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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

FIRSTLINE TRANSPORTATION SECURITY, INC., Employer, and INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA) Petitioner.	Case No. 17-RC-12354 **AMICUS BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION IN SUPPORT OF THE DECISION OF THE REGIONAL DIRECTOR, REGION 17, EXERCISING JURISDICTION AND DIRECTING AN ELECTION**

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I. INTRODUCTION

Service Employees International Union ("SEIU") and its chartered affiliates represent 1.8 million members in the United States, Canada and Puerto Rico who are employed in the health care, public employment, building service, and industrial and allied industry sectors. The SEIU and its members are committed to raising the standard of living and improving the quality of life for workers and their families, and also firmly believe that self-organization and collective bargaining are critical tools for achieving those goals. The SEIU fully supports, therefore, the Regional Director's direction of an election among Firstline's employees through which they may designate a collective bargaining representative, the International Union, Security, Police and Fire Professionals of America.

The employer argues that the Board lacks statutory jurisdiction over privately employed airport screeners and that the Board "should decline to assert jurisdiction in the interest of national security." These arguments must fail.

II. THE BOARD HAS STATUTORY JURISDICTION

A. THERE IS JURISDICTION UNDER THE NATIONAL LABOR RELATIONS ACT

Section 9(c)(1) of the Act grants the Board jurisdiction over petitions raising "a question of representation affecting commerce." 29 U.S.C. § 159(c)(1). The petition here was filed by a labor organization seeking to be the exclusive collective bargaining representative of "employees" to their "employer".

At the representation hearing, Firstline stipulated that it was an "employer engaged in commerce" and "acknowledg[ed] that it meets the Board's statutory and discretionary jurisdictional standards." *Decision and Direction of Election*, footnote 1. It could hardly have done otherwise.

Section 2(2) of the National Labor Relations Act states that

> The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or . . .[any of other listed exceptions].

29 U.S.C. § 152(2). Plainly, Firstline Transportation Security, Inc., is an "employer" in the ordinary sense of one who employs some hundreds of employees. Just as plainly, Firstline in not in the list of exceptions. In particular, it is not the United States or an agency of the United States. The fact that Firstline contracts with the United States does not convert it into a government agency. See, e.g., *Radio Free Europe*, 262 NLRB 549 (1982), *Teledyne Econ. Dev. v. NLRB,* 108 F.3d 56 (4th Cir. 1997), and *Aramark Corp. v. NLRB*, 179 F.3d 872 (10th Cir. 1999).

Section 2(3) states that

> The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise. . . but shall not include any individual employed as an agricultural laborer [or a variety of other listed exceptions]. . .

29 U.S.C. § 152(3). Again, the employees of Firstline Transportation Security, Inc., are employees in the ordinary sense and are not covered by any listed exception.

B. THERE IS NO BAR TO JURISDICTION UNDER THE AVIATION AND TRANSPORTATION SECURITY ACT.

In what sense, then, does the Board lack statutory jurisdiction? Firstline argues that, "The NLRB is statutorily barred from asserting jurisdiction by the Under Secretary's determination that screeners are not entitled to engage in collective bargaining." *Request for Review*, page 4. The alleged statutory bar, according to Firstline, is found not in the National Labor Relations Act, but in the Aviation and Transportation Security Act ["ATSA"], 115 Stat. 597; P.L. 107-71, codified, in part, in Title 49 of the United States Code.

The question, therefore, is whether ATSA bars the NLRB from asserting jurisdiction.

In answering this question, we invoke the first three rules of statutory interpretation recently summarized by Supreme Court nominee John Roberts:

> Read the statute;
>
> read the statute;
>
> read the statute.

In re England, 375 F.3d 1169, 1182 (D.C. Cir. 2004). Upon reading ATSA, we ask what it says about the National Labor Relations Board. It says nothing. What does it say about the collective bargaining rights of private employees? It says nothing.

Was this Congressional silence inadvertent? Did Congress somehow forget to mention labor relations in the Act? Not at all. Believing that a work stoppage would disrupt airport screening, Congress expressly forbade airport screeners to strike:

> An individual that screens passengers or property, or both, at an airport under this section may not participate in a strike, or assert the right to strike, against the person (including a governmental entity) employing such individual to perform such screening.

49 U.S.C. § 44935(i). Congress expressly considered the subject of labor relations and consciously decided to limit the right to strike. The language of this provision also expresses the congressional knowledge that some Airport Screeners would be in the federal service, but others would be privately employed—otherwise why specifically reference a "governmental entity" as included within the definition of "person" employing the screener. Other language, as well, reveals this knowledge.

