

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

FIRSTLINE TRANSPORTATION
SECURITY, INC.,

Employer,

and

INTERNATIONAL UNION, SECURITY
POLICE AND FIRE PROFESSIONALS
OF AMERICA (SPFPA)

Petitioner.

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Case 17-RC-12354

BRIEF *AMICUS CURIAE* IN SUPPORT OF EMPLOYER'S REQUEST FOR REVIEW

INTRODUCTION AND SUMMARY

Amicus, Akal Security, Inc. ("Akal"), is a New Mexico corporation engaged in the business of providing security services to Federal, state and local government agencies, and also to private businesses, throughout the United States. Akal employs approximately 12,000 employees nationwide.

Akal has an interest in this matter because it is a prospective bidder for future contracts with the Transportation Security Administration ("TSA") to provide airport screening services at commercial airports. Akal is also vitally interested in this matter because the outcome of this case could affect whether the National Labor Relations Board (the "Board") has jurisdiction over Akal's employees who perform critical national security functions for *other* Federal agencies, including, in particular, the Department of Defense and the Department of Homeland Security.

In this case, the Regional Director incorrectly concluded that the TSA Under Secretary's January 8, 2003 Memorandum should not apply to private screeners.

The Regional Director also incorrectly relied on the TSA's neutral stance on the issue of organization of private screeners.

The Regional Director also incorrectly relied on *Management Training Corporation*, 317 NLRB 1355 (1995) and failed to consider significant distinguishing factors present in this case. He mistakenly concluded that it is appropriate to assert jurisdiction over the Employer, despite the undisputed fact that the Federal government retains significant control over the vast majority of the terms and conditions of the Employer's screening workforce.

The Regional Director also inexplicably ignored significant policy considerations in concluding that assertion of jurisdiction over the Employer is not incompatible with the maintenance of national security standards.

Akal urges the Board to reverse the Regional Director and dismiss the petition on the ground that the Board is statutorily barred from asserting jurisdiction.

In the alternative, Akal would urge the Board to take this opportunity to overrule *Management Training Corporation*, or to distinguish and limit its application with regard to employees of private contractors, such as Akal and the Employer, who provide critical national security functions for Federal agencies involved in national security and defense, and who are subject to an unusually high degree of direction and control by those same Federal agencies due to the interests of national security.

I. ARGUMENT AND AUTHORITIES

A. The Board Is Statutorily Barred From Asserting Jurisdiction By the Under Secretary's Determination That Screeners Are Not Entitled to Engage In Collective Bargaining

The Under Secretary's June 8, 2003 Memorandum provides that individuals carrying out the security screening function under 49 U.S.C. Section 44901 "in light of their national security responsibilities, shall not, as a term or condition of their employment, be entitled to engage in

collective bargaining or be represented for the purpose of engaging in such bargaining by any representative or organization."

The Under Secretary's authority to issue this Memorandum – with regard to Federal employees -- was addressed by the Federal Labor Relations Authority ("FLRA") in *United States Dep't of Homeland Sec. v. AFGE, AFL-CIO*, 59 F.L.R.A. 423 (2003) (Joint Exhibit 2).

In the *AFGE* case, the FLRA concluded that "the legislative history of the ATSA does not undermine the plain language of 49 U.S.C. Section 44935, Note, which leaves *unfettered discretion* to the Under Secretary to determine the terms and conditions of employment for screener personnel in the TSA." (emphasis added).

In his Decision in this case, the Regional Director correctly concluded that the FLRA has determined that Federal employees in the position of security screener are exempt from jurisdiction of the Federal Service Labor Management Relations Statute.

The *AFGE* case, however, dealt only with Federal employees, since it was an appeal of the dismissal of an election petition filed by the *AFGE* before the FLRA seeking to represent employees of TSA.

Therefore, the *AFGE* case did not, and could not, address the issue of whether the Under Secretary's authority in his June 8, 2003 Memorandum is equally applicable to private screeners.

The answer to that question, however, can readily be found in the language of the ATSA itself. A close examination of the ATSA reveals that the Under Secretary's authority, as expressed in his Memorandum, is equally applicable to any and all screeners – both federal and private – performing work under the supervision of the TSA.

In the above regard, 49 U.S.C. Section 44901(a) provides that the Under Secretary shall provide for the screening of all passengers and property. This same section further provides that

such screening shall be "carried out by a Federal government employee . . . except as otherwise provided in section 44919 or 44920."

49 U.S.C. Sections 44919(f) and 44920(c) each provide that "a private screening company is qualified to provide screening services at an airport if the company will only employ individuals to provide such services *who meet all of the requirements of this chapter applicable to Federal Government personnel who perform screening services at airports under this chapter ...*" (emphasis added).

The specific employment and training standards and requirements of *all* "security screening personnel" are set forth in detail in 49 U.S.C. Section 44935(e) and (f). Significantly, Section 44935 makes no distinction between private and Federal Government screeners. The employment and training standards are on their face applicable to *all* –and are all subject to the extensive control and supervision of TSA.

The annotation at the end of Section 44935 (the "Note") provides that the Under Secretary may fix the terms and conditions of employment of Federal service for such a number of individuals that the Under Secretary determines to be necessary "*to carry out the screening functions of the Under Secretary under section 44901 of Title 49.*" (emphasis added).

As noted above, 49 U.S.C. Section 44901(a) provides that the screening functions shall be carried out by Federal Government employee "*except as otherwise provided in section 44919 or 44920*" – which contemplates use of private screeners under both the "pilot program" and "opt out" program.

Therefore, the Under Secretary's Memorandum is applicable to any and all screeners working pursuant to the ATSA, by the terms of the ATSA itself.

