

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRSTLINE TRANSPORTATION
SECURITY INC.,

Employer,

and

Case 17-RC-12354

INTERNATIONAL UNION, SECURITY,
POLICE AND FIRE PROFESSIONALS
OF AMERICA,

Petitioner.

BRIEF, *AMICI CURIAE*, OF THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
IN SUPPORT OF THE DECISION OF THE REGIONAL DIRECTOR

STATEMENT

This case is before the National Labor Relations Board on the request of the Employer, Firstline Security, Inc., to review the Regional Director’s Decision and Direction of Election. Acting on a representation petition filed by the International Union, Security, Police and Fire Professionals of America, the Regional Director directed an election in a unit comprising “screeners and lead screeners performing guard duties . . . and employed by Firstline Transportation Security, Inc. at the Kansas City International Airport.”

In requesting review of the Regional Director’s decision, the Employer has taken the position that “the NLRB is statutorily barred from exercising jurisdiction over its screener employees or, in the alternative, that it should decline to assert jurisdiction in the

interest of national security.” Request for Review 1-2. And, in granting review, the Board identified the issues to be decided as “whether the Board has statutory jurisdiction over privately employed airport security screeners and, if so, whether the Board should exercise that jurisdiction.” *Firstline Transportation Security, Inc.*, 344 NLRB No. 124, p. 1 (June 30, 2005). The instant brief is filed in response to the Board’s invitation for *amicus* briefs addressing these issues.

ARGUMENT

In challenging the Regional Director’s decision, the Employer does *not* contend that there is anything in the language or polices of the National Labor Relations Act that suggests the Board should refuse to hold a representation election in this case. Rather, the Employer’s primary argument is that the Board is “statutorily barred from asserting jurisdiction” in this case by a determination made by the Under Secretary of Transportation for Security pursuant to the Aviation and Transportation Security Act (ATSA). Request for Review 4-7. The Employer’s fall back position is that, even if the Board is not “statutorily barred from asserting jurisdiction” by the ATSA, the Board should decline to exercise jurisdiction in order to effectuate the “public policy in favor of national security” reflected in the ATSA. *Id.* at 7-9.

The NLRB’s task is to effectuate the policies of the National Labor Relations Act as reflected in the terms of that statute. *Colgate Co. v. NLRB*, 338 U.S. 355, 363 (1949). “That legislation constitutes the immediate frame of reference within which the [Board] operates; and the policies expressed in it must be the basic determinants of its action.”

McLean Trucking Co. v. United States, 321 U.S. 67, 79-80 (1944). See *Carpenters v. NLRB*, 357 U.S. 93, 110-111 (1958).

At the same time, “the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.” *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942). Where there is a claim that “the policies of the Act conflict with another federal statute, the Board cannot ignore the other statute; instead, it ‘must fully enforce the requirements of its own statute, but must do so, insofar as possible, in a manner that minimizes the impact of its actions on the policies of the other statute.’” *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 153-154 (D.C. Cir. 2003), quoting *New York Shipping Ass’n v. Federal Maritime Comm’n*, 854 F.2d 1338, 1367 (D.C. Cir. 1988).

Since the National Labor Relations Act provides the Board’s “immediate frame of reference” and “the policies expressed in [that Act] must be the basic determinants of [the Board’s] action,” *McLean Trucking*, 321 U.S. at 80, we begin with that statute. Having first considered “the requirements of [the Board’s] own statute,” we then show that it is “possible” to “fully enforce” those requirements in a manner that is completely consistent with the ATSA. *New York Shipping*, 854 F.2d at 1367. Indeed, we show that for the Board to decline jurisdiction in this case would defeat the policy of the ATSA with regard to private screening companies as that policy has been interpreted by the Transportation Security Administration.

1. The requirements of the National Labor Relations Act with regard to the representation petition in this case could not be more clear.