> In the case of flights and flight segments originating in the United States, the screening. . .shall be carried out by a Federal Government employee (as defined in section 2015 of title 5, United States Code), except as otherwise provided in section 44919 or 44920. . .

49 U.S.C. § 44901(a). Sections 44919 and 44920, in turn, require the Under Secretary to

> establish a pilot program under which. . . the screening of passengers and property at the airport under section 44901 will be carried out by the screening personnel of a qualified private screening company under a contract entered into with the Under Secretary.

Congress decided to apply the strike limitation equally to publicly and privately employed screeners. Congress knew how to limit the rights of private employees when it wished to do so, and made a deliberate decision that one particular right – the right to strike – would in fact be limited. Nothing in the Act expresses or implies any other limitation on private employee rights. In light of the active consideration by Congress of the subject of labor rights of screeners, it would be wrong to ". . . lightly assume that Congress has omitted from its adopted text

requirements that it nonetheless intends to apply, and [such] reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. Immigration and Customs Enforcement*, 543 U.S. ___, 125 S.Ct. ___, 160 LEd2d 708, 715 (construing an immigration removal statute, 8 U.S.C. § 1231(b)(2).)

Firstline next seeks the alleged statutory bar – not directly in the text of the Act – but in a memorandum issued on January 8, 2003, by Undersecretary of Transportation J.M. Loy. It states:

> *By virtue of the authority vested in the Under Secretary of Transportation for Security in Section 111(d) of the Aviation and Transportation Security Act, Public Law No. 107-71, 49 U.S.C. § 44935 Note (2001)*, I hereby determine that individuals varying out the security screening function under section 44901 of Title 49, United States Code, in light of their critical national security responsibilities, shall not, *as a term or condition of their employment*, be entitled to engage in collective bargaining or be presented for the purpose of engaging in such bargaining by any representative or organization.

(Emphasis added.)

The Undersecretary does not (and legally could not) exceed "the authority vested in the Undersecretary. . .in Section 111(d). . ." But what is that authority? Section 111(d) states:

> Notwithstanding any other provision of law, the Undersecretary of Transportation for Security may employ, appoint, discipline, terminate, and fix the compensation, terms and conditions of employment *of Federal service* for such a number of individuals as the Undersecretary determines to be necessary to carry out the screening functions of the Undersecretary under section 44901. . .

(Emphasis added.) Congress expressly gave the Undersecretary broad authority to set "terms and conditions of employment *of Federal service*." It did not give the Undersecretary authority over "terms and conditions of employment of private service." Again, had Congress wished that result, it could have achieved it easily. It did not.

Nor, plainly, did the Under Secretary intend his memorandum to affect private employees. As of this writing [July 29, 2005] the Transportation Security Administration website contains the following statement:

> Q: What is TSA's policy regarding private screeners joining unions?

> A: It is TSA policy to allow federal screeners to join any union but to not allow any union to represent all screeners for the purpose of collective bargaining. TSA does not take a position regarding whether screeners employed by private screening companies may organize themselves for the purposes of collective bargaining with their company. This is a matter between those screeners and their private employer. However, airport security screeners, private or federal, do not have the right to strike.

[http://www.tsa.gov/public/interapp/editorial/editorial_1752.xml] This statement makes clear that the Under Secretary considers collective bargaining to be "a matter between those screeners and their private employer." His memorandum of January 8, 2003, was not *intended* to limit the collective bargaining rights of private employees.

In sum, neither the ATSA itself nor the memorandum of the Under Secretary deprives this Board of jurisdiction to hold a representation election among the employees of Firstline.

III. THE BOARD SHOULD NOT DECLINE JURISDICTION

Firstline also argues that the Board should exercise its discretion to decline jurisdiction.

A. THE BOARD DOES NOT HAVE AUTHORITY TO DECLINE JURISDICTION HERE

As a preliminary matter, SEIU respectfully submits that the Board has no authority to decline jurisdiction, except as authorized in statute. The Supreme Court has recognized the Board's ability to decline jurisdiction where the effect on commerce would be minimal, but has held that the Board may not decline jurisdiction over a whole class of employees. *Office Employees International Union, Local 11 v. NLRB*, 353 U.S. 313 (1957) [employees of labor unions] and *Hotel Employees Local 255 v. Leedom*, 358 U.S. 99 (1958). The class here is airport screeners; but the principle is the same. It is up to Congress, not the Board, to exclude entire industries or lines of work.