As the record evidence in this case demonstrates, private and federal screeners perform the *same* functions and are subject to the *same* control. Thus, ATSA's equal treatment of all screener employees – whether public or private – is reasonable and makes eminently good sense.

The Regional Director's reliance on the TSA's neutral stance on the issue of the organization of private screeners is not relevant and is misplaced. In his Decision, the Regional Director broadly concluded that "based on current information disseminated by the TSA, it *appears* that the TSA does not view the ATSA as precluding collective bargaining rights for privately-employed security screeners." (emphasis added).

TSA's *neutral* stance, however, absolutely does not compel the conclusion that the Under Secretary's memorandum should then not apply equally to all screener employees – both private and federal.

B. The Regional Director Incorrectly Relied on *Management Training Corporation*, 317 NLRB 1355 (1995) and Failed to Consider Significant Distinguishing Factors Present in this Case

In his Decision, at p. 8, the Regional Director stated that "given that there is no statutory preclusion to the Board asserting jurisdiction, the Board has *routinely asserted jurisdiction* over private contractors of the Federal government., despite substantial control by the government over the private employees' terms and conditions of employment." (emphasis added).

Amicus respectfully submits that this is not a routine case, due to the unique national security interests involved here and the facts of this case. As noted above, the record evidence abundantly demonstrates that the TSA has virtually total and effective operational control over the Employer's screening workforce. This operational control is both authorized and required under ATSA. It includes TSA supervision of all private screener employees, as well as the responsibility to ensure that the private screener employees meet "all of the requirements of this

chapter applicable to Federal Government personnel who perform screening services." 49 U.S.C. Section 44919(f).

The Employer is also required under ATSA to provide compensation and other benefits to its screener employees that are not less than the level of compensation and other benefits provided to Federal Government personnel. 49 U.S.C. Section 44919(f).

In view of all of the foregoing, and the record evidence, the Employer effectively lacks sufficient control over labor relations to engage in meaningful bargaining.

In *Management Training Corporation*, at p. 1358, the Board stated, "we have decided that it is not proper for the Board to decide whether to assert jurisdiction based on the Board's assessment of the quality and/or quantity of factors available for negotiation." In his concurring opinion in *Management Training Corporation*, Member Stephens stated that "I would find that we may properly assert jurisdiction over an employer if it has control over *at least some terms and conditions of employment* as that phrase is intended in Section 8(d) of the Act." (emphasis added).

In this case, the Employer has effective control over almost none of the terms and conditions of employment of its screener employees. Under these circumstances, the Regional Director should not have blindly relied on *Management Training Corporation* to support his conclusion that the Board should assert jurisdiction over the Employer.

The result reached by the Regional Director is exactly the situation envisioned by Member Cohen in his dissent in *Management Training Corporation*. In his dissent, Member Cohen stated, "My colleagues have radically changed extant law concerning the exercise of Board jurisdiction over government contractors....In *Res Care*....the Board adopted the sensible view that it would not assert jurisdiction to create a collective bargaining obligation if the

employer, who would be subject to that obligation, lacks control over essential terms and conditions of employment..... The Board's view made eminently good sense.....My colleagues have now changed all of this. Even worse, they replace it with a doctrine that has virtually no limitation. They will assert jurisdiction without reference to the employer's business or the employer's ability to control terms and conditions of employment...Thus, for example, if the governmental agency controls all economic terms and most of the noneconomic terms, and the employer controls only a handful of noneconomic terms, my colleagues would nonetheless assert jurisdiction over the employer."

Due to the circumstances present in this case, and for the reasons stated by Member Cohen in his dissenting opinion in *Management Training Corporation*, Amicus would respectfully urge the Board to use this opportunity to overrule *Management Training Corporation*.

In the alternative, Amicus would urge the Board to consider the significant distinguishing factors present in this case, and hold that *Management Training Corporation* does not apply in this situation -- especially where the employer is performing national security services for a federal agency which retains considerable and effective control over terms and conditions of employment due to national security interests.

C. In the Alternative, The Board Should Decline To Assert Jurisdiction in the Interest of National Security

In his Decision, at p. 10, the Regional Director stated that "In some circumstances policy considerations *do* militate in favor of or against the assertion of the Board's discretionary jurisdiction." (emphasis added).

However, the Regional Director then effectively ignored the Employer's public policy argument, and found that it would effectuate the policies of the Act to assert jurisdiction. In

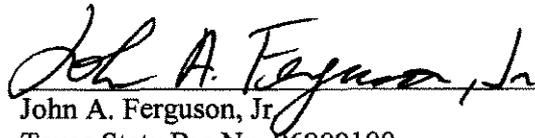
reaching this conclusion, the Regional Director again relied on the fact that TSA has made "no pronouncements seeking to eliminate private security screeners from the protections of the National Labor Relations Act, and has instead stated that the decision to collectively bargain is between the screener and their private employers."

As noted above, the TSA was simply taking a strictly neutral stance. Furthermore, this conclusion is directly contrary to the TSA's own assertion of its authority over the federal screeners and its decision that collective bargaining for screeners *would* jeopardize our national security.

II. CONCLUSION

For all of the foregoing reasons, Amicus respectfully submits that the Board should decline to exercise jurisdiction over the Employer, reverse the DDE and dismiss the petition.

Respectfully submitted,



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ATTORNEY FOR AKAL SECURITY, INC.

Certificate of Service

In accordance with the expedited service requirements of Section 102.114(f) of the Board's Rules and Regulations, the undersigned certifies that a true and correct copy of the above and foregoing Brief *Amicus Curiae* In Support of Employer's Request for Review was served on this 4th day of August 2005, by facsimile transmission, on the following:

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