The Act provides that “[w]henver a petition shall have been filed . . . alleging that a substantial number of employees wish to be represented for collective bargaining and that their employer declines to recognize their representative . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.” 29 U.S.C. § 159 (c) (1). And, the Act further provides that “[i]f the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.” *Ibid.*

The parties have stipulated that Firstline Transportation is an employer engaged in commerce within the meaning of the Act. RD Dec. 2. And, there is no contention that the Board should exercise its discretion to “decline to assert jurisdiction” on the ground that “the effect of [the instant] labor dispute on commerce is not sufficiently substantial to warrant exercise of its jurisdiction.” 29 U.S.C. § 164(c).

The petition adequately alleged that “a substantial number of employees wish to be represented for collective bargaining and that their employer declines to recognize their representative.” 29 U.S.C. § 159(c)(1). And, the Employer has not challenged the Regional Director’s finding that “a question of representation exists.” *Ibid.*

All that being so, “the requirements of [the Board’s] own statute,” *New York Shipping*, 854 F.2d at 1367, are clear. Section 9(c) of the Act states that in these

circumstances, the Board “shall direct an election by secret ballot and shall certify the results thereof.” 29 U.S.C. § 159(c)(1). This provision of the statute “is clear and mandatory.” *Leedom v. Kyne*, 358 U.S. 184, 188 (1958).

2. There is nothing in the Aviation and Transportation Security Act that prevents the Board from “fully enforc[ing] the requirements of its own statute.” *New York Shipping*, 854 F.2d at 1367. To the contrary, for the Board to accord the Employer special treatment would defeat Congress’s purpose in allowing a limited amount of airport screening to be done by private contractors on a “pilot project” basis, as the Transportation Security Administration has recognized. 49 U.S.C. § 44919.

The Aviation and Transportation Security Act provides that “the screening of all passengers and property . . . that will be carried aboard a passenger aircraft operated by an air carrier . . . shall be carried out by a Federal Government employee . . . except as otherwise provided in section 44919 or 44920.” 49 U.S.C. § 44901(a). ATSA § 44919 provides for “a pilot program under which, upon approval of an application submitted an operator of an airport, 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.” 49 U.S.C. § 44919(a). The pilot program was limited to five airports, each representative of a different category of airport security risk. 49 U.S.C. § 44919(d). And, the program was to last for no more than three years. 49 U.S.C. § 44919(b).

In administering the ATSA, the Transportation Security Administration has determined that “[f]ederal screeners are not entitled to engage in collective bargaining with TSA.” TSA, *Guidance on Screening Partnership Program* (June 2004), p. 8.¹ At the same time, TSA has stated that the agency “is neutral about contract employees of private firm seeking to organize themselves for collective bargaining with that contractor.” *Ibid.* TSA’s Assistant Administrator for Transportation Security Policy has explained that, with respect to “the case of contract screeners,” it is TSA’s position that “whether they may organize for purposes of collective bargaining . . . is a matter between those screeners and their employer.” Statement of Thomas Blank to the Subcommittee on Aviation, United States Senate Committee on Commerce, Science, and Transportation (June 24, 2004), p. 8.²

The TSA is the agency responsible for “carrying out [the provisions of the ATSA] relating to civil aviation security.” 49 U.S.C. § 114(d)(1). In situations where two federal agencies are administering two arguably overlapping statutes, the Supreme Court has cautioned “that if either agency is not careful it may trench upon the other’s jurisdiction, and, because of lack of expert competence, contravene the national policy [expressed in the other agency’s statute].” *Burlington Truck Lines v. United States*, 371 U.S. 156, 173 (1962). Thus, the Board must “give substantial weight to the interpretation

¹ Available at:
http://www.tsa.gov/interweb/assetlibrary/SPP_OptOut_Guidance_6.21.04.pdf.

² Available at:
http://www.tsa.gov/interweb/assetlibrary/Sub_on_Aviation_Blank_06.24.2004.pdf.

of the [TSA]" with respect to the provisions of that agency's organic statute. *Exxon Shipping Co.*, 312 NLRB 566, 567 (1993).