Soon after *Office Employees* and *Hotel Employees*, Congress amended the National Labor Relations Act to add Section 14(c)(1):

> The Board, in its discretion, may. . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor

> dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

29 U.S.C. § 164(c)(1).

Section 14(c)(1) makes two things clear. First, the Board's ability to decline jurisdiction is based on its judgment that the effect of a labor dispute on commerce "is not sufficiently substantial to warrant the exercise of its jurisdiction." It is really a *de minimis* rule. In the present case it is not disputed that airport screening affects commerce directly and substantially. See *Castle Instant Maintenance/Maid, Inc.*, 256 NLRB 130, 131 (1981) [Board has jurisdiction over private janitors hired by United States Marines at the Tijuana/San Ysidro border crossing. "It is difficult to imagine a setting where a single labor dispute would have the potential to more directly disrupt the commerce which Congress has empowered the Board to regulate. . ."]

Secondly, Section 14(c)(1) requires the Board to continue exercising jurisdiction over those employers over whom it had exercised jurisdiction before August 1, 1959. Private airport screeners may or may not have existed before August 1, 1959 – but there were equivalent lines of work over which the Board emphatically did assert jurisdiction. For instance, the Board asserted jurisdiction over armed guards at an armaments plant in the midst of World War II, even though the guards were under military authority. In upholding the Board's jurisdiction, the Supreme Court stated that the guards

> are indistinguishable from ordinary watchmen, gatemen, patrolmen, firemen and guards – person who have universally been regarded and treated as employees. . . They perform such duties as inspecting persons, packages and vehicles, carrying cash in various parts of the plant, and generally surveying the premises to detect fires, suspicious circumstances and sabotage. . .
>
> In guarding the plant and personnel against physical danger, they represent the management's legitimate interest in plant protection. But that function is not necessarily inconsistent with organizing and bargaining with the employer on matters affecting their own wages, hours and working conditions. . .

NLRB v. E.C. Atkins & Co., 331 U.S. 398, 404 (1947). See also *NLRB. v. Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947), also involving militarized plant guards in wartime.

We will return to these cases later in this brief. But here we note that – under the

standards prevailing upon August 1, 1959 -- the Board did exercise jurisdiction over employees "performing such duties as inspecting persons, packages and vehicles. . .and generally surveying the premises to detect. . .suspicious circumstances and sabotage." It did so even when the persons, though in private employ, were under military command in time of war. The *proviso* in Section 14(c)(1) requires the Board to continue exercising jurisdiction over similar employees today.

B. THE BOARD SHOULD NOT DECLINE JURISDICTION BECAUSE OF THE EMPLOYER'S ALLEGED LACK OF CONTROL OVER LABOR RELATIONS

The employer claims that the Regional Director's reliance on *Management Training Corp.*, 317 NLRB 1355 (1995) was "unfounded" and "blind". *Management Training* overturned previous Board policy on jurisdiction over government contractors, like Firstline. The Board decided that from *Management Training* forward, it would assert jurisdiction where the employer was an employer and met appropriate revenue standards. It would no longer decline jurisdiction because of the alleged "meaninglessness" of collective bargaining. Let the parties decide whether bargaining can be meaningful or not. See *Aramark Corp. v. NLRB*, 179 F.3d 872 (10th Cir. 1999), for a good history of the issue.[1]

SEIU assumes that the Board is not contemplating overturning *Management Training*. If we are mistaken -- if the Board indeed is considering a return to a "governmental control," "intimate connection to an exempt entity," or other similar test – SEIU respectfully requests the opportunity to brief separately that issue.

For the present, we note that even under the abandoned test of *Res Care, Inc.*, 280 NLRB 670 (1986), the Board would, and should assert jurisdiction here. In *Res Care* the Board declined jurisdiction over a Job Corps Center where the Department of Labor set *maximum* wage

[1] The Tenth Circuit decision in *Aramark Corp.* is but one of a number of Circuit Court decisions which have found the Board's *Management Training Corp.* decision a "reasonable" interpretation of the Act and within the Board's authority. See, *NLRB v. Young Women's Christian Association* (8th Cir. 1999) 192 F.3d 1111; *Pikeville United Methodist Hospital of KY v. NLRB* (6th Cir.) 109 F.3d 1146, *cert den. sub nom Pikeville United Methodist Hospital of KY v. Steel Workers*, 522 U.S. 994 (1997); *Teledyne Econ. Dev. v. NLRB* (4th Cir. 1997) 108 F.3d 56.

rates [no more than those providing similar services and no more than 10% higher than the employee's previous wage]. The Department also had authority to approve every wage rate and every change in wages. And it further was empowered to approve "the staff manning table, the labor grade schedule, the salary schedule, the personnel policies, and the designated employee benefits." The Board thus said:

> In every sense, it is DOL, not Res-Care, which retains ultimate discretion for setting wage and benefit levels. . . and this effectively precludes Res-Care from engaging in meaningful collective bargaining. . .
>
> When an employer like Res-Care lacks the ultimate authority to determine primary terms and conditions of employment, such as wage and benefit levels, it lacks the ability to engage in the necessary "give and take" which. . . makes bargaining meaningful.

