collective bargaining can coexist in the workplace. See, e.g., AFGE Brief at 8-9, 11, 16-19; SEIU Brief at 6-7, 14-15; ILWU Brief at 4-7. As discussed in the Employer's Brief on Review, these citations are unpersuasive. See Employer's Brief on Review at 15-16. At issue here is one statute – ATSA – and the Congressional intent and public policy behind it. As discussed at length, Congress intended to

and did completely change the landscape of the screening industry and how it relates to national security and safety. Opposing parties cite to pre-9/11 precedent and rely on legislation wholly unrelated to ATSA. See, e.g., AFGE Brief at 20-21 (discussing OSHA); ILWU Brief at 8-10 (discussing the Maritime Transportation Security Act). Simply, such citations do not carry weight where Congress has expressly brought about "a fundamental change in the way it approaches the task of ensuring the safety and security of the civil air transportation system." H.R. Conf. Rep. No. 107-296 at 54 (2001); Employer's Brief on Review at 10. They also carry little weight where, unlike the circumstances relied upon by opposing parties, an executive order has expressly prohibited collective bargaining and a government agency has detailed why bargaining does not comport with the screener positions. No such conflicting authority existed in those cases cited by opposing parties.

As noted in the Employer's Brief on Review, the NLRB has already commented on these novel circumstances. The NLRB specifically stated that "because of the events of September 11, 2001 and their aftermath, [it] must now take into account the presence of both real and threatened terrorist attacks." IBM Corp., 341 NLRB No. 148, 2004 WL 1335742, at *6 (NLRB June 9, 2004). It has recognized that the threat of terror brings "a new viability" to certain "policy considerations." Id. Again, a new, complete evaluation of the relevant issues is warranted here, with the NLRB taking into account the unfortunate but unavoidable modern contingencies.

4. Opposing parties' public policy arguments are unpersuasive.

It would seem to be difficult to proffer a public policy contrary to the established national security and safety concerns relevant to the instant matter. Perhaps for that reason, opposing parties have not set forth many public policy arguments. The few attempts to do so, however, are unpersuasive.

A number of parties rely on the NLRB's general favor of representation and collective bargaining as relevant public policy. See, e.g., AFGE Brief at 13-14, 16-19; AFL-CIO Brief at 3-5; ILWU Brief at 3-4. While such a policy no doubt exists, it does not control here. The stated policy in favor of collective bargaining is sweeping and could be applied to any imaginable jurisdictional dispute. It is that broad nature of the policy, however, that stretches it thin and renders it secondary when relevant, distinct competing interests are present. As has been discussed at length, such interests are present here. In the face of the general policy relied upon by opposing parties are the explicit national security and safety interests set forth by Congress and the TSA. The NLRB cannot rely solely on a default pro-bargaining ideal and must give the other significant policies due consideration. To do otherwise would not give the current matter a full treatment and would be contrary to the will of Congress.

A number of opposing parties also suggest another, more specious "public policy" by which the NLRB could avoid the actual issues at hand. In short, a number of parties intimate that the Employer, simply by contesting jurisdiction in this matter, is somehow being unpatriotic or attempting to use the events of 9/11 to its advantage. For example, the AFGE suggests that the NLRB "assert jurisdiction in honor of the union members who labored, died, or both defending freedom on September 11, 2001." AFGE Brief at 15-16. Similarly, the SEIU states that the Employer uses the war on terror "in a calculated and cynical effort to gain an advantage over its own employees" and that "[i]ts plea of 'national security' is a sham . . . ." SEIU Brief at 15. The ILWU asks the NLRB not to "countenance the employer's self-serving and cynical use of 'national security' issues . . . ." ILWU Brief at 10.

No individual is being "honored" or "dishonored" in the litigation of this dispute. A discussion of patriotism or sacrifice is totally irrelevant and would appear itself to be an attempt

to use 9/11 to one's advantage more than a frank, reasoned debate of tangible policies and issues. Certainly, it is absurd to imagine that Congress and the TSA view the instant national security questions as a "sham." Otherwise, ATSA would not exist. Quite simply, as recognized by Congress, issues of national security and safety have taken on new dimensions since 9/11, and the attempt to suggest otherwise is counterproductive and disingenuous. As the Employer feels sure it will, the NLRB should give these self-serving, maudlin purported public policy arguments no consideration.

III. CONCLUSION

This is not an easy case. It involves the conditions of employment for a potentially large number of employees nationwide. It involves the security and safety of an even greater number of U.S. citizens and other individuals who travel every day. The large number of briefs and amicus curiae briefs, most of which are well-meaning and conscientiously drafted, help frame the relevant issues but can also serve to muddy the waters.

A few things, however, are clear. On its face, the Under Secretary's Memorandum prohibits collective bargaining for all screener employees, barring NLRB jurisdiction in this case. The TSA's Statement does nothing to disturb that interpretation of the Memorandum's and ATSA's clear language. Even if the Board somehow disagrees, the Congressional intent and public policies underlying ATSA are equally clear. Congress noted the post-9/11 security and safety concerns. Both the TSA and the Under Secretary expertly set forth how these interests do not comport with collective bargaining. To look past these findings would be contrary to Congressional intent and would create disparate levels of security and safety at different airports. The NLRB cannot ignore the consequences of its assertion of jurisdiction in this case.

Based on the foregoing and the Employer's Brief on Review, it is again respectfully requested that the NLRB reject the Regional Director's Decision and deny the SPFPA's petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that an exact copy of this pleading has been served upon counsel for all parties in this action, or upon said parties themselves as required by law, by delivering a copy thereof, or by depositing a copy of the same in the United States Mail, with sufficient postage affixed thereto to ensure delivery to the following:

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This _____ of August, 2005.

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