The TSA's understanding that the ATSA leaves collective bargaining by contract screeners as "a matter between those screeners and their employer" is consistent with the terms of that statute.

The ATSA does not say anything about the rights of contract screeners to engage in collective bargaining with their employers. In enacting the ATSA, Congress was aware that the collective bargaining rights of the employees of private security firms is a matter governed by the NLRA. Thus, the ATSA's silence in this regard strongly indicates that Congress intended to leave untouched the collective bargaining rights of airport screeners employed by private firms. *See Branch v. Smith*, 538 U.S. 254, 273 (2003).

What the ATSA does say with respect to the terms and conditions of employment of contract screeners indicates that Congress contemplated collective bargaining. The ATSA provides that the head of TSA may "fix the compensation, terms and conditions of employment for Federal service" for those employed by the federal government "to carry out the [TSA's] screening functions." 49 U.S.C. § 44935 note. By contrast, the ATSA allows private screening firms the freedom to set the terms of employment of the screeners they employ, just so long as the private firms "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." 49 U.S.C. § 44919(f). And,

the statute clearly contemplates that these private terms will be set through collective bargaining by expressly addressing the question of whether the screeners may strike and stating that they may not. 49 U.S.C. § 44935(i). The ATSA's no-strike provision goes beyond the general prohibition on strikes by federal employees to prohibit strikes by all screeners, whether employed by the federal government or private contractors. *See* 5 U.S.C. § 7311(3) (prohibiting federal employee strikes). A strike is most likely to occur in the context of collective bargaining, and if the ATSA had meant to prohibit all concerted activity by screeners for the purpose collective bargaining, the statutory prohibition would not have been limited to the concerted activity of striking.

The ATSA's position also accords with Congress's purpose in providing for a pilot program of limited private screening.

In the course of enacting the ATSA, a major dispute arose between the Senate and the House over whether airport screeners would be federal employees. The bill passed by the Senate provided that the screeners would be federal employees. S. 1447, 107th Cong., 1st Sess. § 108(a), 147 Cong. Rec. H7756 (2001). And, the House amendments to the Senate bill provided that the screeners would merely be supervised by federal personnel. H.R. 3150, 107th Cong., 1st Sess. § 102, 147 Cong. Rec. H7765. Those who supported the House version argued that allowing private screeners "brings the flexibility of private industry" to this task. 147 Cong. Rec. H7778. The supporters of the House approach pointed out that "pilots[,] . . . flight attendants and mechanics" typically "work for a private company" and that arrangement "works quite well." *Ibid.* The compromise

enacted into law provides for “a comprehensive Federal system” in which “[t]here will be Federal screeners” while allowing “a pilot program in each of the five major category airports . . . that will be all privatized” in order to “test that system to see if it works.” 147 Cong. Rec. S11977. Thus, Congress’s purpose in “initiat[ing] a pilot program for privatizing screeners” was to “give [it] a chance to evaluate and reevaluate what works and what does not.” 147 Cong. Rec. S11982.

The TSA’s approach of treating collective bargaining by contract screeners as “a matter between those screeners and their employer” best fulfills Congress’s purpose of experimenting with privatized screening. Quite clearly, the supporters of privatized screening contemplated that the labor relations at such firms would be carried out in the same manner as at other private firms. And, the adoption of a rule barring collective bargaining between contract screeners and their employers would have the effect of artificially limiting the range of firms that could compete for the privatized work. In other words, the adoption of a rule barring collective bargaining among contract screeners would have interfered with Congress’s effort to experiment with “bring[ing] the flexibility of private industry” to the task of screening, 147 Cong. Rec. H7778, in order to “test that system to see if it works,” 147 Cong. Rec. S11977.