Id., at 673 and 674. The Board also stated, "In declining to assert jurisdiction, we specifically do not rely on the pervasive operational controls exerted by DOL over Res-Care in matters other than those pertaining to labor relations." *Id.*, at note 22..

After 1986 the Board limited *Res-Care* sharply. For instance, in *Dynaelectron Corp.*, 286 NLRB 302 (1987), the Board asserted jurisdiction over an employer performing maintenance work on military aircraft for the United States Navy. The Navy, naturally, monitored quality closely, insisted that the private employees wear certain uniforms and subjected them to Navy regulations and directives. But as to wages and benefits, the Navy insisted only on the *minimum* wages and benefits to be paid. The employer, though operating under a contract cap, was free to pay higher wages and benefits if it chose. The Board asserted jurisdiction.

Likewise, in *Old Dominion Security, Inc.*, 289 NLRB 81 (1988), the employer supplied security services to the Navy at a secure military installation. Again, the Navy set minimum wage and benefit standards, which the employer could exceed, if it chose. The Board again asserted jurisdiction.

> The Navy sets minimum qualifications, requires security clearances and adherence to a dress code, establishes shifts, and specifies duties for the various posts. The Navy also monitors employee performance, specifies post operating procedures, approves overtime above a particular limit, and suggests disciplinary measures when appropriate. However, the

> operational controls in force here ensure contract compliance and maintenance of security measures at a secure facility. They do not limit the employer's ability to bargain. . .

Id., at 83.

The present case is materially indistinguishable from *Dynaelectron* and *Old Dominion*. No doubt there is and should be tight operational control by the Transportation Security Agency. There should be no difference in the security levels provided by airport screeners in the Federal service and those in private employ. But the TSA's operational control over Firstline personnel is – besides irrelevant – no greater than the Navy's control over its security guards in *Old Dominion* or its military aircraft repairmen in *Dynaelectron.*

And although its employees must meet minimum federal standards for employment, it is Firstline which hires, fires, and disciplines them. (Stipulation at RT 23:1 – 13.) More to the point, the TSA sets *minimum* wage and benefit rates, as in *Old Dominion* and *Dynaelectron* – not *maximum* rates, as in *Res Care*. The employer here is free to pay more than the minimum.

At page 4 of its *Request for Review*, the Employer states, "The TSA sets the pay rate parameters for Firstline employees." That is false. 49 U.S.C. § 44919(f) states that private screening companies must "provide compensation and other benefits to such individuals that are *not less* than the level of compensation and other benefits provided to such Federal Government personnel." [Emphasis added.] And see 49 U.S.C. § 44920(c). ATSA thus sets a minimum compensation level, but does not preclude the employer from offering more. Again, the TSA website states the policy:

> Q: What is the difference between the benefits for Federal screeners and private screeners? How is TSA ensuring that private screeners are receiving pay and benefits comparable to that of the federal screeners?
>
> A: ATSA mandates private screening companies to provide compensation and other benefits to their screeners that are not less than the level of compensation and other benefits provided to comparable Federal Government personnel. TSA conducted an extensive review of the private contractors and found overall the private screening companies are providing pay and benefits that equal *or exceed* the pay and benefits provided by the Federal Government.
>
> Private screening contractors have some flexibility in fashioning their compensation and benefits packages in terms of the precise type of health

> and other benefits that are being provided to provide the best mix of pay and benefits to their employees while ensuring they provide a sufficient package to recruit and retain quality workers that meet federal standards. Consequently, the compensation and benefits packages at the private airports are equivalent but not identical to those available to federal screeners.

[http://www.tsa.gov/public/interapp/editorial/editorial_1752.xml] [Emphasis added.]

Beyond the usual wages and benefits, Firstline has established a Tuition Assistance Program, potentially paying $10,000 per employee for tuition, even if not job-related. And it gives "additional incentives and expressions of appreciation. . ." *Written Testimony of Firstline President John DeMell* before the U.S. House of Representatives (April 22, 2004), page 10, and attached in-house newsletter "One Team One Mission"

http://www.house.gov/transportation/aviation/04-22-04/demell.pdf

In a representation case processed in Region 20 in 2003, *Covenant Aviation Security, LLC*, Case 20-RC-17896, the TSA was actually granted intervenor status, and appeared. After the hearing, TSA submitted a post-hearing brief focused on the question of whether or not it was a "joint employer" with the security contractor, Covenant Aviation Security. The Board is requested to take notice of that brief, and its attachments, a true and correct copy of which is included within this brief as Appendix 1.

As can be seen from a review of that brief, TSA argued that it and the employer there, an identically-situated private security company providing airport screeners at San Francisco International Airport, were not "joint employers" of the private company's employees. Exhibit 1 at p. 1. At page 2 of its brief, TSA pointed out the things which it does not control, and over which the private company had control. This included day to day supervision and direction. The setting of levels of pay and salaries. The provision of employment benefits, the establishment of work schedules, the making of work assignments, the provision of a break room, the decision as to which employees received awards or bonuses, the decision to hire and fire employees, the payment of social security taxes, the establishment of annual leave rights, and the provision of written performance evaluations. *Id.* at p. 2.

The facts in the instant case are, based upon our review of the underlying record made before the Regional Director, essentially indistinguishable.

In sum, even if the Board were to retreat from *Management Training* to *Res-Care*, still it should assert jurisdiction over Firstline, which can and does hire, fire, and discipline its own employees, and which can and does set their wages and benefits subject to a federal minimum. Bargaining will be "meaningful".

C. THE BOARD SHOULD NOT DECLINE JURISDICTION "IN THE INTEREST OF NATIONAL SECURITY"

The employer argues that there should be no *disparity* between the collective bargaining rights of airport screeners in the federal service and those in private employment; but it has advanced no reasons why such a disparity would be objectionable.

The evident purpose of the security screening pilot program established by Section 44919 and continued in Section 44920 was to compare the efficacy of federal screening and private screening. The minimum employment standards, equipment used, and procedures and protocols followed are identical between the two groups – and will remain so. TSA retains ultimate operational control over both groups. What differs between the two groups is precisely that they are under different employment regimes.

Firstline President John DeMell testified:

> . . .TSA concentrates on directing and overseeing all security-related operational matters, while Firstline fulfills the administrative and human resources component.

Written Testimony, supra, at page 6. Mr. DeMell explained the rationale of the pilot program very well:

> [I]n addition to creating, maintaining and protecting high safety standards enforced by TSA, today's post-9/11 hybrid model of airport passenger security screening also allows the PP5 contractors [i.e., the private contractors] to leverage inherent private sector advantages. This allows TSA to benefit from our flexible, timely solutions to employee concerns or employee performance discrepancies, and to benefit from our ability to quickly implement ever-evolving industry-best practices in workforce management. The post-9/11 screening model has also created an environment in which the PP5 contractors act as private sector laboratories that foster innovations that could be adopted TSA-wide.

Id., at page 8.

On the same day before the same Congressional hearing, TSA Acting Administrator David M. Stone also testified about how the pilot program deliberately allowed for differences between private screeners and the TSA. "A primary purpose for conducting the private screening pilot was to lay the predicate for airports to opt out of Federal security screening. . ." *Statement of David M. Stone* before the U.S. House of Representatives (April 22, 2004), http://www.tsa.gov/interweb/assetlibrary/stone04-22-04.pdf. Mr. Stone testified

> [W]e should not overlook the significant flexibilities that the contractors possessed under the program. For example, they have significant discretion in operational and management decisions, including in the areas of supervision, overhead, materials, recruiting, compliance, and scheduling, and have implemented these flexibilities within their operations. Also, since the inception of the PP5 program, the contract screening companies have possessed the flexibility to differentiate from TSA in the design and delivery of recurrent training.

Id, page 7. Mr. Stone expressed the belief "that additional flexibilities will be possible, including the provision of greater discretion and authority to conduct hiring and training at the local level . . ." *Id.*, at page 6.

As of July 27, 2005, the TSA announced an expansion of the "opt-out" program, certifying 34 private screening companies and including yet another airport in the program. See http://www.tsa.gov/public/display?theme=44&content=0900051980150f8b

Private sector employment is different from public sector employment. *That* is the disparity – and it was chosen by Congress deliberately. Part of the disparity is that there are different rules of collective bargaining. Part of the disparity is that Congress allowed the Undersecretary broad power over "terms and conditions of employment *in the federal service*." Congress did not indicate that it wished to deprive private employees of any labor rights -- except the right to strike. Collective bargaining is the normal concomitant of private sector employment – and neither Congress nor the Under Secretary has done anything to forbid it here. Rather, it is part of the "private sector laboratory" about which both Mr. Stone and Mr. DeMell testified.