Against all that, the Employer argues that the TSA’s determination that federally employed screeners “shall not, as a term or condition of their employment, be entitled to engage in collective bargaining” must be extended to privately employed screeners. Request for Review 4. The TSA obviously does not see things that way, for that agency

has expressly distinguished federal from private screeners in this regard. This distinction between federal and private screeners derives from the TSA's understanding of its authority under the ATSA. In determining that federal screeners would not be allowed to engage in collective bargaining, the TSA invoked its authority to "fix the compensation, terms and conditions of employment for Federal service" for those employed by the federal government "to carry out the [TSA's] screening functions." 49 U.S.C. § 44935 note.³ TSA does not have similar authority to set the terms and conditions of privately employed screeners. *See* 49 U.S.C. § 44919(f) (providing only minimum standards for private terms of employment).

In sum, the TSA's conclusion that collective bargaining by contract screeners is "a matter between those screeners and their employer" to be decided through the ordinary means, i.e., through an NLRB representation election, is an entirely sound construction of that agency's organic statute. And, given that construction, the ATSA provides no basis for the Board to decline to hold a representation election in this case.

Having shown that there is no conflict between the NLRA and the ATSA with regard to the direction of election in this case, all that remains is the Employer's contention that the Board "should decline to assert jurisdiction" in this case in the interest of some "[p]ublic policy in favor of national security" that has not found expression in

³ For the reasons stated by Member Pope's dissent from the Federal Labor Relations Authority's decision in *Department of Homeland Security*, 59 FLRA No. 63 (2003), TSA's conclusion that the authority to "fix the compensation, terms and conditions of employment" of federal screeners includes the authority to abrogate the federal sector collective bargaining system is highly questionable.

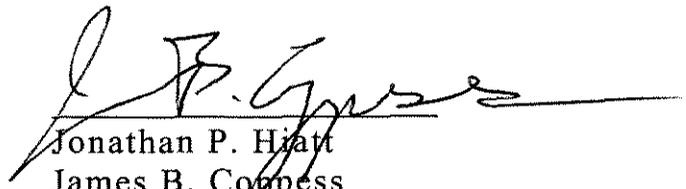
either the terms of the ATSA or the policies of the TSA. The Board has not been granted authority to articulate and implement such a public policy.

“The Board itself is a mere creature of the law. It is no ‘Poo Bah’ to loose or bind at will.” *NLRB v. Dorsey Trailers, Inc.*, 179 F.2d 589, 592 (5th Cir. 1950). The National Labor Relations Act provides clearly and unequivocally that, in circumstances such as those presented here, “the Board . . . shall direct an election by secret ballot and shall certify the results thereof.” 29 U.S.C. § 159(c)(1). Since there is nothing in the Aviation and Transportation Security Act that countermands this direction, the Board “must fully enforce the requirements of its own statute.” *New York Shipping*, 854 F.2d at 1367.

CONCLUSION

The Board should adopt the decision of the Regional Director and direct an election as provided therein.

Respectfully submitted,



Jonathan P. Hiatt
James B. Coppess
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

CERTIFICATE OF SERVICE

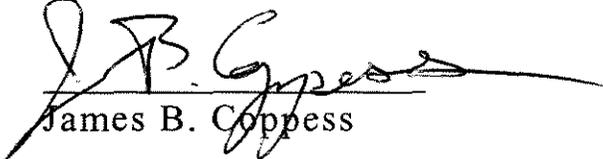
I hereby certify that on Tuesday, August 2, 2005, one copy of the Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amici Curiae* in Support of the Decision of the Regional Director was served via first class mail on the following counsel of record:

Mark L. Heinen
Gregory, Moore, Jeakle,
Heinen & Brooks
65 Cadillac Square, Suite 3727
Detroit, MI 48226
(313) 964-5600

William G. Trumpeter
Miller & Martin
Suite 1000, Volunteer Building
832 Georgia Avenue
Chattanooga, TN 37402
(423) 756-6600

D. Michael McConnell
Regional Director, Region 17
National Labor Relations Board
8600 Farley Street, Suite 100
Overland, KS 66212
(913) 967-3000

Stephen P. Schuster
Constangy, Brooks & Smith
2600 Grand Boulevard
Suite 300
Kansas City, MO 64108
(816) 472-6400


James B. Coppess