In short, Firstline correctly states that if the Board asserts jurisdiction here there will be a difference between the collective bargaining rights of private sector employees and federal employees; but Firstline fails to explain what is wrong with disparity. Disparity in types of employment is exactly what Congress had in mind.

Firstline also argues that "Allowing private screener employees to be represented for the purpose of collective bargaining would create *disparate security standards* among the nation's airports and would be contrary to vital national security interests." *Request for Review*, page 10 (emphasis added). The argument is entirely false. The security standards for screening operations is *entirely* at the direction of the TSA and will remain so. As Mr. Stone testified:

> Most importantly, while the private contractors do provide management and supervisory staff oversight, screening activities are subject to supervision by TSA, as provided in ATSA. . . Operationally, the relationship between the Federal government and the private contractors ensures that security remains the primary focus. . .

Stone, supra, at page 3. And Thomas Blank, Assistant Administrator for Transportation Security Policy, testified to the Senate:

> Before I proceed, however, I would like to assure members of the Subcommittee and the public that security has been and will remain our top priority. . . We managed the PP5 program with security first and foremost on our minds and in keeping with the requirements of ATSA, and security will remain our most important consideration as we move forward on implementing the Screening Partnership Program.

Statement of Thomas Blank (June 24, 2004).

http://www.tsa.gov/interweb/assetlibrary/Sub_on_Aviation_Blank_06.24.2004.pdf

Aside from the disparity between federal and private screeners, what is the national security concern about collective bargaining? It is certainly true that the Under Secretary prohibited federal screeners from collective bargaining "in light of their critical national security responsibilities." *Memorandum* of January 8, 2003. But the Under Secretary did not explain how their national security responsibilities would be compromised by collective bargaining. Nor does Firstline offer any substantive argument on the point. The only policy argument even mentioned in the brief is Senator Hollings' remark that "You cannot let the security people strike

on you." 147 Cong.Rec. 10,029 (2001), quoted at page 8 of the Employer's *Request for Review*. But Congress implemented that policy directly: it forebade both private and federal screeners from striking. Why would it follow that collective bargaining should also be forbidden? Firstline offers no substantive reason *why* concerns about "national security" should cause the Board to decline jurisdiction.

In the past, the Board has seen "national security" as a reason to assert jurisdiction, not a reason to decline it. As already pointed out, the Board asserted jurisdiction over armed, militarized guards at defense plants in time of actual war. *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 404 (1947) and *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947). In the latter case, the Supreme Court stated:

> [T]he Board has discovered no serious question as to any conflict between loyalties to the Army and to the union, the Board finding no basis to assume that membership in a union tends to undermine the patriotism of militarized guards or that loyalty to the United States would be secondary in their minds to loyalty to the union.

331 U.S. at 424. The court went on to hold

> And in this nation, the statutory rights of citizens are not to be readily cut down on pleas of military necessity, especially pleas that are unsupported by military authorities.

Id., at 426.

In 1958 the Board announced a new policy on jurisdiction over national defense operations. *Ready Mixed Concrete & Materials, Inc.*, 122 NLRB 318. In that case the Board jettisoned the monetary minimums of defense contractors:

> The Board has determined that it best effectuates the policies of the Act to assert jurisdiction over all enterprises, as to which the Board has statutory jurisdiction, whose operations exert a substantial impact on the national defense, irrespective of whether the enterprise's operations satisfy any of the Board's other jurisdictional standards. . . It has done so because it believes that it has a special responsibility as a Federal agency to reduce the number of labor disputes which might have an adverse effect on the Nation's defense effort.

Id., at 320.

Ready Mixed has been followed without exception for nearly fifty years. Indeed, it pre-

dates August 1, 1959, and could not be overruled consistently with the *proviso* of Section 14(c)(1). But even if the Board could overrule *Ready Mixed*, it should not do so. SEIU respectfully contends that since airport screening involves national security, that is a reason for the Board to assert jurisdiction, not to decline it.

IV. A FINAL WORD ON NATIONAL SECURITY

Firstline Transportation Security, Inc., has arrogated to itself an heroic title: "First Line". Its title implies that the corporation is the "first line" of America's defense against terrorists.

But the actual "first line" defenders are not the corporation, but the screeners who daily search for weapons and explosives, confronting potential terrorists literally face to face. And these true first line defenders want a union to represent their interests -- not against the United States – but in employment matters under the control of their employer, a private, for-profit company.

The name "first line" calls to mind yet other employees. On September 11, 2001, hundreds of New York firefighters and other unionized public safety employees unflinchingly entered and mounted the World Trade Center. Hundreds perished as they answered their call to public service.

Firstline is attempting to use the war on terror – not to fight our common enemies – but in a calculated and cynical effort to gain an advantage over its own employees. Its plea of "national security" is a sham, which should be soundly rejected.

Dated: August 2, 2005

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: _____
VINCENT A. HARRINGTON, JR.
Attorneys for Intervenor Service Employees International Union

110563/391558

PROOF OF SERVICE
(C.C.P. § 1013)

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On August 2, 2005, I served upon the following parties in this action:

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copies of the document(s) described as:

Amicus Brief of Service Employees International Union in Support of the Decision of the Regional Director, Region 17 Exercising Jurisdiction and Directing an Election

[X] **BY MAIL** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

[ ] **BY OVERNIGHT DELIVERY SERVICE** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and placed the same for collection by Overnight Delivery Service by following the ordinary business practices of Weinberg, Roger & Rosenfeld, Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of Overnight Delivery Service correspondence, said practice being that in the ordinary course of business, Overnight Delivery Service correspondence is deposited at the Overnight Delivery Service offices for next day delivery the same day as Overnight Delivery Service correspondence is placed for collection.

[ ] **BY FACSIMILE** I caused to be transmitted each document listed herein via the fax number(s) listed above or on the attached service list.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on August 2, 2005.

Mary Piro

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

In the Matter of:

COVENANT AVIATION SECURITY, LLC,

Employer,

And

UNITED SCREENERS ASSOCIATION, LOCAL 1,

Petitioner,

And

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 790,

Intervenor and
Cross Petitioner.

POST-HEARING SUBMISSION OF
INTERVENOR TRANSPORTATION SECURITY ADMINISTRATION

The Transportation Security Administration ("TSA"), United States Department of Homeland Security, as intervenor, respectfully provides this post-hearing submission on the limited issue of TSA's interaction with the employees identified in the Petition.[1] As the parties stipulated and the evidence submitted at the hearing before the Board on November 12, 2003, demonstrated, TSA and the Employer are not "joint employers" of the Employer's employees.

To qualify as a "joint employer," TSA must exercise supervisory control over the terms and conditions of employment of the Employer's employees. See, e.g., AT&T v.

[1] The Hearing Officer directed that post-hearing submissions be filed on or before November 21, 2003.

EXHIBIT 1

NLRB, 67 F.3d 446, 451 (2d Cir. 1995). For example, TSA would have to be responsible for such matters as the Employer's employees' hiring and firing, discipline, supervision, payroll, and insurance. See id.

The undisputed testimony of James Adams, TSA's Administrative Officer assigned to the San Francisco International Airport, unequivocally demonstrates that TSA does not exercise supervisory control over the Employer's employees. Mr. Adams pointedly testified that the Employer supervises its employees and controls their day-to-day activities, and that TSA does not. See November 12, 2003 Hearing Transcript (portions attached hereto) at 424, ln. 21 to 425, ln. 1. Furthermore, Mr. Adams explained that the Employer, not TSA, sets the levels of and pays the salaries of the Employer's employees, id. at 425, lns. 21-24; 426, lns. 7-8. Finally, Mr. Adams testified that TSA does not:

(1) provide any employment benefits such as insurance coverage, retirement benefits or IRA contributions to the Employer's employees, id. at 426, lns. 9-12;

(2) establish the Employer's employees' work schedules, id. at 426, lns. 18-20;

(3) make work assignments to the Employer's employees, id. at 426, lns. 21-22;

(4) provide a break room for the Employer's employees, id. at 426, lns. 23-24;

(5) decide which of the Employer's employees receive awards or bonuses, id. at 427, lns. 2-4;

(6) direct who the Employer hires or fires, id. at 427, lns. 5-6;

(7) pay the Employer's employees' social security taxes, id. at 427, lns. 7-9;

(8) afford the Employer's employees annual leave, id. at 427, lns. 10-11; or

(9) provide written performance evaluations for the Employer's employees.

Therefore, TSA respectfully submits that the stipulation of the parties and the evidence presented at the hearing demonstrate that TSA is not a "joint employer" of the Employer's employees.

Dated: November 21, 2003

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CERTIFICATE OF SERVICE

I certify that a true and correct copies of Post-Hearing Submission of Intervenor Transportation Security Administration were served via facsimile on:

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22 Castillo St.
P.O. Box 1444
San Francisco, CA 94030.

Dated: November 21, 2003

Lois B. Osler

MR. GRAEFE: But we will need copies and I don't know if you want to mark it as --

HEARING OFFICER REEVES: Give it to me and I'll make copies at the next break. This is Exhibit E-12 is it?

MR. GRAEFE: Twelve, yes.

(Employer Exhibit 12 was identified and received in evidence.)

HEARING OFFICER REEVES: And Mr. Graefe, that's your last witness?

MR. GRAEFE: That's our last witness.

HEARING OFFICER REEVES: Let's go over to TSA's witness now, if that's --

MS. OSLER: Okay. I'd like to call Jim Adams please.

HEARING OFFICER REEVES: Raise your right hand please.

Whereupon,

JAMES ADAMS

was called as a witness herein and, having been first duly sworn, was examined and testified as follows:

HEARING OFFICER REEVES: Have a seat. State your name.

THE WITNESS: James Adams.

DIRECT EXAMINATION

Q BY MS. OSLER: Good afternoon, Mr. Adams. Who is your current employer?

A Transportation Security Administration.

Q And Transportation Security Administration is an agency of the Federal Government?

A Yes, under the Department of Homeland Security.
Q What is your position with TSA?
A Administrative Officer.
Q And what did you join TSA?
A September 23, 2002.
Q Did you join as the Administrative Officer?
A I did.
Q Could you describe to the Board what your duties are as the Administrative Officer at SFO?
A I'm responsible for all the financial business dealings, contract operations and other administrative duties associated with personnel, the finance budget, those types of things, and I act as the Chief Counsel for the Federal Security Director.
Q Based on your duties as the Administrative Officer, are you familiar with the relationship between TSA and Covenant?
A Yes, I am.
Q Does TSA employe security screeners at SFO?
A No, they do not.
Q Could you tell the Board who does please?
A Covenant Aviation Security.
Q Does Covenant control the means and manner, i.e. the daily, the every day activities of security screeners at SFO?
A Yes.
Q Are all security screeners subject to Covenant's supervision?

A Correct.
Q Could you describe the relationship between TSA and Covenant?
A It's a contractual one, a service agreement, service contract.
Q Do you play a specific role in connection with that relationship?
A Yes, I'm the contracting officer's technical representative from Washington D.C.
Q And the acronym for that is COTAR?
A That's correct.
Q And what are the duties of a COTAR?
A I am responsible for all of the scope of work judgments, to make sure that the work and the duties they perform are within the scope of work. I'm also responsible to ensure that the fiduciary relationship between the government and their expenditure of government funds is done correctly, and I report to Washington based on the services being delivered, and I validate and verify all the finances and expenditures that they do.
Q Does TSA pay the salaries of any Covenant employee?
A No.
Q Who pays those salaries?
A Covenant Aviation Security.
Q Does TSA set the salary levels for any Covenant employee?

A No, we do not, other than the language that stipulates that the contractor must provide an equal to or better than salary for their employees.

Q And that would be language in the Aviation Transportation Security Act?

A That's correct, ATSA.

Q So, who sets the salary levels for Covenant employees?

A Covenant Aviation management.

Q Does TSA provide any employment benefits, such as insurance coverage, retirement benefits, IRA contributions, to any Covenant employee?

A No.

Q Covenant provides those benefits for its own employees?

A Yes, to the best of my knowledge, yes.

Q Does TSA discipline any Covenant employee?

A No, I was just going to say at staff meetings maybe but, no.

Q Does TSA establish the work schedules of any Covenant employee?

A No, we do not.

Q Does TSA make work assignments to any Covenant employee?

A We do not.

Q Does TSA provide a break room to Covenant employees?

A No, we do not. That's a lease holder agreement between the City and County of San Francisco and Covenant Aviation

directly.

Q Does TSA decide which Covenant employees receive awards or bonuses, things of that nature?

A No, we do not.

Q Does TSA direct who Covenant hires or fires?

A No.

Q Does TSA pay social security taxes for security screeners employed by Covenant?

A No.

Q Does TSA afford security screeners annual leave?

A No.

Q Does TSA provide written performance evaluations of Covenant employees?

A No, we do not.

MS. OSLER: That's all I have.

HEARING OFFICER REEVES: I just have one question that's probably relevant to nothing but, the floor of wages, for example, that ATSA requires, is there a geographical adjustment, for example is the floor in San Francisco different than in Tupelo?

THE WITNESS: Yeah. San Francisco has the highest paid screening work force in the country, and their locality pay, which is formulized (sic) in the pay that they receive as employees is 21.08 percent, the highest in the country.

HEARING OFFICER REEVES: Mr. Graefe?